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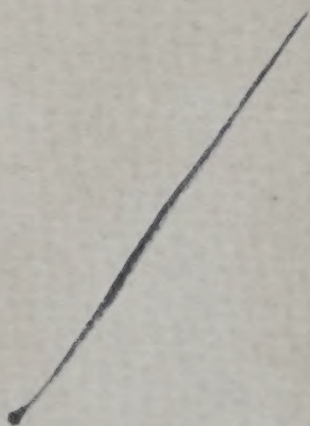


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Editor
G. F. L. BRIDGMAN, ESQ.
of the Middle Temple, Barrister-at-Law

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THE ALL ENGLAND LAW REPORTS REPRINT

QUINN v. LEATHEM

[HOUSE OF LORDS (The Earl of Halsbury, L.C., Lord Macnaghten, Lord Shand, Lord Brampton, Lord Robertson and Lord Lindley), May 14, 17, 20, June 11, 13, August 5, 1901]

[Reported [1901] A.C. 495; [1901] 2 I.R. 705; 70 L.J.P.C. 76;
85 L.T. 289; 65 J.P. 708; 50 W.R. 139; 17 T.L.R. 749]

Tort—Contract—Procurement of breach—Right of a person to conduct his business without interference—Wrongful act done with intent to damage a person and damaging him.

A British subject has a right to earn his living in his own way, provided he does not violate some law prohibiting him from so doing or infringe the legal rights of other people. This right involves liberty to deal with other persons who are willing to deal with him. The correlative of the right is the general duty of every person not to prevent the free exercise of the right without justification, and an interference with the right is a breach of the duty giving rise to a cause of action by the person damaged. It is a violation of the right to induce a breach of contract if there be no justification for the inducement, but the principle involved cannot be confined to inducements to break contracts. It reaches all wrongful acts done intentionally to damage a particular individual and actually damaging him. An act otherwise lawful, although harmful, does not become actionable by being done maliciously in the sense of proceeding from a bad motive and with intent to annoy or harm another.

Conspiracy—Contract—Inducement to break—Threats—Object not to advance legitimate interests—Action for damages—Competency.

A conspiracy by persons, maliciously and with intention to injure a plaintiff and not legitimately to advance their own interests, by inducing his servants with threats not to continue in his employment and similarly inducing his customers not to make contracts with him and not to deal with him, as a result of which the plaintiff suffers damage, is actionable in civil proceedings for damages.

Conspiracy—Conduct not actionable if done by one person—Intolerable annoyance and coercion.

PER LORD LINDLEY: It is said that conduct which is not actionable on the part of one person cannot be actionable if it is that of several acting in concert.

This may be so when many do so more than one is supposed to do. But numbers may annoy and excite where one may not. Annoyance and excitation by many may be so intolerable as to become actionable and produce a result which one alone could not produce.

Allen v. Flood (1), [1898] A.C. 1, distinguished.

Lumley v. Gye (2) (1853), 2 F. & B. 216 and *Temperley v. Russell* (3), [1900] 1 Q.B. 715, approved.

Judgment—Judicial decision as authority—Qualification by facts of case—Authority limited to actual decision—Not authority for proposition logically following from it.

Per the EARL OF HALSBURY, L.C.: Every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expressions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be found. A case is only an authority for what it actually decides. It cannot be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical.

Notes. So far as trade disputes are concerned this case must be read in the light of s. 3 of the Trade Disputes Act, 1906 (25 HALSBURY'S STATUTES (2nd. Edn.) 1267), which provides that an act done in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or is an interference with the trade, business, or employment of some other person.

Applied: *Read v. Friendly Society of Operative Stonemasons of England, Ireland and Wales*, [1902] 2 K.B. 792; *Giblin v. National Amalgamated Labourers' Union of Great Britain and Ireland*, [1903] 2 K.B. 600. Considered: *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1904-7] All E.R. Rep. 211. Applied: *National Phonograph Co. v. Edison Bell Consolidated Phonograph Co.*, [1904-7] All E.R. Rep. 116; *Larkin v. Long*, [1914-15] All E.R. Rep. 469. Considered: *Long v. Smithson* (1918), 88 L.J.K.B. 223; *Pratt v. British Medical Association*, [1918-19] All E.R. Rep. 104; *Ware and De Freville v. Motor Trade Association*, [1920] All E.R. Rep. 387; *Hodges v. Webb*, [1920] All E.R. Rep. 447; *Brimelow v. Cassin*, [1923] All E.R. Rep. 40. Applied: *Jaspersen v. Dominion Tobacco Co.*, [1923] A.C. 700. Distinguished: *Reynolds v. Shipping Federation, Ltd.*, [1923] All E.R. Rep. 383. Applied: *G.W.K. v. Dunlop Rubber Co.* (1926), 42 T.L.R. 376. Considered: *Re Simms, Ex parte The Trustee v. William Simms Ltd., and S. H. Gillett*, [1933] All E.R. Rep. 302; *Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch*, [1942] 1 All E.R. 142; *British Motor Trade Association v. Salvadori*, [1949] 1 All E.R. 208. Referred to: *Bulcock v. St. Anne's Master Builders' Federation* (1902), 19 T.L.R. 27; *West Ham Union v. L.C.C.* (1902), 71 L.J.K.B. 299; *Denaby and Wadby Main Collieries, Ltd. v. Yorkshire Miners' Association*, [1904-7] All E.R. Rep. 616; *Gaskell v. Lancashire and Cheshire Miners' Federation* (1912), 36 Sol. Jo. 719; *Santen v. Busnach* (1913), 29 T.L.R. 214; *In the Goods of Hall v. Knight and Baxter* (1913), 109 L.T. 589; *Vacher & Sons, Ltd. v. London Society of Compositors*, [1911-13] All E.R. Rep. 241; *Re Ainsworth, Finch v. Smith*, [1915] 2 Ch. 96; *Valentine v. Hyde*, [1919] 2 Ch. 129; *Wellton v. Batterley Co.*, [1920] 1 Ch. 130; *Said v. Butt*, [1920] All E.R. Rep. 232; *Davies v. Thomas*, [1920] All E.R. Rep. 438; *White v. Riley*, [1920] All E.R. Rep. 371; *Sorsell v. Smith*, [1925] All E.R. Rep. 1; *Hardie and Jane, Ltd. v. Chilton*, [1928] All E.R. Rep. 36; *De Tetley Marks v. Greenwood*, [1936] 1 All E.R. 863; *Thorne v. Motor Trade Association*, [1937] 3 All E.R. 157; *De Stempel v. Dunksels*, [1938] 1 All E.R. 238; *British Industrial Plastics, Ltd. v. Ferguson*, [1938] 4 All E.R. 504; *Halla*

- A** *Selassie v. Cable and Wireless, Ltd.*, [1938] 2 All E.R. 677; *Camden Nominees, Ltd. v. Slack*, [1940] 2 All E.R. 1; *Read v. J. Lyons & Co.*, [1945] 1 All E.R. 106; *E. v. West*, *R. v. Northcott*, *R. v. Weitzman*, *R. v. White*, [1948] 1 All E.R. 718; *Best v. Samuel Fox & Co.*, [1952] 2 All E.R. 394; *D. C. Thomson & Co. v. Deakin*, [1952] 2 All E.R. 361; *R. v. Newland*, [1953] 2 All E.R. 1067; *Jones Bros. (Hunstanton), Ltd. v. Stevens*, [1954] 3 All E.R. 677; *Huntley v. Thornton*, [1957] 1 All E.R. 234; *Midland Silicones, Ltd. v. Scruttons, Ltd.*, [1959] 2 All E.R. 289; *Shaw v. D.P.P.*, [1961] 2 All E.R. 446.

As to the torts of interference with contractual relations and conspiracy, see 37 HALSBURY'S LAWS (3rd Edn.) 124-131 and for cases see 42 Digest 983-990.

Cases referred to :

- C** (1) *Allen v. Flood*, [1898] A.C. 1; 67 L.J.Q.B. 119; 77 L.T. 717; 62 J.P. 595; 46 W.R. 258; 14 T.L.R. 125; 42 Sol. Jo. 149, H.L.; 42 Digest 972, 35.
- (2) *Lumley v. Gye* (1853), 2 E. & B. 216; 22 L.J.Q.B. 463; 17 Jur. 827; 1 W.R. 432; 118 E.R. 749; 42 Digest 987, 169.
- D** (3) *Temperton v. Russell*, [1893] 1 Q.B. 715; 62 L.J.Q.B. 412; 69 L.T. 78; 57 J.P. 676; 41 W.R. 565; 9 T.L.R. 393; 37 Sol. Jo. 423; 4 R. 376, C.A.; 42 Digest 987, 170.
- (4) *Bowen v. Hall* (1881), 6 Q.B.D. 333; 50 L.J.Q.B. 305; 41 L.T. 75; 45 J.P. 373; 29 W.R. 367, C.A.; 42 Digest 988, 174.
- (5) *Stevenson v. Newnham* (1853), 13 C.B. 285; 22 L.J.C.P. 110; 20 L.T.O.S. 279; 17 Jur. 600; 138 E.R. 1208, Ex. Ch.; 42 Digest 972, 33.
- E** (6) *Gregory v. Duke of Brunswick* (1843), 6 Man. & G. 205; 6 Scott, N.R. 309; (1884), 6 Man. & G. 953; 7 Scott, N.R. 972; 2 L.T.O.S. 188; 8 Jur. 148; 134 E.R. 1178; on appeal (1849), 2 H.L.Cas. 415, H.L.; 42 Digest 972, 32.
- (7) *R. v. Duffield* (1851), 5 Cox, C.C. 404; 14 Digest (Repl.) 134, 973.
- (8) *R. v. Rowlands* (1851), 5 Cox, C.C. 436.
- F** (9) *R. v. Parnell* (1881), 14 Cox, C.C. 508; 14 Digest (Repl.) 125, *486.
- (10) *Mogul Steamship Co. v. McGregor, Gow & Co.* (1889), 23 Q.B.D. 598; 58 L.J.Q.B. 465; 61 L.T. 820; 53 J.P. 709; 37 W.R. 756; 5 T.L.R. 658; 6 Asp.M.L.C. 455, C.A.; affirmed, [1892] A.C. 25; 61 L.J.Q.B. 295; 66 L.T. 1; 56 J.P. 101; 40 W.R. 337; 8 T.L.R. 182; 7 Asp.M.L.C. 120, H.L.; 42 Digest 986, 157.
- G** (11) *Tarleton v. M'Gawley* (1794), Peake 270; 170 E.R. 153, N.P.; 43 Digest 9, 39.
- (12) *Clifford v. Brandon* (1809), 2 Camp. 358; 170 E.R. 1183, N.P.; 42 Digest 907, 37.
- (13) *Carrington v. Taylor* (1809), 11 East 571; 103 E.R. 1126; 2 Digest (Repl.) 295, 39.
- H** (14) *Keeble (Kebble) v. Hickeringhall* (1706), 3 Salk 9; Holt K.B. 14, 17, 19; Kelw. 273; 11 Mod. 74, 130; 11 East 574, n.; 91 E.R. 659; 2 Digest (Repl.) 295, 38.
- (15) *Garret v. Taylor* (1620), Cro. Jac. 567; 2 Roll. Rep. 162; 79 E.R. 485; 34 Digest 169, 1317.
- I** (16) *Bradford Corp'n. v. Pickles*, [1895] A.C. 587; 64 L.J.Ch. 759; 73 L.T. 353; 60 J.P. 3; 44 W.R. 190; 11 T.L.R. 555; 11 R. 286, H.L.; 36 Digest (Repl.) 256, 67.
- (17) *Hilton v. Eckersley* (1855), 6 E. & B. 47; 24 L.J.Q.B. 353; 25 L.T.O.S. 214; 20 J.P. 4; 1 Jur.N.S. 874; 3 C.L.R. 1415; 119 E.R. 781; affirmed (1856), 6 E. & B. 66; 25 L.J.Q.B. 199; 26 L.T.O.S. 314; 20 J.P. 196; 2 Jur.N.S. 587; 4 W.R. 326; 119 E.R. 789, Ex. Ch.; 43 Digest 10, 50.
- (18) *Mulcahy v. R.* (1868), L.R. 3 H.L. 306, H.L.; 14 Digest (Repl.) 123, 856.
- (19) *Vegelahn v. Guntner* (1896), 167 Mass. 92.

- (20) *Scottish Co-operative Wholesale Society, Ltd. v. Glasgow Fleshers' Trade Defence Association* (1898), 33 So. L.R. 615; 5 M.L.T. 269; 3 Digest (Repl.) 21, *83.
- (21) *J. Lynda & Sons v. Whiting*, [1896] 1 Ch. 811; 65 L.J.Ch. 601; 74 L.T. 685; 60 J.P. 325; 45 W.R. 19; 12 T.L.R. 278; 40 Sol. Jo. 372, C.A.; 15 Digest (Repl.) 919, 8824. Subsequent proceedings [1899] 1 Ch. 255; 68 L.J.Ch. 146; 79 L.T. 709; 63 J.P. 339; 47 W.R. 291; 15 T.L.R. 128, C.A.; 15 Digest (Repl.) 919, 8825.
- (22) *R. v. Druiitt, Lawrence and Adamson* (1867), 16 L.T. 855; 10 Cox, C.C. 592; 43 Digest 112, 1175.

Appeal by a defendant in the action from a decision of the Court of Appeal in Ireland (LORD ASHBURNE, L.C., PORTER, M.R., WALLER and HUGHES, L.J.), reported (1899) 2 L.R. 667, affirming a decision of the Queen's Bench Division (SIR P. O'BRIEN, C.J., ANDREW and O'BRIEN, J.J.; PALLES, C.B., dissenting).

The following statement of the facts is taken from the opinion of Lord BAVANTON.

The action was brought in the High Court in Ireland by Henry Leatham, the respondent, as plaintiff, against Joseph Quinn (the sole appellant) and four other persons—John Craig (now dead), John Davey, Henry Dorman, and Robert Shaw, as defendants, to recover damages for a wrongful interference with the plaintiff's business of a butcher at Lisburn, a few miles from Belfast. For upwards of twenty years before July, 1895, Leatham had carried on business in Lisburn, having as one of his constant customers Andrew Munce (now also dead), who kept a butcher's shop at Belfast, to whom he supplied weekly £20 or £30 worth of the best meat, and he had in his employment as assistants several men at weekly wages. In February, 1893, a trade union society was registered under the Trade Union Acts, 1871 and 1876, by the name of "The Belfast Journeymen Butchers and Assistants' Association." Of this society Craig was president, Quinn treasurer, and Davey secretary; they were original members; the other defendants, Dorman and Shaw, joined subsequently as mere ordinary members. Leatham was not a member, nor were any of his assistants. The members of the society among themselves soon adopted an unregistered rule that they would not work with non-union men, nor would they cut up meat that came from a place where non-union hands were employed; but there was no evidence that, prior to July, 1895, this had been productive of any conflict between Leatham's men and the union. Early in that month, however, Leatham, on the invitation of Davey, attended a meeting of the society held at Lisburn. All the defendants were there. Leatham had at that time among his assistants a man named Robert Dickie, a family man, with young children dependent upon him; this man had been in his employ for ten years; he was desirous of keeping him and all the others employed by him in his service, but still of doing anything in reason to conciliate the society. But I had better let him tell his account of this meeting in his own words, as he told it to the jury.

"I said that I came on behalf of my men, and was ready to pay all fines, debts, and demands against them; and I asked to have them admitted to the society. The defendant Shaw got up and objected to their being allowed to work my, and to their admission, and said that my men should be put out of my employment, and could not be admitted, and should walk the streets for twelve months. I said it was a hard case to make a man walk the streets with nine small children, and I would not submit to it. Shaw moved a resolution that my assistants should be called out; a man named Morgan seconded the resolution, and it was carried. Craig was in the chair; I was sitting beside him. He said there were some others there that would suit me as well. He picked them out, and they said they could work for me. I said they were not suitable for my business, and I would keep the men I had. They said I had to take them. I said I would not put out my men. Craig then spoke, and told me my meat would be stopped in Andrew Munce's if I would not comply with their wishes."

A The chairman spoke truly; for, on Sept. 6, the secretary of the society wrote to Leatham, asking "whether he had made up his mind to continue to employ non-union labour," adding: "If you continue as at present our society will be obliged to adopt extreme measures in your case." He wrote also to Mr. Munce on Sept. 13, stating that a deputation had been appointed to wait upon him to come to a decision in regard to his purchase of meat from Leatham & Sons, as they were anxious to have a settlement at once. To this letter Mr. Munce sent, on Sept. 14, a very sensible reply: "It is quite out of my province to interfere with the liberty of any man. But why refer to me in the matter? I do not think it fair for you to come at me, seeing it appears to be the Messrs. Leatham that you wish to interfere with." A deputation, which included Craig, Quinn, Shaw, and Dornan, had an interview with a son of Mr. A. Munce, and on Sept. 17 he wrote to the secretary the reply of his father "that he could not interfere to bring pressure to bear on Mr. Leatham to employ none but society men by refusing to purchase meat from him, as that would be outside his province and interfering with the liberty of another man." September 18 brought a definite announcement from the secretary to Mr. Munce, that having failed to make a satisfactory arrangement with Mr. Leatham, they had no other alternative but to instruct his (Munce's) employes "to cease work immediately Leatham's beef arrives." Thereupon Mr. Munce was constrained to send to Leatham on Sept. 20 a telegram: "Unless you arrange with society you need not send any beef this week, as men are ordered to quit work." On and from that day Munce took no more meat from Leatham, to his substantial loss.

Another mode adopted by several of the defendants with a view to prevent persons from dealing with Leatham was the publication throughout the district of Lisburn of "black lists," containing and holding up to odium not only his name, but the names of persons who dealt with him, as a warning to those persons that if they wished their names to be removed from the lists they must have no more dealings with him or any other non-society shops. Among others, a man named McBride, a customer of Leatham, was operated on by this mode, and ceased to deal with him; attempts were also made by means of such lists to induce two other men named Davis and Hastings. With the object of further inconveniencing Leatham in his trade, two of his weekly servants, Rice and McDonnell, who had been non-union men, were somehow or other induced to join the society and to quit their service with Leatham; it is true that they gave due notice of their intention to do so, and as regards them, therefore, no separate cause of action could be maintained. But after they had left their service they were paid by the society during the time that they were out of work weekly sums of money as compensation for the wages which they would have earned with Leatham. As regards the assistant, Robert Dickie, he left his service without any notice in the middle of a week, and so broke his contract with his employers, and there was evidence that he was induced to do so through the influence of the defendants, for Dickie's evidence at the trial was that he was brought out of Leatham's shop by Rice to a meeting of the society in a room over the defendant Dornan's shop; that Shaw (another defendant) was there; that they wanted him to leave Leatham because the rest were out, and promised to pay him what he had from Leatham; that he left and was paid by Rice for the society and was then in Dornan's service.

The case came on for trial at the Belfast Assizes in July, 1896, before FITZGERBON, L.J., and a special jury. The pleadings charged in the first four counts as separate causes of action—(i) the procuring Munce to break contracts he had made with Leatham; (ii) the publication by the defendants of "black lists"; (iii) the intimidation of Munce and other persons to break their contracts; and (iv) the coercion of Dickie and other servants to leave the service of the plaintiff. Each of these counts alleged that the acts complained of were done "wrongfully and maliciously, and with intent to injure the plaintiff, and to occasion him and have occasioned him actual loss, injury, and damage." The fifth and last count charged also as a separate cause of action, that the defendants unlawfully and maliciously conspired together,

and with others, to do the various acts complained of in the previous counts, with intent to injure the plaintiff and his trade and business, and that by reason of the conspiracy he was injured and damaged in his trade. Damages and an injunction were claimed. At the conclusion of the evidence, Mr. O'SHAUGHNESSY, Q.C., for the defendants, submitted that they were entitled to a verdict upon the grounds that there was no evidence of a contract between Munro and Leathem, nor of any pecuniary damage to the plaintiff by reason of the acts of the defendants, and the acts of the defendants were legitimate. The learned lord justice refused to grant the verdict. I think rightly. He left, in compliance with the wishes of the defendants' counsel, the three following questions to the jury: (i) Did the defendants, or any of them, wrongfully and maliciously induce the customers or servants of the plaintiff named in the evidence to refuse to deal with the plaintiff? (ii) Did the defendants, or any two or more of them, maliciously conspire to induce the plaintiff's customers or servants named in the evidence, or any of them, not to deal with the plaintiff or not to continue in his employment, and were such persons so induced not to do so? (iii) Did the defendants Davey, Dorman, and Shaw, or any of them, publish the "black list" with intent to injure the plaintiff in his business, and, if so, did the publication so injure him? The jury answered each of these questions in the affirmative, and assessed the damages against all the defendants at £200. With regard to the third question they found against the defendants Dorman, Davey, and Shaw, with an additional £50 as damages against them only. Judgment was given in accordance with that verdict. The defendants appealed, but the appeal was dismissed except that the damages were disallowed in respect of the third question.

From a careful perusal of the learned lord justice's own notes and memoranda, I am satisfied that every indulgence that could have been reasonably given to the learned counsel in presenting his case to the jury was allowed him, and I am satisfied that he must be taken to have acquiesced in the form in which the questions submitted for the consideration of the jury were left to them, even though it might otherwise have been open to criticism. After commenting upon the evidence relied upon by the plaintiff as proof of actionable misconduct, the judge told the jury that they had to consider whether the conduct and actions of the defendants went beyond the limits which would not be actionable—namely, securing or advancing their own interests or those of their trade by reasonable means, including lawful combination, or whether their acts as proved were intended and calculated to injure the plaintiff in his trade through a combination, and with a common purpose to prevent the free action of his customers and servants in dealing with him, and with the effect of actually injuring him, as distinguished from acts legitimately done to secure or advance their own interests; that acts done with the object of increasing the profits or raising the wages of any combination of persons, such as the society to which the defendants belonged, by reasonable and legitimate means were perfectly lawful and were not actionable, so long as no wrongful act was maliciously—that is to say, intentionally—done to injure a third party. To constitute such a wrongful act for the purposes of this case, he told the jury that they must be satisfied that there had been a conspiracy, a common intention and a combination on the part of the defendants to injure the plaintiff in his business, and that acts must be proved to have been done by the defendants in furtherance of that intention, which had inflicted actual money loss upon the plaintiff in his trade. Having so told the jury, he proposed to put to them as the question which they had to try upon the evidence, whether the acts of the defendants were or were not in that sense actionable?

I have thought it right to follow as nearly as possible the language of the lord justice, for that charge was delivered before *Allen v. Flood* (1) was decided in this House, and in substance I think that it was correct, having regard to the particular case. In some respects it seems to me a little too favourable to the defendants. The defendants' counsel made four objections to the summing-up. The first two—viz., that the judge had given no definition of damage, and that he had told the jury

A that the liability of the defendants depended on a question of law—were conclusively answered in the summing-up. The third objection was that the question relating to the black list should be separately left to the jury. It was then so left, and as to that the judge directed them that there was not sufficient evidence to connect Quinn and Craig with the black lists. By this, I take it, he meant not as an independent cause of action, there being, in fact, no evidence of their personal participation in the publication of these lists. But that left them still affected by them as overt acts of conspiracy, for each of which every one of the conspirators was liable, and the evidence touching the black lists is beyond question admissible under the conspiracy count. The fourth objection was that there was no evidence of any binding contract having been broken through the action of the defendants, but the judge then declined to withdraw the question of contract from the jury, and I think rightly. At a later stage, after the whole matter had been disposed of under the conspiracy count, he rightly refrained from putting the question at all, because it had become unnecessary. The single general question at first proposed by the judge was finally divided into the three separate questions which have already been mentioned (*ante* p. 6).

D As stated above, an appeal by the defendants was dismissed by the Court of Appeal, and the defendant Quinn now appealed to the House of Lords.

W. Martin McGrath (of the Irish Bar) and Vesey Knox for the appellant.
Haldane, K.C., and Francis Watt for the respondent.

Their Lordships took time for consideration.

E Aug. 5, 1901.—The following opinions were read.

THE EARL OF HALSBURY, L.C.—In this case the plaintiff has, by a properly-framed statement of claim, complained of the defendants, and proved to the satisfaction of a jury that the defendants have wrongfully and maliciously induced customers and servants to cease to deal with the plaintiff; that the defendants did this in pursuance of a conspiracy formed among them; that in pursuance of the same conspiracy they induced servants of the plaintiff not to continue in the plaintiff's employment; and that all this was done with malice in order to injure the plaintiff, and it did injure the plaintiff. If upon these facts so found the plaintiff could have no remedy against those who had thus injured him, it could hardly be said that our jurisprudence was that of a civilised community. Nor, indeed, do I understand that any one has doubted, before the decision in *Allen v. Flood* (1) in this House, that such facts would have established a cause of action against the defendants.

I Before discussing *Allen v. Flood* (1) and what was decided therein, there are two observations of a general character which I wish to make; and one is to repeat what I have very often said before—that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all. I think that the application of these two propositions renders the decision of this case perfectly plain, notwithstanding the decision in *Allen v. Flood* (1).

The hypothesis of fact upon which *Allen v. Flood* (1) was decided by a majority in this House was that the defendants there neither uttered nor carried into effect any threat at all. They simply warned the plaintiff's employer of what the men themselves without their persuasion or influence had themselves determined to do, and it was certainly proved that no resolution of the trade union had been arrived at,

and that the trade union official had no authority himself to call out the men, which, it was argued in this case, was the threat which caused the employer to discharge the plaintiff. It was further an element in the decision that there was no sign of complicity or signs of combination. What was alleged to have been done was only an independent and single action of the defendant, actuated as what he did by the desire to express his own views in favour of his fellow members. It is true that I personally did not believe that it was the true view of the facts, but as I have said we must look at the hypothesis of fact upon which the case was decided by the majority of those who took part in the decision.

In my view, what has been said already is enough to decide this case without going further into the facts of *Allen v. Flood* (1), but I cannot help agreeing with cordiality the statement of the case prepared by two of your Lordships—LORD BRAMPTON and LORD LINDLEY—with great care and precision. In this case it cannot be denied that, if the verdict stands, there was a conspiracy and threats carried into execution so that loss of business and interference with the plaintiff's legal rights are abundantly proved, and I do not understand that the very learned judge who dissented doubted any one of the propositions; but his view was grounded on the belief that *Allen v. Flood* (1) had altered the law in these respects and made that lawful which would have clearly been actionable before the decision of that case. For the reasons which I have given I cannot agree with that conclusion. I do not deny that if some of the observations made in that case have to be pushed to their logical conclusion it would be very difficult to resist PALLIS, C.B.'s, inflexible logic; but, with all the respect which any view held by that learned judge is entitled to command, I cannot concur. This case is distinguished in its last form from the essentially important facts in *Allen v. Flood* (1). Rightly or wrongly the theory upon which judgment was pronounced in that case is one whereby the present is shown to be one which the majority of your Lordships would have held to be a case of actionable injury inflicted without any excuse whatever. I move that this appeal be dismissed with costs.

LORD MACNAGHTEN (read by LORD BRAMPTON).—Notwithstanding the strong language of O'BRIEN, J., and the weighty argument of PALLIS, C.B., I cannot help thinking that *Allen v. Flood* (1) has very little to do with the question now under consideration. In my opinion, the decision in *Allen v. Flood* (1) laid down no new law. It simply brushed aside certain dicta which were, in the opinion of the majority, contrary to principle, and unsupported by authority. Those dicta are first to be found in the judgment delivered by BRETT, L.J. (later Lord Esher), on behalf of himself and LORD SELBORNE, L.C., in *Bower v. Hall* (4). They were repeated by LORD ESHER, M.R., and LOPES, L.J., in *Temperton v. Russell* (3); but they were not, I think, necessary for the decision in either case. They did form the ground of the decision in *Allen v. Flood* (1) in its earlier stages. But the only result of the final decision in that case was that the law was restored to the condition in which it was before LORD ESHER's views in *Bower v. Hall* (4) and *Temperton v. Russell* (3) were accepted by the Court of Appeal. In fact I think that the headnote to *Allen v. Flood* (1) ([1898] A.C. 1) might well have run in these words, which were used by PARKER, B., in giving the judgment of an exceptionally strong court nearly half a century ago in *Sterryman v. Nienhain* (5) (13 C.B. at p. 297): "An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent." That, in my opinion, is the sum and substance of *Allen v. Flood* (1), if you eliminate all matters of merely passing interest, the charge of the learned judge, the findings of the jury (unintelligible, I think, without a careful examination of the evidence), and the discussion of the evidence itself in the two aspects in which it was presented for the consideration of this House, and for the consideration of the judges by whom the House was assisted.

The case which is really brought under review on this appeal is *Temperton v. Russell* (3). I cannot distinguish that case from the present case. The facts are

A identical in substance, and the grounds of decision must be the same. The decision in *Temperton v. Russell* (3) was not overruled in *Allen v. Flood* (1), nor is the authority of *Temperton v. Russell* (3), in my opinion, shaken in the least by the decision in *Allen v. Flood* (1). Disembarrassed of the expressions which LORD ESHER, M.R., unfortunately used in giving judgment, the decision in *Temperton v. Russell* (3) seems to me to stand on sure ground. So far from being impugned

B in *Allen v. Flood* (1) it had, I think, the approval of LORD WATSON, whose opinion seems to me to represent the joint views of the majority far better than any other judgment delivered in the case. LORD WATSON says ([1898] A.C. at p. 108) that he did not think it necessary to notice at length *Temperton v. Russell* (3) because it was to his mind

C "very doubtful whether in that case there was any question before the court with regard to the effect of the animus of the actor in making that unlawful which would otherwise have been lawful."

Then he goes on to say :

D "The only findings of the jury which the court had to consider were : (i) that the defendants had maliciously induced certain persons to break their contracts with the defendants; and (ii) that the defendants had maliciously conspired to induce, and had thereby induced, certain persons not to make contracts with the plaintiffs. There having been undisputed breaches of contract by the persons found to have been induced, the first of these findings raised the question which was disposed of in *Lumley v. Gye* (2). According to the second finding,

E the persons induced merely refused to make contracts, which was not a legal wrong on their part; but the defendants who induced were found to have accomplished their object, to the injury of the plaintiffs, by means of unlawful conspiracy, a clear ground of liability according to *Lumley v. Gye* (2) if, as the court held, there was evidence to prove it."

F It must be admitted, I think, that the second reference to *Lumley v. Gye* (2) in the passage which I have just quoted is a slip, a rare, if not an unexampled, occurrence in a judgment of LORD WATSON'S. I cannot see that *Lumley v. Gye* (2) has any bearing on the question of conspiracy. But I do not think that the slip (if it be a slip) impairs the effect of what LORD WATSON said. Obviously he thought that there was authority for the proposition that a conspiracy to injure may give rise to civil liability. There is authority for that proposition; but even if there were none to be found, LORD WATSON'S view that the proposition was supported by authority is, I think, of considerable weight.

G

Precisely the same questions arise in this case as arose in *Temperton v. Russell* (3). The answers, I think, must depend upon precisely the same considerations. Was *Lumley v. Gye* (2) rightly decided? I think it was. *Lumley v. Gye* (2) was much

H considered in *Allen v. Flood* (1). But as it was not directly in question, some of your Lordships thought it better to suspend your judgment. In this case the question arises directly, and it is necessary to express an opinion on the point. Speaking for myself, I have no hesitation in saying that I think the decision right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is

I a cause of action, and that it is a violation of right to interfere with contractual relations recognised by law, if there be no justification for the interference.

The only other question is this : Does a conspiracy to injure, if there be damage, give rise to civil liability? It seems to me that there is authority for that proposition, and that it is founded in good sense. *Gregory v. Duke of Brunswick* (6) is one authority, and there are others. There are valuable observations on the subject in ERLE, J.'s, charges to the jury in *R. v. Duffield* (7) and *R. v. Rowlands* (8). Those were cases of trade union outrages, but the observations to which I refer were not confined to exploded doctrines in regard to restraint of trade. There are

also weighty observations to be found in the charge delivered by FITZGERALD, J., in *R. v. Parnell* (9). That a conspiracy to injure, an expressive combination, differs widely from an invasion of civil rights by a single individual cannot be doubted. I agree with the remarks of BOWEN, L.J., and LORD BRIDGEWATER, and LORD HANSEN in *Mugal Steamship Co. v. McGregor, Gair & Co.* (10). A man may seem without much difficulty the wrongful act of an individual. To expelling it he would probably have at least the moral support of his friends and neighbours; but it is a very different thing, as FITZGERALD, J., observes, when one man has to defend himself against many combined to do him wrong.

I have only to add that I agree generally with the judgments delivered in the courts below, and particularly with the judgment of ABBOTTS, J., in the Queen's Bench, and the judgment of HOLMES, L.J., in the Court of Appeal. I do not think that the acts done by the defendants were done "in contemplation or furtherance of a trade dispute between employers and workmen." So far as I can see there was no trade dispute at all. Leathem had no dispute with his men. They had no quarrel with him. For his part he was quite willing that all his men should join the union. He offered to pay all their fines and entrance money. What he did object to was a cruel punishment which it was proposed to inflict on some of his men for not having joined the union sooner. There was certainly no trade dispute in the case of Munnice. But the defendants conspired to do harm to Munnice in order to compel him to do harm to Leathem, and so enable them to wreak their vengeance upon Leathem's servants who were not members of the union. I also think that the provision in the Conspiracy and Protection of Property Act, 1875 (see s. 3), which says that in certain cases an agreement or combination is not to be "unlawful as a conspiracy," has nothing to do with civil remedies.

LORD SHAND (read by LORD DAVY).—After the able and full opinions of the learned judges of the Court of Appeal in Ireland, holding that the verdict and judgment for the plaintiff ought to stand, the grounds of my opinion that this judgment ought to be affirmed, and the appeal dismissed, may be shortly stated. I refrain from any detailed reference to the numerous cases cited in the argument. These have been considered and discussed by the judges of the Court of Appeal, and I concur in the reasoning of the majority of their Lordships, and they have been already dealt with in my judgment in *Allen v. Flood* (1). In that case I expressed my opinion that while a combination of different persons in pursuit of a trade object was lawful, although resulting in such injury to others as may be caused by legitimate competition in labour, yet that a combination for no such object, but in pursuit merely of a malicious purpose to injure another, would be clearly unlawful; and, having considered the arguments in this case, my opinion has only been confirmed. The learned lord justice, FITZGIBBON, L.J., before whom the case was tried told the jury with reference to the words "wrongfully and maliciously" in the first question that the questions to be answered by them were only matters of fact to be determined on the evidence, and in particular involved the question whether the intention of the defendants was to injure the plaintiff in his trade, as distinguished from the intention of legitimately advancing their own interests. The verdict affirms that this was the fact, for after the direction of the learned judge no other interpretation can be given to the finding that the acts were done by the defendants "wrongfully and maliciously."

This being clearly so, the question now raised is whether in consequence of the decision of this House in *Allen v. Flood* (1), and of the grounds on which that case was decided, it is now the law that where the acts complained of are in pursuance of a combination or conspiracy to injure or ruin another, and not to advance the parties' own trade interests, and injury has resulted, no action will lie; or, to put the question in a popular form, whether the decision in *Allen v. Flood* (1) has made boycotting lawful? Apart from the decision in that case the judgment of the learned judges in Ireland would have been unanimous in affirming the principle to which

A FITZGIBBON, L.J., gave effect. The general law cannot, I think, be more happily stated than in the passage from the judgment of BOWEN, L.J., in the *Mogul Case* (10) (23 Q.B.D. at p. 614), which was quoted by LORD HALSBURY, L.C., with an expression of his strong approval, in *Allen v. Flood* (1). The Lord Chancellor there said ([1898] A.C. at p. 74): "I can desire no more apt exposition of the law than that which is contained in BOWEN, L.J.'s admirably reasoned judgment in the *Mogul Case* (10) B in the Court of Appeal," which he then quotes, as follows:

"Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of the violation of individual rights, contractual or other, assuming always that there is no just cause for it. The intentional driving away of customers by show of violence (*Tarleton v. M'Gawley* (11)); the obstruction of actors on the stage by preconcerted hissing (*Clifford v. Brandon* (12); *Gregory v. Duke of Brunswick* (6)); the disturbance of wildfowl in decoys by the firing of guns (*Carrington v. Taylor* (13), and *Keeble v. Hickeringhall* (14)); the impeding or threatening servants or workmen (*Garret v. Taylor* (15)); the inducing persons under personal contracts to break their contracts (*Bowen v. Hall* (4); and *Lumley v. Gye* (2)), are all instances of such forbidden acts." D

The Lord Chancellor also spoke with approval, as I should certainly do, of the views to a similar effect stated by ERLE, J., in his work on trade unions. It may be that in certain cases the object of inflicting injury and success in that object require combination or conspiracy with others in order to be effectual. That was not so in all the cases enumerated by BOWEN, L.J., but no question on that point arises in the circumstances of this particular case, for, according to the verdict of the jury, the defendants by combined action wrongfully and maliciously induced a number of persons to refrain from dealing with the plaintiff. That is sufficient for the decision of the case, although, in my opinion, it is further proved that they succeeded in inducing a servant and a customer of the plaintiff to break existing contracts with him. E F

On the whole, it seems to me clear that the defendants were guilty of unlawful acts unless the judgment in *Allen v. Flood* (1) has introduced a change which has rendered such acts lawful. As to the vital distinction between *Allen v. Flood* (1) and the present case, it may be stated in a single sentence. In *Allen v. Flood* (1) the purpose of the defendant was by the acts complained of to promote his own trade interest, which he was held entitled to do, although it was injurious to his competitors, whereas in the present case, while it is clear that there was combination, the purpose of the defendants was "to injure the plaintiff in his trade as distinguished from the intention of legitimately advancing their own interests." G It is unnecessary to quote from the judgments of the majority of the learned judges in *Allen v. Flood* (1) to show their opinions on the importance of this essential H point. LORD HERSCHELL, for example, said ([1898] A.C. at p. 132):

"The object which the defendant and those whom he represented had in view throughout was what they believed to be the interest of the class to which they belonged; the step taken was a means to that end."

The other Lords in the majority expressed themselves to a similar effect. For I myself, I said (*ibid.* at p. 163):

"If anything is clear on the evidence it seems to me to be this, that the defendant was bent, and bent exclusively, on the object of furthering the interests of those whom he represented in all that he did, that this was his motive of action, and not a desire, to use the words of the learned judge, 'to do mischief to the plaintiffs in their lawful calling.' The case was one of competition in labour, which in my opinion is in all respects analogous to competition in trade, and the same principles must apply to it."

The ground of judgment of the majority of the House, however varied in expression by their Lordships, was, as it appears to me, that Allen, in what he said and did, was only exercising the right of himself and his fellow workmen as competitors in the labour market, and the effect of injury thus caused to others from such competition, which was legitimate, was not a legal wrong.

It is only necessary to add that the defendants here have no such defence as legitimate trade competition. Their acts were wrongful and malicious in the sense found by the jury—that is to say, they acted by conspiracy, not for any purpose of advancing their own interests as workmen, but for the sole purpose of injuring the plaintiff in his trade. I am of opinion that the law prohibits such acts as unjustifiable and illegal; that by so acting the defendants were guilty of a clear violation of the rights of the plaintiff, with the result of causing serious injury to him; and that *Allen v. Flood* (1), as a case of legitimate competition in the labour market, is essentially different and gives no ground for the defendants' argument. I concur in holding that there is not sufficient ground for disturbing the verdict on the question of damages, and in holding that the special provision of s. 3 of the Conspiracy and Protection of Property Act, 1875, has no application to the circumstances of this case.

LORD BRAMPTON. This case now awaiting final judgment is one which, looked at simply as affecting the parties to it, is of no serious pecuniary concern, but it involves nevertheless questions of widespread importance to every trader, and to every employer and servant engaged in trade. [His Lordship stated the facts as already set out.]

Rightly understood, I think that the judgment in *Allen v. Flood* (1) is inapplicable. But in order properly to appreciate it, it is essential to ascertain what were the material facts assumed to exist by their Lordships who assented to that judgment, and what were the principles of law applied by them to those facts. This necessity will be more apparent when it is realised that unanimity of opinion as to the facts certainly did not prevail, and that the judges who were called on to render assistance to the House were given one simple question only, viz., "Assuming the evidence given by the plaintiff's witnesses to be correct, was there any evidence of a cause of action fit to be left to the jury?" The evidence of the plaintiff's witnesses handed to the judges most certainly did not altogether coincide with some very material facts assumed by their Lordships. This would account for the variance in the views expressed as to the legal rights and alleged wrongful acts of the parties. It would be an endless task to endeavour to reconcile all these differences of fact and opinion. I will, therefore, not make the attempt. Some of this confusion arose, no doubt, from the course taken, rightly or wrongly, at the trial. Then all questions of conspiracy, intimidation, coercion, or breach of contract were withdrawn from the jury, the only matters of fact found by them being that Allen maliciously induced the Glengall company to discharge Flood and Taylor from their employment, and not to engage them again, and that each plaintiff had suffered £20 damages. It was assumed by their Lordships that the Glengall company were under no contractual obligation to retain the plaintiffs, Flood and Taylor, in their service for any duration of time, but might dismiss them from their employment at any moment, and that the boilermakers were working under the same conditions; that Allen, in making the communication which induced the company to dismiss the plaintiff, was only doing that which he had a legal right to do, and their Lordships held, therefore, that the plaintiffs had no legal cause of action against either the company or the defendant, and that the mere fact, as found by the jury, that the defendant was actuated by a malicious motive could not convert a rightful into a wrongful act. This proposition that the exercise of an absolute legal right cannot be treated as wrongful and actionable merely because a malicious motive prompted such exercise was established as clear law in *Bradford Corp. v. Pickles* (16), and it is now too late to dispute it even if one were disposed to do so, which I am not. It must not,

A however, be supposed that a malicious intention can in no case be material to the maintenance of an action. It is commonly used to defeat the defence of privilege, to do or to say that which, without such privilege, would be wrongful and actionable. Take the familiar instance of an action for malicious prosecution. It is not a wrongful act for any person who honestly believed that he had reasonable and probable cause, though he had it not, in fact, to put the criminal law in motion against another; but if a malicious motive operating on the mind of such prosecutor be added, that which would have been a justifiable act, if done without malice, becomes with malice wrongful and actionable. What would constitute such malice it is not material for the purposes of this case to define.

C In the present case the alleged cause of action is very different from that in *Allen v. Flood* (1). The real and substantial cause of action was an unlawful conspiracy to molest the plaintiff, a trader, in carrying on his business, and by so doing to invade his undoubted right—in the words of ALDERSON, B., in *Hilton v. Eckersley* (17) (6 E. & B. at p. 74):

“in all matters not contrary to law to regulate his own mode of carrying on his business according to his own discretion and choice.”

D To this I would add the emphatic expression of LORD HALSBURY, L.C., in the *Mogul Case* (10) ([1892] A.C. at p. 38): “All are free to trade upon what terms they will,” and of BRAMWELL, B., in *R. v. Druitt, Lawrence and Adamson* (22), who in a passage referred to by LORD HALSBURY, L.C., in the same case said (*ibid.* at p. 73):

E “The liberty of a man’s mind and will to say how he should bestow himself and his means, his talents, and his industry, is as much a subject of the law’s protection as is that of his body.”

Again, SIR WILLIAM ERLE thus expresses himself (ERLE ON TRADE UNIONS, p. 12):

F “Every person has a right under the law as between himself and his fellow-subjects to full freedom in disposing of his own labour, or his own capital, according to his will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others.”

I am not aware that the rights thus stated have ever been seriously questioned. I rest my judgment on the principle expressed in the extracts which I have G read. I seek for no more.

The remedy for the invasion of a legal right was thus stated by LORD WATSON in *Allen v. Flood* (1) ([1898] A.C. at p. 92):

“Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences in so far as these are injurious to the person whose right is infringed.”

H I cannot suppose that any intelligent person reading the evidence adduced on the trial of the present case would fail to come to the conclusion that the acts complained of amounted to a serious invasion of the plaintiff’s trade rights, and I am at a loss to comprehend on what ground the defendants seek to justify or excuse their action towards him. As members of a trade union they had no more legal right to commit I what would otherwise be unlawful wrongs than if the association to which they were attached had never come into existence [but see note ante p. 2]. They had no more right to coerce others pursuing the same calling as themselves to join their society, or to adopt their views or rules, than those who differed from them and belonged to other trade associations would have a right to coerce them. The legislature in conferring on trade unions such privileges as were contained in the Acts of 1871 and 1876 most certainly has not conferred on any association or any member of it a licence to obstruct or interfere with the freedom of any other person in carrying on his business or bestowing his labour in the way which he thinks fit, provided

only that it is lawful; and although a combination of members of a trade union for a certain purpose is no longer unlawful or criminal by a conspiracy, merely because the objects of that combination are in restraint of trade, no protection is given to any combination or conspiracy which before the Act of 1871 would have been criminal for other reasons. One cannot read s. 7 of the Conspiracy Act, 1875, without seeing that it had no intention to tolerate such proceedings as in this case were complained of, but rather to protect those upon whom coercive measures might be practised.

But I will not linger upon a consideration of what might be done in competition. For competition is not even suggested as a justification of the acts now complained of—acts of wanton aggression, the outcome of a malicious but successful conspiracy, to harm the plaintiff in his trade. It cannot be—it has not even been suggested—that these acts were done in furtherance of any of the lawful objects of the association as set forth in their registered rules, according to the statutory requirements, nor in support of any lawful right of the association, or any member of it, nor to obtain or maintain fair hours of labour or fair wages, nor to promote a fair understanding between employers and employed or workman and workman. It would indeed be a strange mode of promoting such a good understanding to coerce a tradesman's customers to leave him because he would not at the bidding of the association dismiss workmen who desired to continue in his service, and whom he wished to retain, to make way for others whom he did not want; nor for the settlement of any dispute, for none had existence.

I will next deal with the conspiracy part of the claim, respecting which much confusion and uncertainty seems somehow to have arisen, which I find it difficult to understand. I have no intention, however, of embarking upon a history of the law relating to the subject. That would be useless for the present purpose, and I will endeavour briefly to state how I view the matter practically as far as it concerns the present case. A conspiracy consists of an unlawful combination of two or more persons to do that which is contrary to law, or to do that which is wrongful or harmful towards some other person. It may be punished criminally by indictment, or civilly by an action if damage has been occasioned to the person against whom it is directed. It may also consist of an unlawful combination by unlawful means. The essential elements, whether of a criminal or of an actionable conspiracy are, in my opinion, the same, though to sustain an action special damage must be proved. I will quote, as a very instructive definition, the words of a great lawyer, WILKES, J., in *Mulcahy v. R.* (18) in delivering the unanimous opinion of himself and others, which was adopted by this House:

"A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more, to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced if lawful; and punishable if for a criminal object, or for the use of criminal means. The number and compact give weight and cause danger."

It is true that these words were uttered touching a criminal case, but they are none the less applicable to conspiracies made the subject of civil actions like the present.

I have occupied more of your Lordships' time than I had intended, but the case is of great importance and I feel that such unlawful conduct as has been pursued towards Mr. Leatham demands serious attention. I think that the law is with him, and that the damages awarded were in the circumstances very moderate. It is at all times a painful thing for any individual to be the object of the hatred, spite, and ill-will of anyone who seeks to do him harm. But that is as nothing compared with the danger and alarm created by a conspiracy formed by a number of unscrupulous conspirators acting under an illegal compact together and separately, as often as

A opportunity occurs, regardless of law, and actuated by malevolence, to injure him and all who stand by him. Such a conspiracy is a powerful and dangerous engine, which in this case has, I think, been employed by the defendants for the perpetration of organised and ruinous oppression. I think that the judgment in the courts below ought to be affirmed and this appeal dismissed with costs.

B LORD ROBERTSON concurred.

D LORD LINDLEY.—*Allen v. Flood* (1) has so important a bearing on the present appeal that it is necessary to ascertain exactly what this House really decided in that celebrated case. It was an action by two workmen of an iron company against three members of a trade union for maliciously, wrongfully, and with intent to injure the plaintiffs, procuring and inducing the iron company to discharge the plaintiffs. The only question which the House of Lords had to decide in that case was whether what Allen had done entitled the plaintiffs to maintain their act against him. What the jury found that he had done was that he had maliciously induced the employers of the plaintiffs to discharge them, whereby the plaintiffs suffered damage. Different views were taken by the noble Lords who heard the appeal, but the opinion of the majority was that Allen had no power himself to call the workmen out, and all that he did was to inform the employers of the plaintiffs that most of their workmen would leave them if they did not discharge the plaintiffs. There being no question of conspiracy, intimidation, coercion, or breach of contract for the consideration of the House, and the House having come to the conclusion that Allen had done no more than I have stated, the majority of the noble Lords held that the action against Allen would not lie, that he had infringed no right of the plaintiffs, that he had done nothing which he had not a legal right to do, and that the fact that he had acted maliciously, and with intent to injure the plaintiffs, did not entitle the plaintiffs to maintain the action.

F This decision, as I understand it, establishes two propositions, one a far-reaching and extremely important proposition of law, and the other a comparatively unimportant proposition of mixed law and fact, useful as a guide, but of a very different character from the first. The first and important proposition is that an act otherwise lawful, although harmful, does not become actionable by being done maliciously in the sense of proceeding from a bad motive, and with intent to annoy or harm another. This is a legal doctrine not new nor laid down for the first time in *Allen v. Flood* (1); it had been gaining ground for some time, but it was never before so fully and authoritatively expounded as in that case. In applying this proposition, however, care must be taken to bear in mind, first, that in *Allen v. Flood* (1) criminal responsibility had not to be considered. It would revolutionise criminal law to say that the criminal responsibility for conduct never depends on intention. Secondly, it must be borne in mind that even in considering a person's liability to civil proceedings the proposition in question only applies to "acts otherwise lawful"—i.e., to acts involving no breach of duty, or, in other words, no wrong to anyone. I shall refer to this matter later on. The second proposition is that what Allen did infringed no right of the plaintiffs, even though he acted maliciously and with a view to injure them. I have already stated what he did and all that he did in the opinion of the majority of the noble Lords. If their view of the facts was correct, their conclusion that Allen infringed no right of the plaintiff is perfectly intelligible and, indeed, unavoidable. Truly, to inform a person that others, not under the control of the informant, will annoy or injure him unless he acts in a particular way cannot of itself be actionable whatever the motive or intention of the informant may have been.

I I will pass now to the facts of the present case and consider (i) what the plaintiff's rights were; (ii) what the defendants' conduct was; (iii) whether that conduct infringed the plaintiff's right. For the sake of clearness it will be convenient to

consider these questions, in the first place, apart from the statute which legalises strikes, and in the next place, with reference to that statute.

(i) As to the plaintiff's rights. He had the ordinary rights of a British subject. He was at liberty to earn his own living in his own way, provided that he did not violate some special law prohibiting him from so doing, and provided that he did not infringe the rights of other people. This liberty involved liberty to deal with other persons who were willing to deal with him. This liberty is a right recognised by law; its correlative is the general duty of every one not to prevent the free exercise of this liberty without justification. But a person's liberty or right to deal with others is nugatory unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him. If such interference is justifiable in point of law he has no redress. Again, if such interference is wrongful, the only person who can sue in respect of it is, as a rule, the person immediately affected by it; another who suffers by it has usually no redress: the damage to him is too remote, and it would obviously be practically impossible and highly inconvenient to give legal redress to all who suffered from such wrongs. But if the interference is wrongful and is intended to damage a third person, and he is damaged in fact—in other words, if he is wrongfully and intentionally struck at through others, and is thereby damaged, the whole aspect of the case is changed; the wrong done to others reaches him, his rights are infringed although indirectly, and damage to him is not remote or unexpressed, but is the direct consequence of what has been done. Our law, as I understand it, is not so defective as to refuse him a remedy by an action under such circumstances. The cases collected in the old books on actions on the case, and the illustrations given by BOWEN, L.J., in his admirable judgment in the *Mogul Steamship Co.'s Case* (10) may be referred to in support of the foregoing conclusion, and I do not understand the decision in *Allen v. Flood* (1) to be opposed to it. If the above reasoning is correct, *Lumley v. Gye* (2) was rightly decided, as I am of opinion it clearly was. Further, the principle involved in it cannot be confined to inducements to break contracts of service; nor, indeed, to inducements to break any contracts. The principle which underlies the decision reaches all wrongful acts done intentionally to damage a particular individual and actually damaging him. *Temperton v. Russell* (3) ought to have been decided and may be upheld on this principle. That case was much criticised in *Allen v. Flood* (1), and not without reason; for, according to the judgment of LORD ESHER, M.R., the defendant's liability depended on motive or intention alone whether anything wrong was done or not. This went too far, as was pointed out in *Allen v. Flood* (1). But in *Temperton v. Russell* (3) there was conspiracy and a wrongful act—viz., unjustifiable interference with Brentano, who dealt with the plaintiff. This wrongful act warranted the decision, which I think was right.

(ii) I pass on to consider what the defendants did. They were the officers of a trade union, and the jury have found that the defendants wrongfully and maliciously induced the customers of the plaintiff to refuse to deal with him and maliciously conspired to induce them not to deal with him. There were similar findings as to inducing servants of the plaintiff to leave him. What the defendants did was to threaten to call out the union workmen of the plaintiff and of his customers if he would not discharge some non-union men in his employ. In other words, in order to compel the plaintiff to discharge some of his men the defendants threatened to put the plaintiff and his customers, and persons lawfully working for them, to all the inconvenience they could without using violence. The defendants' conduct was the more reprehensible because the plaintiff offered to pay the fees necessary to enable his non-union men to become members of the defendants' union, but this would not satisfy the defendants. The facts of this case are entirely different from those which this House had to consider in *Allen v. Flood* (1). In the present case there was no dispute between the plaintiff and his men. None of them wanted to leave his employ. Nor was there any dispute between the plaintiff's customers and their own men, nor between the plaintiff and his customers; nor between the men

they respectively employed. The defendants called no witnesses, and there was no evidence to justify or excuse their conduct. That they acted as they did in furtherance of what they considered the interests of union men may probably be fairly assumed in their favour, although they did not come forward and say so themselves; but that is all that can be said for them. No one can, I think, say that the verdict was not amply warranted by the evidence. I have purposely said nothing about the black list, as the learned judge who tried the case considered that the evidence did not connect the appellant with that list. But the black list was, in my opinion, a very important feature in the case.

(iii) The remaining question is whether such conduct infringed the plaintiff's rights so as to give him a cause of action. In my opinion, it plainly did. The defendants were doing a great deal more than exercising their own rights; they were dictating to the plaintiff and his customers and servants what they were to do. The defendants were violating their duty to the plaintiff and his customers and servants, which was to leave them in the undisturbed liberty of acting as they had a perfect right to do. What is the legal justification or excuse for such conduct? None is alleged and none can be found. This violation of duty by the defendants resulted in damage to the plaintiff; not remote, but immediate and intended. The intention to injure the plaintiff negatives all excuses and disposes of any question of remoteness of damage. Your Lordships have to deal with a case, not of *damnum absque injuria*, but of *damnum cum injuria*. Every element necessary to give a cause of action on ordinary principles of law is present in this case.

As regards authorities, they were all exhaustively examined in *Mogul Steamship Co. v. McGregor, Gow & Co.* (10) and *Allen v. Flood* (1) and it is unnecessary to dwell upon them again. I have examined all those which are important, and I venture to say that there is not a single decision anterior to *Allen v. Flood* (1) in favour of the appellants. Their sheet-anchor is *Allen v. Flood* (1) which is far from covering this case, and can only be made to cover it by greatly extending its operation. It was contended at the Bar that, if what was done in this case had been done by one person only, his conduct would not have been actionable, and that the fact that what was done was effected by many acting in concert makes no difference. One man without others behind him who would obey his orders could not have done what these defendants did. One man exercising the same control over others as these defendants had could have acted as they did, and if he had done so I conceive that he would have committed a wrong towards the plaintiff, for which the plaintiff could have maintained an action. I am aware that in *Allen v. Flood* (1) LORD HERSCHELL expressed his opinion to be that it was immaterial whether Allen said he would call the men out or not. This may have been so in that particular case, as there was evidence that Allen had no power to call out the men, and the men had determined to strike before Allen had anything to do with the matter. But if LORD HERSCHELL meant to say that as a matter of law there is no difference between giving information that men will strike and making them strike or threatening to make them strike by calling them out when they do not want to strike, I am unable to concur with him. It is all very well to talk about peaceable persuasion. It may be that in *Allen v. Flood* (1) there was nothing more, but here there was very much more. What may begin as peaceable persuasion may easily become, and in trade disputes generally does become, peremptory ordering with threats, open or covert, of very unpleasant consequences to those who are not persuaded. Calling workmen out involves very serious consequences to such of them as do not obey. Black lists are real instruments of coercion, as every man whose name is on one soon discovers to his cost. A combination not to work is one thing, and is lawful. A combination to prevent others from working is a very different thing, and is *prima facie* unlawful. Again, not to work oneself is lawful so long as one keeps off the poor rates, but to order men not to work when they are willing to work is another thing. A threat to call men out given by a trade union official to an employer of men belonging to the union and willing to work with him is a form of coercion.

intimidation, molestation, or annoyance to them and to him, very difficult to resist, and, to say the least, requiring justification. None was offered in this case. A

It is said that conduct which is not actionable on the part of one person cannot be actionable if it is that of several acting in concert. This may be so when they do no more than one is supposed to do. But numbers may annoy and coerce where one may not. Annoyance and coercion by many may be so intolerable as to become actionable, and produce a result which one alone could not produce. I am B aware of the difficulties which surround the law of conspiracy, both in its criminal and civil aspects; and older laws have been greatly and, if I may say so, most beneficially modified by the discussions and decisions in America and this country. Among the American cases I would refer especially to *Vegetable v. Greenlee* (19), where coercion by other means than violence or threats of it was held unlawful. In C this country it is now settled by the decision of this House in the *Mogul Steamship Co.'s Case* (10) that no action for a conspiracy lies against persons who act in concert to damage another and do damage him, but at the same time merely exercise their own rights and infringe no rights of other people. *Allen v. Flood* (1) emphasises the same doctrine. The principle was strikingly illustrated in the *Scottish Co-operative Wholesale Society, Ltd. v. Glasgow Fishers' Trade Defence Association* (20), D which was referred to in the course of the argument. In that case some butchers induced some salesmen not to sell meat to the plaintiffs. The means employed were to threaten the salesmen that if they continued to sell meat to the plaintiffs they, the butchers, would not buy from the salesmen. There was nothing unlawful in this, and the learned judge held that the plaintiffs showed no cause of action, although the butchers' object was to prevent the plaintiffs from buying for co-operative societies in competition with themselves, and the defendants were acting E in concert.

The cardinal point of distinction between such cases and the present is that in them, although damage was intentionally inflicted on the plaintiffs, no one's right was infringed; no wrongful act was committed; while in the present case the coercion of the plaintiff's customers and servants, and of the plaintiff through them, F was an infringement of their liberty as well as of his, and was wrongful both to them and also to him, as I have already endeavoured to show. Intentional damage which arises from the mere exercise of the rights of many is not, I apprehend, actionable by our law as now settled. To hold the contrary would be unduly to restrict the liberty of one set of persons in order to uphold the liberty of another set. According to our law, competition, with all its drawbacks, not only between individuals, but G between associations, and between them and individuals, is permissible provided that nobody's rights are infringed. The law is the same for all persons, whatever their callings; it applies to masters as well as to men; the proviso, however, is all-important, and it also applies to both, and limits the rights of those who combine to lock out as well as the rights of those who strike. But coercion by threats open or disguised not only of bodily harm, but of serious annoyance and damage, is, H *prima facie*, at all events, a wrong inflicted on the persons coerced, and in considering whether coercion has been applied or not numbers cannot be disregarded. I conclude this part of the case by saying that, in my opinion, the direction given to the jury by the learned judge who tried the case was correct, so far as the liability of the defendants turns on principles of common law, and that the objection taken to it by the counsel for the appellant is untenable. I mean the objection that the learned judge did not distinguish between coercion to break contracts of service and coercion I to break contracts of other kinds, and coercion not to enter into contracts.

I pass now to consider the effect of the Conspiracy and Protection of Property Act, 1875. This Act clearly recognises the legality of strikes and lock-outs up to a certain point. It is plainly legal now for workmen to combine not to work except on their own terms. On the other hand, it is clearly illegal for them or anyone else to use force or threats of violence to prevent other people from working on any terms which they think proper. But there are many ways short of violence, or the threat of it, of

compelling persons to act in a way which they do not like. There are annoyances of all sorts of degrees; picketing is a distinct annoyance, and if damage results is an actionable nuisance at common law; but if confined merely to obtaining or communicating information it is rendered lawful by the Act (s. 7). Is a combination to annoy a person's customers so as to compel them to leave him unless he obeys the combination permitted by the Act or not? It is not forbidden by s. 7; is it permitted by s. 3? I cannot think that it is. The Court of Appeal (of which I was a member) so decided in *J. Lyons & Sons v. Wilkins* (21), in the case of Schoenthal, which arose there, and is referred to in the judgment of WALKER, L.J., in this case. This particular point had not to be reconsidered when *J. Lyons & Sons v. Wilkins* (21) came before the Court of Appeal after the decision in *Allen v. Flood* (1), but BYRNE, J. modified the injunction granted on the first occasion by confining it to watching and besetting (see [1899] 1 Ch. at pp. 258, 259). He might safely have gone further and have restrained the use of other unlawful means; but the strike was then over, and his modification was not objected to, and cannot be regarded as an authority in favour of the appellant's contention. It must be conceded that if what the defendants here did had been done by one person it would not have been punishable as a crime. I cannot myself see that there was in this case any trade dispute between employers and workmen within the meaning of s. 3. I am not at present prepared to say that the officers of a trade union who create strife by calling out members of the union working for an employer with whom none of them has any dispute can invoke the benefit of this section even on an indictment for a conspiracy. But assuming that there was a trade dispute within the meaning of s. 3, and that an indictment for conspiracy could not be sustained in a case like this, the difference between an indictment for a conspiracy and an action for damages occasioned by a conspiracy is very marked, and is well known. An illegal agreement, whether carried out or not, is the essential element in a criminal case; the damage done by several persons acting in concert and not the criminal conspiracy is the important element in the action for damages: see the notes to 1 Wms. Saund. 229b and 230. In my opinion, it is quite clear that s. 3 has no application to civil actions; it is confined entirely to criminal proceedings. Nor can I agree with those who say that the civil liability depends on the criminality, and that, if such conduct as is complained of has ceased to be criminal, it has, therefore, ceased to be actionable. On this point I will content myself by saying that I agree with ANDREWS, J., and those who concurred with him. It does not follow, and it is not true, that annoyances which are not indictable are not actionable. The law relating to nuisances, to say nothing of the law relating to combinations, shows that many annoyances are actionable which are not indictable, and the principles of justice on which this is held to be so appear to me to apply to such cases as these. I will detain your Lordships no longer. *Allen v. Flood* (1) is in many respects a very valuable decision, but it may be easily misunderstood and carried too far. Your Lordships are asked to extend it, and to destroy that individual liberty which our laws so anxiously guard. The appellants seek by means of *Allen v. Flood* (1) and by logical reasoning based upon some passages in the judgments given by the noble Lords who decided it, to drive your Lordships to hold that boycotting by trade unions in one of its most objectionable forms is lawful and gives no cause of action to its victims, although they may be pecuniarily ruined thereby. So to hold would, in my opinion, be contrary to well-settled principles of English law, and would be to do that which is not yet authorised by any statute or legal decision. In my opinion, this appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitors: *Eyre, Dowling & Co.*, for *Joseph Donnelly*, Belfast; *Francis H. White*, for *G. B. Wilkins*, Lisburn, Ireland.

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

KRELL v. HENRY

COURT OF APPEAL (V. L. J. Lord Williams, Romer and Scrutton, L. J. J., 140; 13, 14, 15.
August 11, 1903]

[Reported [1903] 2 K.B. 740; 72 L.J.K.B. 794; 89 L.T. 328; 52 W.R. 246;
19 T.L.R. 711]

Contract—Frustration—State of things foundation of contract—Destruction by agent not in contemplation of parties—Extrinsic evidence as to surrounding facts and knowledge of parties when making contract—Contract for hire of seats to view coronation processions—Cancellation of processions.

Where a condition or state of things clearly appears by extrinsic evidence to have been assumed by the parties to a contract to be the foundation or basis of the contract and as essential to its performance, and an event which is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made renders it impossible to perform the contract, the parties are discharged from further performance of the contract. This principle is not limited to cases in which the event causing the impossibility of performance is the destruction or non-existence of some thing which is the subject-matter of the contract or of some condition or state of things expressly specified as a condition of it. The surrounding facts and the knowledge of the parties of those facts must be taken into consideration.

The plaintiff, who was the tenant of rooms the windows of which commanded a view of the route of the intended coronation processions on June 26 and 27, 1902, agreed with the defendant that he should have possession of them on those days in consideration of a payment of £75. The coronation was postponed and no processions took place.

Held: the use of the rooms was let and taken for the particular purpose of viewing the processions, and no other; parol evidence was admissible to show that the happening of the processions and a view thereof was the foundation of the contract; it was not in the contemplation of the parties that the processions would not take place; the non-happening of the processions prevented the performance of the contract; and the contract was discharged.

Taylor v. Caldwell (1) (1863), 3 B. & S. 826, applied.

Notes. In *Maritime National Fish, Ltd. v. Ocean Traders, Ltd.*, LORD WRIGHT pointed out that the correctness of the decision in *Krell v. Henry* was questioned by LORD FINLAY, L.C., in *Larrinaga & Co., Ltd. v. Société Franco-Américaine des Phosphates de Médulla, Paris*, [1923] All E.R. Rep. 1, and himself said: "The authority is certainly not one to be extended": see [1935] All E.R. Rep. 88, 89. As to the recovery of sums paid under a frustrated contract see *Lex Reform (Frustrated Contracts) Act, 1943*, ss. 1, 2. (4 HALSEBURY'S STATUTES (2nd Edn., 662).

Distinguished: *Larrinaga & Co., Ltd. v. Société Franco-Américaine des Phosphates de Médulla, Paris* (1922), 27 Com. Cas. 160. Considered: *First Russian Insurance Co. v. London and Lancashire Insurance Co.*, [1928] Ch. 922; *Maritime National Fish, Ltd. v. Ocean Traders, Ltd.*, [1935] All E.R. Rep. 86; *Fikria Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*, [1942] 2 All E.R. 122. Referred to: *Elliot v. Gratchley*, [1903] 2 K.B. 476; *Associated Portland Cement Manufacturers* (1900), *Ltd. v. Cory* (1915), 31 T.L.R. 442; *Re Skipton, Anderson and Harrison*, [1915] 3 K.B. 676; *F. A. Tompkin Steamship Co. v. Anglo-Mexican Petroleum Products Co.*, [1915] 3 K.B. 668; *Foster's Agency v. Romaine* (1916), 32 T.L.R. 331; *Berthoud v. Schroeder* (1915), 31 T.L.R. 404; *London and Northern Estates Co. v. Schlesinger*, [1914-15] All E.R. Rep. 593; *Horlock v. Bad*, [1916-17] All E.R. Rep. 81; *Leisham Gas Co., Ltd. v. Leisham Gas Supply Co., Ltd.*, [1916-17]

All E.R. Rep. 329; *Lloyd Royal Belge Société Anonyme v. Stathatos* (1917), 33 T.L.R. 390; *Scottish Navigation Co. v. Sauter, Admiral Shipping Co. v. Weidner, Hopkins & Co.*, [1917] 1 K.B. 222; *Blackburn Bobbin Co. v. Allen* (1918), 87 L.J.K.B. 1985; *Re Badische Co., Bayer Co., etc.*, [1921] 2 Ch. 331; *Larrinaga & Co., Ltd. v. Société Franco-Américaine des Phosphates de Médulla, Paris*, [1923] All E.R. Rep. 1; *Cohen v. Sellar*, [1926] All E.R. Rep. 312; *First Russian Insurance Co. v. London and Lancashire Insurance Co.*, [1928] Ch. 922; *The Penelope*, [1928] P. 180; *Hyman v. Hyman, Hughes v. Hughes*, [1929] P. 1; *May v. May*, [1929] All E.R. Rep. 484; *Bell v. Lever Bros., Ltd.*, [1931] All E.R. Rep. 1; *Tatem, Ltd. v. Gamboa*, [1938] 3 All E.R. 135; *Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corp., Ltd., The Kingswood*, [1941] 2 All E.R. 165; *Swift v. Macbean*, [1942] 1 All E.R. 126; *Unger v. Preston Corp.*, [1942] 1 All E.R. 200; *Re Sergeant* (1948), 29 Ry. & Can. Tr. Cas. 84; *Arab Bank, Ltd. v. Barclays Bank (D.C. & O.)*, [1953] 2 All E.R. 263.

As to doctrine of frustration, see 8 HALSBURY'S LAWS (3rd Edn.) 185-194, and for cases see 12 DIGEST (Repl.) 436 et seq.

Cases referred to :

- (1) *Taylor v. Caldwell* (1863), 3 B. & S. 826; 2 New Rep. 198; 32 L.J.Q.B. 164; 8 L.T. 356; 27 J.P. 710; 11 W.R. 726; 122 E.R. 309; 12 Digest (Repl.) 418, 3242.
- (2) *Nickoll and Knight v. Ashton, Edridge & Co.*, [1901] 2 K.B. 126; 70 L.J.K.B. 600; 84 L.T. 804; 49 W.R. 513; 17 T.L.R. 467; 9 Asp.M.L.C. 209; 6 Com. Cas. 150, C.A.; 12 Digest (Repl.) 430, 3308.
- (3) *Baily v. De Crespigny* (1869), L.R. 4 Q.B. 180; 10 B. & S. 1; 38 L.J.Q.B. 98; 19 L.T. 681; 33 J.P. 164; 17 W.R. 494; 12 Digest (Repl.) 420, 3249.
- (4) *Jackson v. Union Marine Insurance Co.* (1873), L.R. 8 C.P. 572; 42 L.J.C.P. 284; 22 W.R. 79; affirmed (1874), L.R. 10 C.P. 125; 44 L.J.C.P. 27; 31 L.T. 789; 23 W.R. 169; 2 Asp.M.L.C. 435, Ex.Ch.; 12 Digest (Repl.) 438, 3339.
- (5) *The Moorcock* (1889), 14 P.D. 64; 58 L.J.P. 73; 60 L.T. 654; 37 W.R. 439; 5 T.L.R. 316; 6 Asp.M.L.C. 373, C.A.; 12 Digest (Repl.) 686, 5274.
- (6) *Hamlyn & Co. v. Wood & Co.*, [1891] 2 Q.B. 488; 60 L.J.Q.B. 734; 65 L.T. 286; 40 W.R. 24; 7 T.L.R. 731, C.A.; 12 Digest (Repl.) 684, 5266.
- (7) *Harris and Taylor v. Dreesman* (1854), 23 L.J.Ex. 210; 18 J.P. 458; 41 Digest 456, 2870.
- (8) *Mumford v. Gething* (1859), 7 C.B.N.S. 305; 29 L.J.C.P. 105; 1 L.T. 64; 6 Jur.N.S. 428; 8 W.R. 187; 141 E.R. 834; 12 Digest (Repl.) 204, 1429.
- (9) *Price v. Mouat* (1862), 11 C.B.N.S. 508; 2 F. & F. 529; 142 E.R. 895; 12 Digest (Repl.) 169, 1087.
- (10) *Macdonald v. Longbottom* (1860), 1 E. & E. 977, 987; 29 L.J.Q.B. 256; 2 L.T. 606; 6 Jur.N.S. 724; 8 W.R. 614; 120 E.R. 1181, Ex.Ch.; 39 Digest 400, 369.
- (11) *Lloyd v. Guibert* (1865), L.R. 1 Q.B. 115; 6 B. & S. 100; 35 L.J.Q.B. 74; 13 L.T. 602; 2 Mar.L.C. 283; 122 E.R. 1134, Ex.Ch.; 12 Digest (Repl.) 418, 3243.
- (12) *Stubbs v. Holgrave Rail. Co.* (1867), L.R. 2 Exch. 311; 36 L.J.Ex. 166; 16 L.T. 631; 15 W.R. 769; 12 Digest (Repl.) 666, 5154.

Also referred to in argument :

- Appleby v. Myers* (1867), L.R. 2 C.P. 651; 36 L.J.C.P. 331; 16 L.T. 669, Ex. Ch.; 12 Digest (Repl.) 696, 5334.
- Boust v. Firth* (1868), L.R. 4 C.P. 1; 38 L.J.C.P. 1; 19 L.T. 264; 17 W.R. 29; 12 Digest (Repl.) 425, 3271.
- Howell v. Coupland* (1876), 1 Q.B.D. 258; 46 L.J.Q.B. 147; 33 L.T. 832; 40 J.P. 276; 24 W.R. 470, C.A.; 12 Digest (Repl.) 429, 3304.
- Purdine v. Jane* (1647), Aleyd. 26; Sty. 47; 82 E.R. 897; 12 Digest (Repl.) 417, 3236.

- Barker v. Hodgson* (1814), 3 M. & S. 267; 105 L.R. 612; 12 Digest (Repl.) 439, 3347. A
- Hills v. Sughrue* (1846), 15 M. & W. 253; 153 L.R. 844; sub nom. *Mills v. Bourne*, 6 L.T.O.S. 414; 12 Digest (Repl.) 431, 3311.
- Brown v. Royal Insurance Co.* (1859), 1 E. & E. 853; 25 L.J.Q.B. 275; 33 L.T.O.S. 434; 5 Jur.N.S. 1255; 7 W.R. 479; 120 L.R. 1131; 12 Digest (Repl.) 432, 3316. B
- Benley v. Stuart* (1862), 7 H. & N. 753; 31 L.J.Ex. 281; 8 Jur.N.S. 389; 158 E.R. 672; 12 Digest (Repl.) 706, 5392.
- Kennedy v. Panama, etc., Mail Co.* (1867), L.R. 2 Q.B. 580; 8 B. & S. 571; 36 L.J.Q.B. 260; 17 L.T. 62; 15 W.R. 1039; 12 Digest (Repl.) 260, 2020.
- Re Arthur, Arthur v. Wynne* (1880), 14 Ch.D. 603; 49 L.J.Ch. 556; 43 L.T. 46; 28 W.R. 972; 12 Digest (Repl.) 427, 3285. C
- London Founders Association v. Clarke* (1888), 20 Q.B.D. 576; 57 L.J.Q.B. 291; 59 L.T. 93; 36 W.R. 489; 4 T.L.R. 377, C.A.; 9 Digest (Repl.) 365, 2337.
- Turner v. Goldsmith*, [1891] 1 Q.B. 544; 60 L.J.Q.B. 247; 64 L.T. 301; 39 W.R. 547; 7 T.L.R. 233, C.A.; 12 Digest (Repl.) 431, 3312.
- Ashmore & Son v. C. S. Cox & Co.*, [1899] 1 Q.B. 436; 68 L.J.Q.B. 72; 15 T.L.R. 55; 4 Com. Cas. 48; 12 Digest (Repl.) 432, 3318. D
- Blakeley v. Muller & Co., Hobson v. Pattenden & Co.*, [1903] 2 K.B. 760, n.; 88 L.T. 90; 67 J.P. 51; 19 T.L.R. 186; 47 Sol. Jo. 239, D.C.; 12 Digest (Repl.) 463, 3455.
- Wood v. Leadbitter* (1845), 13 M. & W. 838; 14 L.J.Ex. 161; 4 L.T.O.S. 433; 9 J.P. 312; 9 Jur. 187; 153 E.R. 351; 30 Digest (Repl.) 542, 1771.
- Kerrison v. Smith*, [1897] 2 Q.B. 445; 66 L.J.Q.B. 762; 77 L.T. 344; 30 Digest (Repl.) 539, 1732.
- Puller v. Staniforth* (1809), 11 East, 232; 103 E.R. 993; 41 Digest 462, 2936.
- Cutter v. Powell* (1795), 6 Term Rep. 320; 101 E.R. 573; 12 Digest (Repl.) 463, 3454.
- Whincup v. Hughes* (1871), L.R. 6 C.P. 78; 40 L.J.C.P. 104; 24 L.T. 76; 19 W.R. 439; 12 Digest (Repl.) 261, 2022. F
- Carter v. Boehm* (1766), 3 Burr. 1905; 1 Wm. Bl. 593; 97 E.R. 1162; 29 Digest 36, 3.

Appeal by the plaintiff from a decision of DARLING, J., in an action tried by him without a jury.

The plaintiff, Paul Krell, sued the defendant, C. S. Henry, to recover £50, being the balance of a sum of £75, at which price the defendant had agreed to hire from the plaintiff some rooms at 56A, Pall Mall, London, of which the plaintiff was tenant, on June 26 and 27, 1902, to view the processions which it had been intended to hold on those days in connection with the coronation of His Majesty King Edward VII. The defendant denied that he was liable to pay the £50, and counterclaimed for the return of £25 which he had paid as a deposit, on the ground that, the processions not having taken place owing to the illness of the King, there had been a total failure of consideration for the contract entered into by him. On August 11, 1902, the action came on for trial before DARLING, J., sitting without a jury, when the learned judge gave judgment for the defendant on both claim and counterclaim. The plaintiff appealed. G

Spencer Bower, K.C., and Holman Gregory for the plaintiff.

Duke, K.C., and Ricardo for the defendant.

Cur. adv. vult.

Aug. 11, 1903. **VAUGHAN WILLIAMS, L.J.**, read the following judgment.—The real question in this case is the extent of the application in English law of the principle of the Roman law which has been adopted and acted on in many English I

decisions, and notably in *Taylor v. Caldwell* (1). That case at least makes it clear that

"where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

Thus far it is clear that the principle of the Roman law has been introduced into the English law. The doubt in the present case arises as to how far this principle extends. The Roman law dealt with *obligationes de certo corpore*. Whatever may have been the limits of the Roman law, *Nickoll and Knight v. Ashton, Edridge & Co.* (2) makes it plain that the English law applies the principle not only to cases where the performance of the contract becomes impossible by the cessation of existence of the thing which is the subject-matter of the contract, but also to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things, going to the root of the contract, and essential to its performance. It is said, on the one side, that the specified thing, state of things, or condition the continued existence of which is necessary for the fulfilment of the contract, so that the parties entering into the contract must have contemplated the continued existence of that thing, condition, or state of things as the foundation of what was to be done under the contract, is limited to things which are either the subject-matter of the contract, or a condition or state of things, present or anticipated, which are expressly mentioned in the contract. But, on the other side, it is said that the condition or state of things need not be expressly specified, but that it is sufficient if such condition or state of things clearly appears by extrinsic evidence to have been assumed by the parties to be the foundation or basis of the contract and the event which causes the impossibility is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made. In such a case the contracting parties will not be held bound by general words which, though large enough to include, were not used with reference to a possibility of a particular event rendering performance of the contract impossible.

I do not think that the principle of the civil law as introduced into the English law is limited to cases in which the event causing the impossibility of performance is the destruction or non-existence of some thing which is the subject-matter of the contract or of some condition or state of things expressly specified as a condition of it. I think that you first have to ascertain, not necessarily from the terms of the contract, but if necessary from necessary inferences, drawn from surrounding circumstances recognised by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things. If it does, this will limit the operation of the general words, and in such case if the contract becomes impossible of performance by reason of the non-existence of the state of things assumed by both contracting parties, as the foundation of the contract, there will be no breach of the contract thus limited.

What are the facts of the present case? The contract is contained in two letters of June 20, 1902, which passed between the defendant and the plaintiff's agent, Mr. Cecil Bigood. These letters do not mention the coronation, but speak merely of the taking of Mr. Krell's chambers, or, rather, of the use of them, in the daytime of June 26 and 27, 1902, for the sum of £75, £25 then paid, balance £50 to be paid

on the 24th. But the affidavits, which by agreement between the parties are to be taken as stating the facts of the case, show that the plaintiff advertised on his premises, 56A, Pall Mall, an announcement to the effect that windows to view the royal coronation processions were to be let, and that the defendant was induced by that announcement to apply to the landlady on the premises, who said that the owner was willing to let the suite of rooms for the purpose of seeing the royal procession for both days, but not nights, of June 26 and 27. In my judgment, the use of the rooms was let and taken for the purpose of seeing the royal processions. It was not a demise of the rooms or even an agreement to let and take the rooms. It was a licence to use rooms for a particular purpose and none other. And in my judgment the taking place of those processions on the days proclaimed along the proclaimed route, which passed 56A, Pall Mall, was required by both contracting parties as the foundation of the contract. I think that it cannot reasonably be supposed to have been in the contemplation of the contracting parties, when the contract was made, that the coronation would not be held on the proclaimed days, or the processions not take place on those days along the proclaimed route: and I think that the words imposing on the defendant the obligation to accept and pay for the use of the rooms for the named days, although general and unconditional, were not used with reference to the possibility of the particular contingency which afterwards occurred.

It was suggested in the course of the argument that if the occurrence, on the proclaimed days, of the coronation and the processions in this case were the foundation of the contract, and if the general words are thereby limited or qualified, so that in the event of the non-occurrence of the coronation and processions along the proclaimed route they would discharge both parties from further performance of the contract, it would follow that if a cabman was engaged to take someone to Epsom on Derby-day at a suitable enhanced price for such a journey, both parties to the contract would be discharged in the contingency of the race at Epsom for some reason becoming impossible, but I do not think this follows, for I do not think that in the cab case the happening of the race would be the foundation of the contract. No doubt the purpose of the engager was to go to see the Derby, and that the price was proportionately high; but the cab had no special qualifications for the purpose which led to the selection of the cab for this particular occasion. Any other cab would have done as well. Moreover, I think that, under the cab contract, the hirer, even if the race went off, could have said: "Drive me to Epsom, I will pay you the agreed sum, you have nothing to do with the purpose for which I hired the cab"—and that if the cabman refused he would have been guilty of a breach of contract, there being nothing to qualify his promise to drive the hirer to Epsom on a particular day, whereas, in the case of the coronation, there is not merely the purpose of the hirer to see the coronation processions, but it is the coronation processions and the relative position of the rooms which is the basis of the contract as much for the lessor as the hirer; and I think that if the King, before the coronation day and after the contract, had died, the hirer could not have insisted on having the rooms on the days named. It could not in the cab case be reasonably said that seeing the Derby race was the foundation of the contract, as viewing the processions was of the licence in this case, whereas, in the present case, where the rooms were offered and taken, by reason of their peculiar suitability from the position of the rooms for a view of the coronation processions, surely the view of the coronation processions was the foundation of the contract, which is a very different thing from the purpose of the man who engaged the cab—viz., to see the race—being held to be the foundation of the contract.

Each case must be judged by its own circumstances. In each case one must ask oneself, first: What, having regard to all the circumstances, was the foundation of the contract?; secondly: Was the performance of the contract prevented?; and thirdly: Was the event which prevented the performance of the contract of such a character that it cannot reasonably be said to have been in the contemplation of

the parties at the date of the contract? If all these questions are answered in the affirmative (as I think they should be in this case), I think both parties are discharged from further performance of the contract. I think that the coronation processions were the foundation of this contract, and that the non-happening of them prevented the performance of the contract; and, secondly, I think that the non-happening of the processions, to use the words of SIR JAMES HANNEN in *Baily v. De Crespigny* (3) (L.R. 4 Q.B. at p. 185), was an event

of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, and that they are not to be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happened."

The test seems to be, whether the event which causes the impossibility was or might have been anticipated and guarded against. It seems difficult to say, in a case where both parties anticipate the happening of an event, which anticipation is the foundation of the contract, that either party must be taken to have anticipated, and ought to have guarded against, the event which prevented the performance of the contract. In both *Jackson v. Union Marine Insurance Co.* (4) and *Nickoll and Knight v. Ashton, Edridge & Co.* (2) the parties might have anticipated as a possibility that perils of the sea might delay the ship and frustrate the commercial venture, in the former case the carriage of the goods to effect which the charterparty was entered into, and in the latter case the sale of the goods which were to be shipped on the steamship which was delayed. But the court held in the former case that the basis of the contract was that the ship would arrive in time to carry out the contemplated commercial venture, and in the latter that the steamship would arrive in time for the loading of the goods the subject of the sale.

I wish to observe that cases of this sort are very different from cases where a contract or warranty or representation is implied, such as was implied in *The Moorcock* (5), and refused to be implied in *Hamlyn & Co. v. Wood & Co.* (6). But *The Moorcock* (5) is of importance in the present case as showing that, whatever is the suggested implication—be it condition, as in this case, or warranty or representation—one must, in judging whether the implication ought to be made, look not only at the words of the contract, but also at the surrounding facts and the knowledge of the parties of those facts. There seems to me to be ample authority for this proposition. Thus, in *Jackson v. Union Marine Insurance Co.* (4) in the Common Pleas, the question whether the object of the voyage had been frustrated by the delay of the ship was left as a question of fact to the jury, although there was nothing in the charterparty defining the time within which the charterers were to supply the cargo of iron rails for San Francisco, and nothing on the face of the charterparty to indicate the importance of time in the venture. That was a case in which, as BRAMWELL, B., points out in his judgment, *Taylor v. Caldwell* (1) was a strong authority to support the conclusion arrived at—that not arriving in time for the voyage contemplated, but at such time that it frustrated the commercial venture, was not only a breach of the contract, but discharged the charterer, though he had such an excuse that no action would lie. Again, in *Harris and Taylor v. Dreesman* (7), the vessel had to be loaded, as no particular time was mentioned, within a reasonable time; and, in judging of a reasonable time, the court approved of evidence being given that the defendants, the charterers, to the knowledge of the plaintiffs, had no control over the colliery from which both parties knew that the coal was to come, and that, although all that was said in the charterparty was that the vessel should proceed to Spital Tongue Spout (the spout of the Spital Tongue's Colliery), and there take on board from the freighters a full and complete cargo of coals, and five tons of coke, and although there was no evidence to prove any custom in the port as to loading vessels in turn. Again, it was held in *Mumford v. Gething* (8) that in construing a written contract of service under which A. was to enter the employ

of B., oral evidence is admissible to show in what respects A. was to serve B. and A. also *Price v. Mouatt* (9).

The rule seems to be that which is laid down in *Taylor on Evidence* (2nd Edn.), vol. 2, p. 1027, s. 1082.

"It may be laid down as a broad and distinct rule of law that extrinsic evidence of every material fact which will enable the court to ascertain the nature and quality of the subject-matter of the instrument, or, in other words, to identify the persons and things to which the instrument refers, must of necessity be received."

In *Macdonald v. Longbottom* (10) (1 E. & E. at p. 983) LORD CAMPBELL, C.J., in his judgment, says:

"I am of opinion that, when there is a contract for the sale of a specific subject-matter, oral evidence may be received, for the purpose of showing what that subject-matter was, of every fact within the knowledge of the parties before and at the time of the contract."

It seems to me that the language of WILLES, J., in *Lloyd v. Gubbert* (11), points in the same direction. I myself am clearly of opinion that in this case, where we have to ask ourselves whether the object of the contract was frustrated by the non-happening of the coronation and its processions on the days proclaimed, parol evidence is admissible to show that the subject of the contract was seats to view the coronation processions, and was so to the knowledge of both parties.

When once this is established, I see no difficulty whatever in the case. It is not essential to the application of the principle of *Taylor v. Caldwell* (1) that the direct subject of the contract should perish or fail to be in existence at the date of performance of the contract. It is sufficient if a state of things or condition expressed in the contract and essential to its performance perishes or fails to be in existence at that time. In the present case the condition which fails and prevents the achievement of that which was, in the contemplation of both parties, the foundation of the contract, is not expressly mentioned either as a condition of the contract or the purpose of it, but I think for the reasons which I have given that the principle of *Taylor v. Caldwell* (1) ought to be applied. This disposes of the plaintiff's claim for £50 unpaid balance of the price agreed to be paid for the use of the rooms. The defendant at one time set up a cross-claim for the return of the £25 he paid at the date of the contract. As that claim is now withdrawn it is unnecessary to say anything about it. I have only to add that the facts of this case do not bring it within the principle laid down in *Stubbs v. Holywell Rail. Co.* (12), that in the case of contracts falling directly within the rule of *Taylor v. Caldwell* (1) the subsequent impossibility does not affect rights already acquired, because the defendant had the whole of June 24 to pay the balance, and the public announcement that the coronation and processions would not take place on the proclaimed days was made early on the morning of the 24th, and no cause of action could accrue till the end of that day. I think this appeal ought to be dismissed.

ROMER, L.J.—With some doubt, I have also come to the conclusion that this case is governed by the principle on which *Taylor v. Caldwell* (1) was decided, and accordingly that the appeal must be dismissed. The doubt I have felt was whether the parties to the contract now before us could be said, under the circumstances, not to have had at all in their contemplation the risk that for some reason or other the coronation processions might not take place on the days fixed, or, if the processions took place, might not pass so as to be capable of being viewed from the rooms mentioned in the contract, and whether, under this contract, that risk was not undertaken by the defendant. But on the question of fact as to what was in the contemplation of the parties at the time, I do not think it right to differ from the conclusion arrived at by VAUGHAN WILLIAMS, L.J., and (as I gather) also arrived

at by my brother DARLING. This being so, I concur in the conclusions arrived at by VAUGHAN WILLIAMS, L.J., in his judgment, and I do not desire to add anything to what he has said so fully and completely.

STIRLING, L.J.—I have had an opportunity of reading the judgment delivered by VAUGHAN WILLIAMS, L.J., with which I entirely agree. Though the case is one of very great difficulty, I think that it comes within the principle of *Taylor v. Caldwell* (1) and that the appeal should be dismissed.

Appeal dismissed.

Solicitors: Cecil Bisgood; M. Grunebaum.

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]

MERSEY DOCKS AND HARBOUR BOARD v. BIRKENHEAD ASSESSMENT COMMITTEE

[HOUSE OF LORDS (The Earl of Halsbury, L.C., Lord Macnaghten, Lord Shand, Lord Davey, Lord Robertson and Lord Lindley), April 23, 25, 1901]

[Reported [1901] A.C. 175; 70 L.J.K.B. 584; 84 L.T. 542; 65 J.P. 579; 49 W.R. 610; 17 T.L.R. 444]

Rates—Assessment—Profits basis—When applicable—Consideration of business carried on at hereditament, value of hereditament and land, and all surrounding circumstances—Relevance of application of profit by ratepayer.

In arriving at the valuation for rating of a hereditament where there are no analogous premises with which it can be compared and no other evidence of the rent which a hypothetical tenant could be expected to pay for it, it is legitimate to consider the profits made by the ratepayer from the business which he conducts on the hereditament, the nature of that business, the chances of its permanence, the value of the hereditament as a structure and of the land enjoyed with it, and all the surrounding circumstances. It is immaterial how the profit made by the ratepayer is applied.

Rates—Assessment—Appeal—Grounds on which assessment will be reviewed.

For the court to interfere with an assessment the party complaining of it must establish either that something has been excluded from the calculations leading to the assessment which by law ought to have been included or that something has been included which by law ought not to have been included.

Notes. Considered: *Crockett v. Northampton Assessment Committee* (1902), 72 L.J.K.B. 320; *East London Railway Joint Committee v. Greenwich Union Assessment Committee*, *Same v. Bermondsey Assessment Committee*, *Same v. Stepney Assessment Committee*, [1913] 1 K.B. 612; *White v. South Stowham Assessment Committee*, [1915] 1 K.B. 103; *Port of London Authority v. Orsett Union*, [1920] All E.R. Rep. 545; *Railway Assessment Authority v. Southern Rail Co., L.C.C. v. Southern Rail Co.*, [1936] 1 All E.R. 26. Referred to: *East London Railway Joint Committee v. Greenwich and St. Olave's Unions and St. Matthew, Bethnal Green* (1902), Ryde & K. Rat. App. 59; *Re Great Northern Rail Co. and Edmonton Union and Hornsey Assessment Committee* (1905), 69 J.P. 179; *East London Railway Joint Committee v. Greenwich Union* (1907), 97 L.T. 404; *Ipswich Gas Light Co. v. Ipswich Union* (1907), 2 Konst. Rat. App. 699; *London United Tramways* (1901). *Id.* v. *Brentford Union Assessment Committee* (1907), 96 L.T. 528; *Great Central*

Rail. Co. v. Banbury Union, Sheffield Union v. Great Central Rail. Co., [1909] A.C. 78; *Great Western and Metropolitan Railways v. Kensington Assessment Committee, Same v. Hammersmith Assessment Committee*, [1916] 1 A.C. 23; *Coman v. Rotunda Hospital, Dublin*, [1921] 1 A.C. 1; *Consett Iron Co., Ltd. v. Durham (North-Western Area) Assessment Committee*, [1931] All E.R. Rep. 62; *Fry v. Salisbury House Estate, Ltd.*, [1930] All E.R. Rep. 538; *Leamy & Co. v. Whymsey*, [1934] 2 K.B. 511; *Robinson Bros. (Brewers), Ltd. v. Houghton and Chester-le-Street Assessment Committee*, [1937] 2 All E.R. 298; *Barking Borough Rating Authority v. Central Electricity Board*, [1940] 2 All E.R. 341; *Croydon Union v. Croydon County Borough Rating Authority*, [1946] 1 All E.R. 384; *Yehell R.D.C. v. South Somerset and District Electricity Co.*, [1947] 1 All E.R. 669; *Cardiff Rating Authority v. Guest Keen Baldwins Iron and Steel Co., Ltd.*, [1949] 1 All E.R. 27; *British Transport Commission v. Hingley*, [1961] 1 All E.R. 837.

As to valuation for rating on the profits basis and appeals against the valuation list, see 32 HALSBURY'S LAWS (3rd Edn.) 77, 79, 119 et seq. For cases see 38 Digest (Repl.) 619, 620, 715 et seq.

Case referred to:

- (1) *Mersey Docks v. Cameron, Jones v. Mersey Docks* (1865), 11 H.L.Cas. 443; 20 C.B.N.S. 56; 6 New Rep. 378; 35 L.J.M.C. 1; 12 L.T. 643; 29 J.P. 483; 11 Jur.N.S. 746; 13 W.R. 1069; 11 E.R. 1405, H.L.; 38 Digest (Repl.) 545, 395.

Also referred to in argument:

L.C.C. v. Erith Parish (Churchwardens, etc.) and Dartford Union Assessment Committee, West Ham Parish (Churchwardens, etc.) v. L.C.C., St. George's Union Assessment Committee v. L.C.C., [1893] A.C. 562; 63 L.J.M.C. 9; 69 L.T. 725; 57 J.P. 821; 42 W.R. 330; 10 T.L.R. 1; 6 R. 22; sub nom. *L.C.C. v. Erith Overseers, L.C.C. v. West Ham Union, L.C.C. v. Woolwich Union, L.C.C. v. St. George's Union*, Ryde, Rat. App. (1891-93) 382, H.L.; 38 Digest (Repl.) 481, 47.

Sculcoates Union v. Kingston-upon-Hull Dock Co., [1895] A.C. 136; 64 L.J.M.C. 49; 71 L.T. 642; 59 J.P. 612; 43 W.R. 623; 11 R. 74, H.L.; 38 Digest (Repl.) 668, 1189.

Cartwright v. Sculcoates Union, post; [1900] A.C. 150; 69 L.J.Q.B. 403; 82 L.T. 157; 64 J.P. 229; 48 W.R. 394; Ryde & K. Rat. App. 167; sub nom. *Cartwright v. Sculcoates Union, Wilford v. Same, Walsh v. Same, Robinson v. Same*, 16 T.L.R. 238, C.A.; 38 Digest (Repl.) 670, 1213.

Mersey Docks v. Liverpool Overseers (1873), L.R. 9 Q.B. 84; 43 L.J.M.C. 33; 29 L.T. 454; 38 J.P. 21; 22 W.R. 184; 38 Digest (Repl.) 669, 1204.

Mersey Docks and Harbour Board v. Birkenhead Overseers (1873), L.R. 8 Q.B. 445; 42 L.J.M.C. 141; 29 L.T. 27; 38 J.P. 5; 21 W.R. 913; 38 Digest (Repl.) 484, 69.

Allison v. Monkwearmouth Shore Overseers (1854), 4 E. & B. 13; 23 L.J.M.C. 177; 18 Jur. 1075; 119 E.R. 6; sub nom. *R. v. Allison*, 2 C.L.R. 154; 23 L.T.O.S. 232; 18 J.P. 438; 2 W.R. 592; 38 Digest (Repl.) 673, 1214.

R. v. Coke (1826), 5 B. & C. 797; 8 Dow. & Ry.K.B. 606; 4 Dow. & Ry. 210; 217; 5 L.J.O.S.M.C. 8; 108 E.R. 296; 38 Digest (Repl.) 596, 751.

Leicester Port Comm. v. Barram-in-Furness Overseers, [1897] 1 Q.B. 166; 66 L.J.Q.B. 90; 75 L.T. 358; 61 J.P. 21; 13 T.L.R. 30, D.C.; 38 Digest (Repl.) 625, 916.

R. v. Verrall (1875), 1 Q.B.D. 9; 45 L.J.M.C. 29; 24 W.R. 139; sub nom. *Verrall v. Croydon Union*, 33 L.T. 379; sub nom. *Croydon Union v. Verrall*, 40 J.P. 550; 38 Digest (Repl.) 620, 883.

Appeal by the ratepayers from a decision of the Court of Appeal (A.L. SMITH, COLLINS, and VAGHAN WILLIAMS, L.J.J.), reported [1900] 1 Q.B. 113, affirming a decision of the Queen's Bench Division (LAWRENCE and CHANNELL, J.J.) upon a case

stated by the recorder of Birkenhead, on an appeal against an assessment for rating made in respect of certain lairages on the Birkenhead side of the river Mersey, of which the appellants were owners and occupiers.

The lairages were buildings of brick and wood, roofed partly with felt and partly with slate, used for the reception and slaughter of cattle and sheep brought from abroad, and for the cooling and preservation of the carcases. Two of the buildings used as lairages were originally warehouses—one a warehouse of several stories and another a warehouse of two stories, erected and formerly used for the storage of general produce. Certain sloping galleries were constructed outside the warehouses with entrances thereto to enable the cattle to walk up to the various stories, and the warehouses were fitted with pens and other fittings necessary for lairages, slaughterhouses, cooling rooms, and stores. The other buildings were designed and constructed for the purpose of lairages, slaughterhouses, cooling rooms, and stores, and were fitted with pens and other fittings necessary for the above purposes and were for the most part of one story. The premises were the only place in the neighbourhood at which foreign animals could be landed, except under penalties as provided by the Diseases of Animals Act, 1894, but there were lairages for foreign animals at Deptford, Manchester, Hull, Cardiff, Bristol, Glasgow, and other places. The lairages were erected, worked and carried on by the appellants under statutory powers, and not as a local authority under the Diseases of Animals Act, 1894.

In the course of the hearing of the appeal, the respondents tendered in evidence certain accounts, made up from the books of the appellants, showing the receipts and expenditure of the appellants in the conduct of the business of the lairages for the three years ending July 1, 1896, and the averages thereof. The appellants objected to the admission of any evidence as to the amount of receipts and expenditure, but the recorder held such evidence admissible and admitted the evidence tendered by the respondents accordingly. The learned recorder found the following facts: (i) The tenements subject to assessment were capable of separate beneficial occupation apart from their connection with the rest of the appellants' property. (ii) Their value was enhanced by their proximity to and connection with the docks and rails belonging to the appellants. (iii) There were tenants other than the appellants available for the occupation of the tenements for the purpose of carrying on the business of a lairage. (iv) There were no similar tenements in the neighbourhood with which a comparison could be made. If the assessment ought to be based on the mere structural value of the buildings plus the value of the land and without reference to receipts and expenditure, the recorder found as follows: Lairage in Woodside, gross estimated rental £13,381; net annual value £8,964; lairage in Wallasey, gross estimated rental, £3,728; net annual value, £2,419. The appellants admitted that if the principle of assessment contended for by the respondents was correct the gross estimated rentals of the two hereditaments in question appearing upon the rate book were not too high, and the respondents admit that in this appeal they could not be increased. Consequently, the recorder adopted these figures and found the true rateable value as follows: Lairage in Woodside, gross estimated rental, £19,333; net annual value, £12,622; lairage in Wallasey, gross estimated rental, £4,723; net annual value, £3,414. The result was that as the net values were reduced the appeal was allowed and the rate must be made upon the aforesaid net values of £12,622 and £3,414, instead of the figures £17,400 and £4,251.

The questions for the opinion of the court were: (i) Whether the accounts referred to were properly admitted; (ii) whether the principle adopted in the aforesaid judgment was correct.

Aquith, K.C., F. Marshall, K.C., and Horridge, K.C., for the appellants.

Pickford, K.C., A. A. Tobin, and Montgomery, for the respondents, were not called on to address their Lordships.

THE EARL OF HALSBURY, L.C. In this case it appears to me that this appeal ought to be dismissed with cost. I cannot help thinking that a great deal

of the hesitation and confusion which has arisen upon the subject-matter which your Lordships have heard debated on the part of the appellants has arisen from the advisory character of the judgments which have been given from time to time by the various courts before whom this question has come. A

The thing that the legislature has called upon the overseers to do (Parochial Assessment Act, 1836, s. 1) is to solve a simple question of fact, and although it may be by no means simple in the mode in which they are to arrive at it, the question of fact is simple enough as stated—*that is to say, they are to look* B

“at the rent at which the several hereditaments rated might reasonably be expected to let from year to year free of all usual tenant’s rates and taxes and tithe commutation rent-charge, if any, deducting therefrom the probable average cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent.” C

That is the proposition put before the parish officers, which they have to answer, and they are to arrive at the value, so far as I know, unfettered by any statute as to the way in which they can do it. I am not aware of any rule of law or of any statute which has limited them as to the mode in which they shall arrive at it. It is not a question of law at all, it is a question of fact. These questions have from time to time come before the courts and have been argued as questions of law, where, instead of doing what the section has directed them to do, the overseers, or those who were acting on the part of the parish, have thought proper either to include something which by law ought not to be included, or to exclude something which ought to have been included. D

Of course, where you are dealing with a question of fact which has to be answered by any tribunal, it may be that the question has come up in the argument as a matter of law; but still one must bear in mind that the thing to be done is to answer a plain question of fact: What is the rent which a tenant, subject to the deductions mentioned in the statute, can reasonably be expected to give for the buildings as a tenant from year to year? The first part of the proposition is that you are to rate. What? Not the tenant’s trade. Some questions arise, with which I will deal presently, whether you are to go into the question of profit and loss. They are excluded by the language of the statute. You are to rate the hereditaments according to their value. Therefore, it would be wrong to rate the trade as if you were dealing with a question for income tax. You are not rating the income; you are rating the hereditaments. So that where you have buildings of a similar character with equal facilities for carrying on the trade, you have a very facile mode of coming to the conclusion what sum would reasonably be given by a tenant from year to year for such buildings. But if instead of doing that, you choose to go into elaborate calculations of how much the premises cost to erect and when erected what would be the value of it, you are only elaborating and making more complex and difficult the simple proposition which the legislature has put before the overseers to answer. E

From time to time observations have been made by learned judges saying this should have been done and the other should have been done and the other should not have been done, but those were not pronouncements upon the law of evidence whether or not the admission of evidence regarding such and such a topic was legitimate or not in arriving at the conclusion at which the legislature has directed them to arrive; those observations related to what was the ordinary and natural means of arriving at the conclusion at which they were bound to arrive. I am the more anxious to point this out because I think that in these later days we have got rid of a good many of these sources of confusion. The advisory character, as I have said, of the judgments given by the courts has, no doubt, led to words being used not in the strict sense, but as matters of advice to the justices in determining such questions, and sometimes they have been printed in the law reports as if they were decisions upon the law of evidence in this country. I protest against any such view, and in this very case, although, as I say, during the last half century we have F G H I

arrived at conclusions which get rid of a great deal of the confusion which at one time existed, I find that CHANNELL, J., in the Divisional Court, uses a phrase to which I am afraid that I cannot assent—namely, that wherever you can arrive at the value of premises by comparing them with similar tenements, you are bound to arrive at the valuation in that way. If that means that it is a facile and proper way of doing it, I should agree, but if it is laid down as a proposition of law, that it is the only means by which the valuation can be arrived at, I venture to say that I do not assent to that view. Again, I find that COLLINS, L.J., in the Court of Appeal, in the same way says :

"Hence the rule that in ordinary cases when the standard of rent is applicable, evidence of actual profits made cannot be received. But it is equally true that when no such standard of comparison exists, it is legitimate to inquire into the profits actually earned."

Again, I am compelled to say that I cannot concur with the form in which that proposition is put. It is not a question of deciding what, according to the law of evidence, is receivable, but what is the more natural and ordinary and usual mode by which you can answer the proposition put by the legislature to the overseers.

The proposition appears to me a very intelligible one, if unclouded by all these questions which from time to time have been raised by ingenious persons (and at the expense of the parishes a good many academic questions have been discussed). You are to find out what a tenant will reasonably give, looking at all the circumstances of the particular occupation, including therein the business that might be done on the premises; and I think that I had occasion to say, in a former case, that it would be a very extraordinary thing if, although you can give evidence by expert testimony as to what kind of business might be done, you are not at liberty in point of law to ascertain what business has been done. It seems to me that no such proposition could reasonably be maintained. If, on the other hand, to go into the account of profits and losses would not be irrelevant, if you are finding out what a man's income is for the purpose of ascertaining what a tenant would be likely to give, to suggest that it is something which in point of law you have no right to inquire into is equally absurd. If all the circumstances of the occupation of the hereditament, the mode in which the trade is carried on, and the circumstances either of restriction or of amplitude of the trade, are all legitimate subjects of inquiry, the only question of law in any case is whether the tribunal has followed the line which I have indicated. Surely those who are complaining of what has been done by the tribunal must establish either that something has been excluded from the calculation which by law ought to be included, or that something has been included which by law ought not to have been included because the proposition is a proposition of fact, and the only mode in which you get in a question of law is as to the mode in which that proposition of fact has been dealt with.

Let me see what the learned recorder has done in the present case. I will take his own statement of what he has done, and how he has applied his mind to the topics which I have stated to be legitimate topics—the topics to which he has been directed to apply his mind by the legislature. He says :

"I did not assess the rate upon the profits of the tenant, but I used them, together with other evidence to test the values given by the appellants and respondents respectively. Having taken into consideration all the evidence before me as to the actual receipts and expenditure of the occupiers, who carried on the business, the nature of the business, and the chances of its permanence, the structural value of the buildings, the value of the land, and all the surrounding circumstances, I came to the conclusion that the gross values given by the respondents were too low, but I felt that I had no power in this appeal to put them up."

Upon that no question arises before your Lordships. The learned recorder continues: A

"I therefore accept these values as the nearest to the true gross values I could arrive at, and proceeded to determine the amount of the deductions to be made therefrom in order to arrive at the net annual values by a consideration of the evidence before me, most of which was given by the appellants."

When we are dealing with the matter as a question of law, the limits to which I have pointed being whether in arriving at a conclusion of fact anything wrong has been done either by way of inclusion or exclusion, how is it possible to say that what the recorder here has done is wrong? What abstract proposition of law can be laid down to say that the learned recorder was wrong? I have nothing to do with the question of amount. He may or may not be wrong in the particular amount at which he has arrived, but that is not a question of law. The question of law is whether it can be said that the recorder has included anything which he ought not to have included, or has excluded something which he should have included? Upon the statement which I have read it is hopeless to contend that either of those propositions can be made out, and I therefore move your Lordships that this appeal be dismissed with costs. B C D

LORD MACNAGHTEN.—I am of the same opinion.

LORD SHAND.—I also concur and adopt all that has been said by the Lord Chancellor in giving judgment. The heritable property in question is in the position that no building of the same class can be referred to in order to ascertain the annual value of this building. It is not like a public-house, or a railway, or a canal, or docks, or anything which may have analogous buildings to which you can refer. That being the state of matters, it appears to me that the return which has been actually had from the occupation and use of the building is a legitimate element and a material element in ascertaining the valuation according to the statute. That is what a tenant would reasonably give for the premises. Upon that ground, adopting the view which A. L. SMITH, L.J., took of this case in the Court of Appeal, and adopting what my noble and learned friend on the woolsack has said, I am of opinion that the appeal should be dismissed. E F

LORD DAVEY. I am of the same opinion. I only desire to say a very few words upon the chief argument put forward on behalf of the rate-payers. As I understood it, it was that, while they did not say as an abstract proposition that profits made from the use of the hereditament ought not to be taken into account generally, they argued that they ought not to be taken into account in this particular case, because by statute the occupier of the hereditament was precluded from putting those profits or the produce of carrying on this business on this hereditament into his own pocket for his own advantage and the enhancement of his own wealth, but was bound to apply those profits in the particular mode pointed out by the statute in reducing debt and so forth. I think that argument is answered by the case which was decided in this House in 1865, *Jones v. Mersey Docks* (1), because in that case, although it is quite true that the question put to the learned judges by the House and the question decided was whether the hereditament was rateable at all, yet in answering that question ex necessitate the consideration was involved of the question upon what basis the rating should be, because the argument used was that there was no beneficial occupation, and it was held to be rateable because there was a beneficial occupation. I conceive that in principle and applicably, as I think has been held in subsequent cases which have come before the courts, what was really decided was that, notwithstanding the restriction upon the application of the profits resulting from carrying on that business on that hereditament, the profits so derived were a legitimate element in arriving at the value of the beneficial occupation which was to be the subject of rating. And I think that it is put beyond I

concurrent in a passage in the judgment of BLACKBURN, J., in advising the House on behalf of himself and the other judges. He says this (11 H.L.Cas. at p. 462):

"Whichever may be the true mode of enunciating the position, it is clear that there can be no valid rate unless the occupation be such as to be of value; and if the words 'beneficial occupation' are to be understood as merely signifying that the occupation is of value (which is obviously the sense in which the phrase is used in many of the cases cited at the Bar), it is clear that a beneficial occupation is essential as the foundation of the rate; but it is equally clear that if the phrase is to be understood in this limited sense, the trustees have a beneficial occupation for they actually occupy land as docks, and in virtue of that occupation receive payments from the shipping using the docks, at present greatly in excess of what is necessary to maintain the docks."

Every word of that is applicable in the present case. He continued (*ibid.* at pp. 462, 463):

"Hereafter the charges on shipping may be reduced so as to greatly diminish the revenue derived from this occupation, possibly at some future time to render it no greater than the sum requisite to maintain the docks; but while the dues on shipping are maintained at their present rate, it is clear that the hypothetical tenant would give for the occupancy of the docks, as at present enjoyed by the trustees, a rent greatly in excess of what would be necessary to maintain the docks in a state to command that rent."

LORD WESTBURY, in moving the judgment of the House, after referring to the Parochial Assessment Act, which he quotes as saying "that 'occupation' must be of property yielding, or capable of yielding, a net annual value," and so forth, continues (*ibid.* at p. 501):

"It is in this sense that I understand the words 'beneficial occupation,' wherever it is said that to support a rate the occupation must be a beneficial one. For on principle it is by no means necessary that the occupation should be beneficial to the occupiers."

In other words, it is immaterial what becomes of the amount which is the result of carrying on the business on the hereditament after paying the expenses and other outgoings—whether it is applied for the purpose of public uses, whether it is applied for the payment of debt and other charges, as in the present case, or whether it goes into the pockets of the occupiers. What you have to look at is whether the occupation is beneficial in the sense in which the term is used in that passage; and I conceive that if the principles there laid down are adopted (although I admit that the question was not then before the House upon what principle the rate should be made), they are applicable to the case which is now before us, and, as it humbly appears to me, that is a complete answer to the argument addressed to us.

LORD ROBERTSON.—I agree in what has been said by my noble and learned friend the Lord Chancellor, and by my other noble and learned friends who have addressed the House.

LORD LINDLEY.—So do I, and I cannot usefully add anything.

Appeal dismissed.

Solicitors: *Rowcliffe, Rawle, Johnstone & Gregory*, for W. C. Thorue, Liverpool; *J. E. & H. Scott*, for Thompson, Hughes & Mathison, Birkenhead.

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

NOAKES & CO., LTD. v. RICE

House of Lords (The Earl of Haldarby, L.C., Lord Macnaghten, Lord Shand, Lord Davey, Lord Brampton, Lord Robertson and Lord Lindley), December 9, 10, 17, 1901]

Reported [1902] A.C. 24; 71 L.J.Ch. 139; 86 L.T. 62; 66 J.P. 147; 50 W.R. 305; 18 T.L.R. 196; 46 Sol. Jo. 136]

Mortgage—Redemption—Clog on equity—After repayment of money secured (and mortgagor's interest in it to be completely free and unfettered)—Mortgage of public house—Term in deed "tying" house to mortgagees.

Redemption is of the very nature and essence of a mortgage. It is inherent in the thing itself and equity will not permit any device or contrivance designed or calculated to prevent or impede redemption. It follows as a necessary consequence that when the money secured by a mortgage of land is paid off the land itself, and the owner of the land in the use and enjoyment of it, must be as free and unfettered, to all intents and purposes, as if the land had never been made the subject of the security.

Accordingly, a covenant in a mortgage of a public house to a firm of brewers binding the mortgagor to sell on the licensed premises no malt liquors except such as he purchased from the mortgagees, although valid during the continuance of the security, was **held** not to be maintainable after the mortgage debt had been paid off, as being a clog on the equity of redemption.

Santley v. Wilde (1), [1899] 2 Ch. 474, criticised.

Notes. Considered: *Bradley v. Carrilt*, post. Applied: *Samuel v. Jarrah Timber and Wood Paving Corp.*, [1904] A.C. 323. Distinguished: *Daniel v. Chamberlain* (1909), 25 T.L.R. 766. Considered: *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 2 Ch. 502. Distinguished: *Kreplinger v. New Patagonia Meal and Cold Storage Co., Ltd.*, [1911-13] All E.R. Rep. 970; *Re Cuban Land and Development Co. (1911), Ltd.*, [1921] All E.R. Rep. 66. Referred to: *London and Globe Finance Corp. v. Montgomery* (1902), 18 T.L.R. 661; *Morgan v. Jeffreys*, [1910] 1 Ch. 620; *Lewis v. Frank Love, Ltd.*, [1961] 1 All E.R. 446.

As to restrictions on the right to redeem, see 27 HALSBURY'S LAWS (3rd Edn.) 235-239, and for cases see 35 DIGEST 352 et seq.

Cases referred to:

- (1) *Santley v. Wilde*, [1899] 2 Ch. 474; 68 L.J.Ch. 681; 81 L.T. 393; 48 W.R. 90; 15 T.L.R. 528, C.A.; 35 Digest 239, 1.
- (2) *Browne v. Ryan*, [1901] 2 I.R. 653; 35 Digest 352, 946iii.
- (3) *Biggs v. Hoddinott, Hoddinott v. Biggs*, [1898] 2 Ch. 307; 67 L.J.Ch. 540; 79 L.T. 201; 47 W.R. 84; 14 T.L.R. 504, C.A.; 35 Digest 356, 993.
- (4) *Salt v. Marquess of Northampton*, [1892] A.C. 1; 61 L.J.Ch. 49; 65 L.T. 765; 40 W.R. 529; 8 T.L.R. 104; 36 Sol. Jo. 150, H.L.; 35 Digest 352, 951.
- (5) *Tulk v. Moxhay* (1848), 2 Ph. 774; 1 H. & Tw. 105; 18 L.J.Ch. 83; 15 L.T.O.S. 21; 13 Jur. 89; 41 E.R. 1113, L.C.; 40 Digest (Rep.) 342, 277.

Also referred to in argument:

- Jennings v. Ward* (1705), 2 Vern. 520; 23 E.R. 935; 35 Digest 356, 998.
Bunbury v. Winter (1820), 1 Jac. & W. 255; 37 E.R. 372, L.C.; 35 Digest 351, 965.
Howard v. Harris (1683), 2 White & Tud. L.C. 11; 1 Vern. 190; 2 Cas. in Ch. 147; 1 Eq. Cas. Abr. 312; Freem. Ch. 86; 23 E.R. 406; 35 Digest 240, 17.
Teevan v. Smith (1882), 20 Ch.D. 724; 51 L.J.Ch. 621; 47 L.T. 208; 30 W.R. 716, C.A.; 35 Digest 301, 509.
Wallis v. Smith (1882), 21 Ch.D. 243; 47 L.T. 389; on appeal, 21 Ch.D. 252, C.A.; 32 Digest 258, 429.

- A** *Purcell v. Edwards* (1857), 26 L.J.Ch. 468; 5 W.R. 407; 35 Digest 354, 972.
Mainland v. Upjohn (1889), 41 Ch.D. 126; 58 L.J.Ch. 361; 60 L.T. 614; 37 W.R. 411; 35 Digest 355, 976.
Carritt v. Bradley, [1901] 2 K.B. 550; 70 L.J.K.B. 832; 85 L.T. 197; 49 W.R. 593; 17 T.L.R. 641, C.A.; reversed sub nom. *Bradley v. Carritt*, post; [1903] A.C. 253; 72 L.J.K.B. 471; 88 L.T. 633; 51 W.R. 636; 19 T.L.R. 466; 47 Sol. Jo. 534, H.L.; 35 Digest 354, 971.
- B**

Appeal from a decision of the Court of Appeal (LORD ALVERSTONE, M.R., RIGBY and COLLINS, L.J.J.), reported [1900] 2 Ch. 445, affirming a decision of COZENS-HARDY, J., [1900] 1 Ch. 213.

C By a conveyance dated Oct. 7, 1897, the respondent purchased the lease of a public house which terminated at Christmas, 1923. By an indenture of mortgage of that date made between the respondent, of the one part, and the appellants, a brewery company, of the other part, the respondent demised and conveyed to the appellants the said leasehold public house and premises and the trade and tenant's fixtures therein and the goodwill of the business carried on thereat, by way of mortgage for securing the sum of £4,850 and interest thereon at the rate of £5 per cent. per annum, and all such further sums as are therein mentioned. In the same indenture was contained a covenant in the words following:

E "And for the considerations aforesaid the mortgagor, so as to charge the premises hereinbefore expressed to be hereby demised into whosoever possession the same may come, whether by act of the party or by operation of law, or by any other ways or means howsoever, and to the further intent that the obligation of this covenant may run with the hand, doth hereby covenant with the company that the mortgagor shall not nor will at any time during the continuance of the term aforesaid, and whether any principal moneys or interest shall or shall not be owing upon the security of these presents, use or sell or permit to be used or sold in, upon, or about the said demised premises any malt liquors, except such as shall be bona fide purchased by the mortgagor of the company; and, further, that if and whenever there shall be a breach of the said covenant he, the mortgagor, shall and will pay to the company the sum of £1,000 as and for ascertained liquidated damages for each such breach, and will sell all such malt liquors, pure, unadulterated, and unmixed, and of the like strength, character, and quality in all respects as the same shall be supplied to him."

G On Mar. 24, 1898, the respondent gave notice to the appellants of his intention to pay off the money secured by the indenture of Oct. 7, 1897, provided that the appellants were willing on payment thereof to release him from the above-stated covenant. The appellants refused to acquiesce in this suggestion, and on Nov. 8, 1898, the respondent issued the writ in the present action which in due course came before COZENS-HARDY, J., who made a declaration that on payment by the respondent to the appellants of all moneys due under the indenture of Oct. 7, 1897, the respondent was entitled to a reconveyance of the hereditaments comprised therein and to a release or transfer at his option of all the covenants contained in the indenture, and that in any case the appellants were not thereafter entitled to the benefit of the covenant. The appellants appealed, and the Court of Appeal affirmed the order of COZENS-HARDY, J. The appellants now appealed to the House of Lords.

I *Haldane, K.C., Eve, K.C., and Stanley Fisher* for the appellants.
Astbury, K.C., and E. Beaumont, for the respondent.

Their Lordships took time for consideration.

Dec. 17, 1901. The following opinions were read.

THE EARL OF HALSBURY, L.C.—In this case it is suggested that great differences of judicial opinion are apparent upon many of the decisions which are

germane to the present appeal. For my own part I very much doubt if it is quite accurate so to describe the difference of judicial opinion. To many, and indeed I think in most, of the cases to which our attention has been drawn, the court has not been in any doubt or difficulty as to the rule, which has been established in the course of centuries so firmly that nothing could shake it now, but only as to the application of that rule to different sets of facts. It is, in my mind, a very remarkable corroboration of the opinion on which I am now making that in the case upon which doubt appears to have been thrown—namely, *Santley v. Wilde* (1)—the judgment of SIR NATHANIEL LINDLEY, M.R., is in these terms—and I do not know that there has been a more authoritative statement of the rule which comes up now than what he there laid down ([1899] 2 Ch. at pp. 474, 475):

"The principle is this: a mortgage is a conveyance of land, or an assignment of chattels, as a security for the payment of a debt or the discharge of some other obligation for which it is given. This is the idea of a mortgage; and the security is redeemable upon the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. That, in my opinion, is the law. Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption, and is, therefore, void. It follows from this that 'once a mortgage always a mortgage'; but I do not understand that this principle involves the further proposition that the amount or nature of the further debt or obligation the payment or performance of which is to be secured, is a clog or fetter within the rule."

I cite that case because it appears to me that it lays down the rule; and the differences which are supposed to prevail from time to time appear to me to be only differences of fact, or of the modes in which the various courts have regarded the facts, as to whether a case came within that rule or not. But I do not believe that there is any portion of that which SIR NATHANIEL LINDLEY, M.R., laid down in the case which I have cited that has been the subject of doubt or difficulty in any court whatsoever.

I find that the same question has arisen, and has been very learnedly discussed, in the Irish courts lately in *Broune v. Ryan* (2), and certainly that case is extremely relevant to the question which this House is now discussing, because, in truth, it arose upon what practically are the same facts as in this case, and the learned judges in the Court of Appeal arrived at the same conclusion as that at which I invite this House to arrive. FRIZGIBBON, L.J., in his judgment, and also HOLMES, L.J., in referring to the case which I have just cited, appear to consider that case inconsistent with the rule which they themselves lay down. I confess that I am unable to find any inconsistency. It may be that SIR NATHANIEL LINDLEY, M.R., took a different view of the facts in the case with which he was then dealing from that which they would have taken, but that is not a difference in the law: and in this case it appears to me, as in the case which was argued in the Court of Appeal in Ireland, to be almost impossible, if the rule laid down by SIR NATHANIEL LINDLEY, M.R., is the rule upon which the courts must act, to deny that there is a fetter or clog, or whatever figurative word may be used, to prevent that which according to the known state of the law is to be enforced—namely, that the person who has pledged his estate back unfettered and unlogged by anything that shall prevent him from exercising the right which the law insists upon his being permitted to have.

Under these circumstances it is and must be in each case a question of the particular thing which is advanced as a clog or fetter, and in some cases it may seem to come very near the line. Whatever rule is laid down, one can reduce it to something like an absurdity by taking an extreme case. But taking this case it appears to me that undoubtedly this was a mortgage, and that the equity of redemption is clogged and fettered here by the continuance of an obligation which would render

A this house less available in the hands of its owner during the whole period of the term apart from the realisation of the security. Under these circumstances, as a matter of the merest and simplest reasoning, I am wholly unable to come to any other conclusion than that there is a clog and fetter here which the law will not permit. That seems to me to be the whole of this case; and, apart from the attempt to determine the sources from which this rule of law or equity was derived, it seems to me that this case is capable of being disposed of very summarily in that way. I care not what the sources of the rule were. I care not what differences of fact there may have been in other cases. What I say is: Here is a case strictly within the rule, and looking at the facts of this case, and applying to it one's ordinary knowledge of what would be the effect of the covenant upon the property which was made the pledge, and has to be restored free and unfettered to its owner, I cannot entertain a doubt that it did, and did intentionally, place a clog and fetter upon the right of redemption which it is the policy of the law, as declared by the courts of equity, to insist shall not be taken away by anything in the nature of a clog or fetter. Under these circumstances I move that this appeal be dismissed with costs.

D **LORD MACNAGHTEN.**—I am of opinion that the judgment of COZENS-HARDY, J., affirmed by the Court of Appeal, is perfectly right. Redemption is of the very nature and essence of a mortgage as mortgages are regarded in equity. It is inherent in the thing itself, and it is, I think, as firmly settled now as it ever was in former times that equity will not permit any device or contrivance designed or calculated to prevent or impede redemption. It follows as a necessary consequence that, when the money secured by a mortgage of land is paid off, the land itself and the owner of the land in the use and enjoyment of it must be as free and unfettered, to all intents and purposes, as if the land had never been made the subject of the security.

E In the present case it is hardly necessary to appeal to this principle, because the mortgage deed under consideration expressly and in terms provides that, on repayment of the money advanced, the mortgagees are to reconvey the mortgaged premises to the mortgagor or as he shall direct. That, of course, means that the land is to be re-conveyed, freed, and discharged from all burden and liability in respect of or arising out of the contract under which the advance was made. Counsel for the appellants, in his reply, felt the difficulty of his position so much that he was driven to contend that the subject of the security was a "tied" public house, and that, therefore, the mortgagor could only get back his property subject to that tie in favour of the mortgagees the brewers. But to this, as was pointed out in the Court of Appeal, there are two answers. In the first place, the argument has no foundation in fact. Nothing can be plainer than this—that it was the object and intention of all parties that the property should be set free from the old "tie" attached to it or attempted to be attached in the hands of its former owner, and that it should be mortgaged to the appellants as a free public house. In the next place, if the tie is invalid after redemption now, the tie could not have subsisted after the old mortgage was paid off.

G Since the argument, my attention has been called to *Browne v. Ryan* (2), recently decided by the Court of Appeal in Ireland. There a farmer mortgaged his holding to secure £200 and interest, and as part of the mortgage transaction it was stipulated that the mortgagor should sell his holding within twelve months, employ the mortgagee as the auctioneer at a certain commission, and pay him the like commission if the conduct of the sale was given to anyone else. The Court of Appeal held, and, in my judgment, rightly held, that the stipulation had no effect after redemption. The judgments of the learned judges of the Court of Appeal seem to me, if I may venture to say so, to contain a very clear exposition of the law. They had occasion to consider the judgment of the English Court of Appeal in *Santley v. Wilde*, and they expressed their disapproval of the conclusions at which the English Court of Appeal arrived. Speaking for myself, with all deference to my noble and learned friend opposite—LORD LINCOLN, I cannot help sharing that view. I do not

in the least dissent from the propositions laid down by my noble and learned friends, taking them separately. But the transaction in that case seems to me to have been nothing more than an ordinary mortgage to secure an advance of money with a superadded obligation offending against the settled principle of equity in that it rendered redemption impossible. It seems to me to be contrary to principle that a mortgagor should stipulate with his mortgagee that, after full payment of principal, interest, and costs, he should continue to receive for a definite or indefinite period a share of the rents and profits of the mortgaged property as the result of an obligation arising from the contract made when the mortgage was created. Nor can I agree with the President of the Probate Division (SIR FRANKS JONES), who seems to have thought that *Santley v. Wilde* (1) was covered by the decision in *Biggs v. Hoddinott* (3), a decision to which, as it seems to me, no objection can be taken. If there is an expression in COZENS-HARDY, J.'s, judgment to which I do not cordially assent it is one in the last paragraph of his judgment, where the learned judge seems to refer to this tie as "an equity attached to the property" or as "an equitable burden." I rather doubt whether such an obligation can be made to run with the land or can be imposed on the owner in respect of the property except as between lessor and lessee, or in the case of a mortgage during the continuance of the security. I think that the judgment should be affirmed.

LORD SHAND concurred.

LORD DAYEY.— There are three doctrines of the courts of equity in this country which have been referred to in the course of this case. The first doctrine to which I refer is expressed in the maxim: "Once a mortgage always a mortgage." The second is that the mortgagee shall not reserve to himself any collateral advantage outside the mortgage contract; and the third is that a provision or stipulation which will have the effect of clogging or fettering the equity of redemption is void.

The first maxim presents no difficulty; it is only another way of saying that a mortgage cannot be made irredeemable, and that a provision to that effect is void. In *Salt v. Marquis of Northampton* (4) the question was whether a certain life policy, the premiums on which were charged against the mortgagor, was comprised in the mortgage security. That question having been decided in the affirmative, it was declared to be redeemable, notwithstanding an express provision to the contrary contained in the deed. The second doctrine to which I refer—namely, that the mortgagee shall not reserve to himself any collateral advantage outside the mortgage contract—was established long ago when the usury laws were in force. The court of equity went beyond the usury laws, and set its face against every transaction which tended to usury. It, therefore, declared void every stipulation by a mortgagee for a collateral advantage which made his total remuneration for the loan indirectly exceed the legal interest. I think that it will be found that every case under this head of equity was decided either on this ground or on the ground that the bargain was oppressive and unconscionable. The abolition of the usury laws has made an alteration in the view which the court should take on the subject, and I agree that a collateral advantage may now be stipulated for by a mortgagee, provided that no unfair advantage be taken by the mortgagee which would render it void or voidable according to the general principles of equity, and provided that it does not offend against the third doctrine. On these grounds I think that *Biggs v. Hoddinott* (3) was rightly decided.

The third doctrine to which I have referred is really a corollary from the first, and might be expressed in this form: "Once a mortgage always a mortgage, and nothing but a mortgage." The meaning of that is that the mortgagee shall not make any stipulation which will prevent a mortgagor who has paid principal, interest, and costs from getting back his mortgaged property in the condition in which he parted with it. I do not dissent from the opinions expressed by SIR NATHANIEL LINDLEY, M.R., in *Santley v. Wilde* (1). He says: "A clog or fetter is something which is

inconsistent with the idea of security; a clog or fetter is in the nature of a repugnant condition." But, I ask, security for what? I think that it must be security for the principal, interest, and costs, and, I will add, for any advantages in the nature of increased interest or remuneration for the loan for which the mortgagee has validly stipulated during the continuance of the mortgage. There are two elements in the conception of a mortgage—first, security for the money advanced; and, secondly, remuneration for the use of the money. When the mortgage is paid off the security is at an end, and, as the mortgagee is no longer kept out of his money, the remuneration to him for the use of his money is also at an end. I confess that I should have decided *Sanfley v. Wilde* (1) in a way different from that in which it was decided in the Court of Appeal. After the payment of principal and interest and everything which had become payable up to the date of redemption, the property in that case remained charged with the payment to the mortgagee of one-third share of the profits, and the stipulation to that effect should, I think, have been held to be a clog or fetter on the right to redeem.

The principle is this, that a mortgage must not be converted into something else; and when once you come to the conclusion that a stipulation for the benefit of the mortgagee is part of the mortgage transaction, it is but part of his security, and necessarily comes to an end on the payment off of the loan. In my opinion, every yearly or other recurring payment stipulated for by the mortgagee should be held to be in the nature of interest, and no more payable after the principal is paid off than interest would be. I apprehend that a man could not stipulate for the continuance of the payment of interest after the principal was paid, and I do not think that he can stipulate for any other recurring payment such as a share of profits. Any stipulation to that effect would, in my opinion, be void as a clog or fetter on the equity of redemption. By the Conveyancing Act, a mortgagee may now be required to transfer his mortgage upon payment of what is due to him, and he must then transfer all his security, including every advantage which he derives from the mortgage transaction, and all his deeds and documents constituting his title as mortgagee. And on redemption he must do the like to the mortgagor, and any stipulation which varies the effect and incidents of redemption on payment off of what is due on the loan is a clog within the meaning of the rule.

Applying what I have said to the present case, the decision becomes easy. In the first place, I do not think that the respondent's covenant to deal exclusively with the brewers continued after the payment off of the loan and the redemption; and, secondly, if it did, it was an attempt to charge it on the property, and that constituted a clog or fetter which, according to well-established principles, was void. I only desire to add that, with LORD MACNAGHTEN, I cannot assent altogether to the assumption made by COZENS-HARDY, J., that the covenant constituted, or might constitute, a good charge upon the property by virtue of the operation of the doctrine in *Tulk v. Moxhay* (5). I should hesitate some time before I assented to that proposition, but it is perfectly immaterial for the decision in the present case, because, as I have already said, I think that the covenant did not continue after the redemption, and that the mere attempt to make it a charge upon the property would render it void. Upon these grounds I agree that the appeal should be dismissed.

LORD BRAMPTON and **LORD ROBERTSON** concurred.

LORD LINDLEY. I agree in thinking that the covenant contained in this mortgage, by which the mortgagees have attempted to convert the house mortgaged from a free public house into a tied public house, even after redemption, is invalid. I see no answer to the objection taken to it that upon payment of the mortgage debt the mortgagor cannot get back what he mortgaged—namely, a free public house. The attempt to strengthen the tie by stipulating for liquidated damages and charging them on the property certainly does not mend matters, but makes them worse. The case before us is not like the case of a mortgage of wasting property, for

example, a loan which, owing to its nature, cannot be given back on redemption in the state in which it was received. Here the mortgage contained a covenant the subject of which is to disentitle the mortgagee on redemption from having back the property unencumbered by this covenant. This is inconsistent with the settled law of mortgages. I regard the mortgage deed in this case as another unsuccessful attempt to lay a new burden on land not warranted by law, or by the doctrine laid down in *Tulk v. Moxhay* (5), which has often been relied upon of late as going much farther than it does. The conclusion thus arrived at is not inconsistent with *Woolley v. Wilde* (1) on which the appellants rely so strongly. Some of your Lordships think that they can go too far. I do not think so myself; but I will not trouble to consider its details, which were complicated. The principle upon which the Court of Appeal decided the case was, I still think, sound. Whether it was properly applied in that case is now of no importance. I believe the true principle applicable to these cases to be that expounded by the Court of Appeal in *Bliggs v. Hoddinott* (3) and *Sutley v. Wilde* (4). That principle is perfectly consistent with a real pledge and with the maxim: "Once a mortgage always a mortgage"; but it will not render valid the covenant which your Lordships have to consider in the present case. I agree that this appeal ought to be dismissed with costs. As regards the recent case of *Brown v. Ryan* (2) in Ireland, I am satisfied that the Court of Appeal did not go too far in holding that the plaintiff's action for damages could not be sustained.

Appeal dismissed.

Solicitors: *Fishers; Sandilands & Co.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

KEIGHLEY, MAXSTED & CO. v. DURANT

[House of Lords (The Earl of Halsbury, L.C., Lord Macnaghten, Lord Shand, Lord Davey, Lord James of Hereford, Lord Brampton, Lord Robertson and Lord Lindley), March 11, 12, 14, 15, May 20, 1901]

[Reported [1901] A.C. 240; 70 L.J.K.B. 662; 84 L.T. 777; 17 T.L.R. 527; 45 Sol. Jo. 536]

Agent—Principal—Liability for act of agent—Ratification—Contract entered into by person professing to act on own behalf—Undisclosed intention to give benefit of contract to third party—Ratification by third party—Validity.

Civil obligations are not to be created by or founded on undisclosed intentions, and, therefore, a contract made by a person purporting and professing to act on his own behalf alone and not with the authority of or on behalf of a principal, but having an undisclosed intention to give the benefit of the contract to a third party, cannot be ratified or adopted by that third party so as to render him able to sue or liable to be sued on the contract.

Decision of the Court of Appeal, [1900] 1 Q.B. 629, reversed.

Notes. Applied: *Eastern Construction Co. v. National Trust Co.*, [1914] A.C. 197. Referred to: *Humbro v. Burnard*, [1903] 2 K.B. 399; *Re Rowe, E. parte Deranburg*, [1904] 2 K.B. 483; *Boston Fruit Co. v. British and Foreign Marine Insurance Co.*, [1906] A.C. 336; *Relevance Marine Insurance Co. v. Dunder*, [1913] 1 K.B. 265; *Fred. Dragbom, Ltd., v. Roderick T. Transatlantic*, [1918-19] All E.R. Rep. 1122; *The Joannis Vatis* (1921), 91 L.J.P. 182; *A. I. Underwood, Ltd.*

v. Bank of Liverpool, Underwood v. Barclays Bank, [1924] 1 K.B. 775; *Robinson v. Midland Bank* (1925), 41 T.L.R. 402; *Greenwood v. Martin's Bank, Ltd.*, [1932] 1 K.B. 371.

As to agency by ratification, see 1 HALSEBURY'S LAWS (3rd Edn.) 173-181, and for cases see 1 DIGEST (Repl.) 453 *et seq.*

Cases referred to :

- (1) *Pacific and South Pacific Telegraph Co. v. India-Rubber, Gatta-Percha, and Telegraph Works Co.* (1875), 10 Ch. App. 515; 45 L.J.Ch. 121; 32 L.T. 517; 23 W.R. 583, L.J.J.; 1 Digest (Repl.) 552, 1730.
- (2) *Wilson v. Tunman (Tummon)* (1843), 6 Man. & G. 236; 6 Scott, N.R. 894; 1 Dow. & L. 513; 12 L.J.C.P. 306; 1 L.T.O.S. 256, 314; 134 E.R. 879; 1 Digest (Repl.) 467, 1127.
- (3) *Bryden v. Metropolitan Rail. Co.* (1877), 2 App. Cas. 666, H.L.; 12 Digest (Repl.) 55, 300.
- (4) *Bird v. Brown* (1850), 4 Exch. 786; 19 L.J.Ex. 154; 14 Jur. 132; 154 E.R. 1433; 1 Digest (Repl.) 462, 1102.
- (5) *Sorries v. Spencer* (1822), 1 Dow. & Ry. K.B. 32; 1 Digest (Repl.) 471, 1177.
- (6) *Watson v. Swann* (1862), 11 C.B.N.S. 756; 31 L.J.C.P. 210; 142 E.R. 993; 1 Digest (Repl.) 459, 1083.
- (7) *Lyell v. Kennedy, Kennedy v. Lyell* (1889), 14 App. Cas. 437; 59 L.J.Q.B. 268; 62 L.T. 77; 38 W.R. 353, H.L.; 1 Digest (Repl.) 459, 1082.
- (8) *Vere v. Ashby, Rowland and Shaw* (1829), 10 B. & C. 288; 109 E.R. 457; 1 Digest (Repl.) 457, 1071.
- (9) *Falcke v. Scottish Imperial Insurance Co.* (1886), 34 Ch.D. 234; 56 L.J.Ch. 707; 56 L.T. 220; 35 W.R. 143; 3 T.L.R. 141, C.A.; Subsequent proceedings (1887), 57 L.T. 39; 35 W.R. 794; 12 Digest (Repl.) 588, 4552.
- (10) *Armory v. Delamirie* (1722), 1 Stra. 505; 93 E.R. 664; 3 Digest (Repl.) 67, 83.
- (11) *Matheson v. Kilburn* (1877), 1 Sm.L.C., 10th Edn., 349, C.A.
- (12) *Saunderson v. Griffiths* (1826), 5 B. & C. 909; 8 Dow. & Ry. K.B. 643; 4 L.J.O.S.K.B. 318; 108 E.R. 338; 1 Digest (Repl.) 468, 1143.
- (13) *Kelner (Kelmer) v. Barker* (1866), L.R. 2 C.P. 174; 36 L.J.C.P. 94; 15 L.T. 213; 12 Jur.N.S. 1016; 15 W.R. 278; 1 Digest (Repl.) 459, 1084.
- (14) *Bryne v. Van Tienhoven* (1880), 5 C.P.D. 344; 49 L.J.Q.B. 316; 42 L.T. 371; 44 J.P. 667; 12 Digest (Repl.) 85, 463.

Also referred to in argument :

- Simpson v. Egginton* (1855), 10 Exch. 845; 24 L.J.Ex. 312; 19 J.P. 776; 1 Digest (Repl.) 461, 1098.
- Foster v. Bates* (1843), 1 Dow. & L. 400; 12 M. & W. 226; 13 L.J.Ex. 88; 2 L.T.O.S. 150; 7 Jur. 1093; 152 E.R. 1180; 1 Digest (Repl.) 458, 1080.
- Ridgway v. Wharton* (1857), 6 H.L.Cas. 238; 27 L.J.Ch. 46; 29 L.T.O.S. 390; 4 Jur.N.S. 173; 5 W.R. 804; 10 E.R. 1287, H.L.; 1 Digest (Repl.) 378, 451.
- Anon.* (1586), Godb. 109; 78 E.R. 67; 1 Digest (Repl.) 479, 1225.
- Cooke & Sons v. Eshelby* (1887), 12 App. Cas. 271; 56 L.J.Q.B. 505; 56 L.T. 673; 35 W.R. 629; 3 T.L.R. 481, H.L.; 1 Digest (Repl.) 665, 2328.
- Hull v. Pickersgill* (1819), 1 Brod. & Bing. 282; 3 Moore, C.P. 612; 129 E.R. 731; 1 Digest (Repl.) 471, 1179.
- Irvine & Co. v. Watson & Sons* (1880), 5 Q.B.D. 414; 49 L.J.Q.B. 531; 42 L.T. 800, C.A.; 1 Digest (Repl.) 678, 2403.
- Brook v. Hook* (1871), L.R. 6 Exch. 89; 40 L.J.Ex. 50; 24 L.T. 34; 19 W.R. 508; 1 Digest (Repl.) 454, 1056.
- Dean of Exeter v. Serle* (1302), Year Book 30 Edw. 1 (Roll's Edn.) 127A.
- Anon.* (1587), 2 Leon. 196; 74 E.R. 473; 43 Digest 426, 507.
- Fuller and Trimwell's Case* (1587), 2 Leon. 215; 74 E.R. 490; 18 Digest (Repl.) 435, 1799.

Seigneur and Walmer's Case (1623), Godb. 360; 78 L.R. 212; 1 Digest (Repl.) 437, 903. A

Barn v. Drennon (1843), 2 Fsch. 167, at 188; 6 Droc. Tr. N. 3. 326, at p. 341; 154 E.R. 450, at p. 549; 1 Digest (Repl.) 379, 456.

Innes v. Morda (1862), 7 H. & N. 686; 31 L.J.La. 163; 5 L.T. 753, 8 Jur. 38; 516; 10 W.R. 251; 158 E.R. 645; 1 Digest (Repl.) 457, 1070.

Woollen v. Wright (1862), 1 H. & C. 534; 51 L.J.La. 513; 10 W.R. 716; 158 E.R. 1005; sub nom. *Wright v. Woollen*, 7 L.T. 73, Ex. Ch.; 1 Digest (Repl.) 467, 1128. B

Phillips v. Eyre (1870), L.R. 6 Q.B.1; 40 L.J.Q.B. 28; 22 L.T. 869, L.A. Co.; 1 Digest (Repl.) 457, 1067.

Bellon Partners v. Lambert (1889), 41 Ch.D. 295; 58 L.J.Ch. 425; 60 L.T. 687; 37 W.R. 434; 5 T.L.R. 357, C.A.; 1 Digest (Repl.) 460, 1098. C

Appeal by the defendants in the action from a decision of the Court of Appeal (COLLINS and ROMER, L.JJ., A. L. SMITH, L.J., dissenting), reported [1900] 1 Q.B. 629, reversing a decision of DAY, J., in favour of the appellants, at the trial of the action before him with a special jury.

The following statement of facts is taken from the opinion of Lord BRAMFORD. D

The appellants, Keighley, Maxsted & Co., were corn merchants at Hall, and one Wright was their manager and agent. Durant, the respondent, was a corn merchant in London, trading as Bryan, Durant & Co., and one Roberts was a corn merchant at Wakefield. On the morning of May 11, 1898, Roberts received from Durant's brokers a telegram containing an offer from Durant of 500 tons of new white Karachi wheat at 46s. per quarter and 500 tons of red wheat at 45s. per quarter. Later on the same morning Roberts had an interview with Wright, and told him of Durant's offer, and they agreed together that, if Roberts could get the wheat at 45s. 3d. for the white and 44s. 3d. for the red, Roberts and Keighley would become the purchasers on joint account. Roberts, however, was unable to get the wheat at those prices; the proposal, therefore, for a purchase on joint account came to nothing. Between 3 and 4 p.m. on the same day, Roberts, without any further communication with or authority from Keighleys, and apparently purely on his own separate and sole account, by an interchange of telegrams with Durant's brokers, concluded a contract for the purchase by him, in his own name, from Durant of the whole of the wheat, at 45s. 6d. for the white and 44s. 6d. for the red. On the following day, May 12, Roberts met Wright casually at the Manchester Corn Market, and told him that he had bought the wheat at 3d. a quarter more than the price they had settled on the previous day. Wright replied he had given too much, but he thought the wheat was worth it, and told him to take it. Roberts did so, but failing to fulfil his contract with Durant the latter sold it at a loss, to recover which this action was commenced by Durant against Roberts and Keighley, Maxsted & Co. jointly, upon the suggestion of Roberts that this purchase had been made on joint account. DAY, J., gave judgment for Keighley, Maxsted & Co., on the ground that they were not parties to the contract, and no subsequent ratification by them could make them liable to sue or be sued upon it, but his judgment was reversed by the Court of Appeal, and Keighley, Maxsted & Co. now appealed to the House of Lords. G

Carver, K.C., Danckwerts, K.C., and Montague Lush for the appellants. H

Robson, K.C., and Scrutton, K.C., for the respondent. I

Their Lordships took time for consideration.

May 20, 1901. The following opinions were read.

THE EARL OF HALSBURY, L.C.—There are no facts really in dispute in this case. Roberts made a contract on his own behalf and without the authority of anybody else. The contract was made and the parties to it ascertained, and I am of opinion that upon no principle known to the law could the present appellants be

made parties to that contract. They could, of course, make another contract in the same terms if they pleased, but it would not be this contract. It is suggested by the judgment of the Court of Appeal as possible that what is described as ratification might, if the parties had so pleased, make the contract, which was one made between A. and B., include C. as one of the contracting parties. I think such a suggestion contrary to all principle. I confess that I do not see the relevancy of the argument that a contract might be made in the name of an unknown principal, and that such a principal may sue and be sued, though the name was not given at the time when the contract was made. The fact is that in such a case the contract is made by him, and the disclosure afterwards does not alter or affect the contract actually made. Here it would alter the contract afterwards, and make it a different contract. If it is said that it is an anomaly, it certainly is not the only one in our law; and if it were sought to make our laws harmonious by deciding that any proposition which our laws establish involves, as a necessary consequence, the establishment of everything that is analogous to it, the result would be very perplexing indeed. I agree with A. L. SMITH, L.J.*, that a long line of authorities has decided the question in favour of the view which he maintains.

I should say no more but for the appeal of COLLINS, L.J., to the Roman law (see [1900] 1 Q.B. 647), and, with great respect for anything that falls from the Lord Justice, I cannot think that, if the law were as there laid down, it would help the present respondent. I do not think that the passage in the DIGEST upon which he founds his argument refers to what we call ratification at all. But I wish to add that, if it could clearly be made out that it did refer to it I should not be much impressed by it. There are parts of the Roman law which undoubtedly we have made parts of our own, and they are binding on us, not because they are parts of the Roman law, but because they have been made parts of our own law. There are some countries which have made the Roman law their own, but in this country we have never adopted it in such a wholesale fashion. As HALE, C.J., said, the sources of the English law are as undiscoverable as the sources of the Nile; and, although in our day such a phrase cannot be appropriately used it was true in HALE's time. Our law differs in most important respects from the Roman law, and in order to quote the latter as an authority we must show that it has become part of our own jurisprudence. I, therefore, move that the judgment appealed from be reversed, and that the respondent does pay to the appellants the costs both here and below.

LORD MACNAGHTEN.—I am of the same opinion. I dissent very respectfully from the judgments of the majority of the Court of Appeal, and I agree entirely with A. L. SMITH, L.J. It is said that there is no decision one way or the other. It is quite true that there is no reported case in which the precise question discussed in the judgments under review has been raised and determined, and it may be that COLLINS, L.J., is right in thinking that there is no dictum in which that question has been dealt with pointedly and advisedly. But there is a stream of authority all tending in one direction, impossible I think to gainsay or resist, which has been treated as conclusive by text-writers of acknowledged eminence both in this country and in America. And when your Lordships are told that there is no actual decision, nor even any carefully considered expression of opinion in favour of the view which A. L. SMITH, L.J., took to be settled law, I cannot help recalling the observation of a great judge, JAMES, L.J., when he said (10 Ch. App. at p. 526): "The clearer a thing is, the more difficult it is to find any express authority or any dictum exactly to the point"; *Panama and South Pacific Telegraph Co. v. India-Rubber, Gutta-Percha, and Telegraph Works Co.* (1)

I will not go through the roll of cases bearing upon the question. It would be impossible, I think, with advantage to add anything to the very able and exhaustive review of A. L. SMITH, L.J. I will only say a few words in reference

* The judgment of A. L. Smith, L.J., will be found at p. 53.

to the two grounds on which his conclusion is challenged by COLLINS, L.J. Having satisfied himself that the case was not governed by authority, the learned and justice made his judgment by declaring that he was bound to decide in accordance with what he regarded to be "principle and common sense." In appealing to 'common sense' I do not for a moment suppose that COLLINS, L.J., meant to intimate that the conclusion at which he had arrived, inferring himself to be untrammelled by authority, was a self-evident proposition which ought to command the assent of all sensible persons. Admittedly, LORD CANNON, L.C., and BAKER, L.J., both sensible persons, took the other view. I rather suppose that the learned lord justice meant to appeal to considerations of convenience. But I would say that it is difficult to understand how this new departure, if it be a new departure, can be required by any considerations of that sort, seeing that in all these years the question has never before presented itself for decision but once, and then the case was decided on other grounds. With all deference, I must doubt whether the decision under appeal is in accordance with common sense, whatever that expression means. Still less do I think it in accordance with principle.

As a general rule, only persons who are parties to a contract acting either by themselves or by an authorised agent can sue or be sued on the contract. A stranger cannot enforce the contract, nor can it be enforced against a stranger. That is the rule; but there are exceptions. The most remarkable exception, I think, results from the doctrine of ratification as established in English law. That doctrine is thus stated by TINDAL, C.J., in *Wilson v. Tammam* (2) (6 M. & G. at p. 242):

"That an act done, for another, by a person, not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law. In that case the principle is bound by the Act, whether it be for his detriment or his advantage, and whether it be founded on a tort or on a contract to the same effect as by, and with all the consequences which follow from, the same act done by his previous authority."

And so by a wholesome and convenient fiction a person ratifying the act of another who without authority has made a contract openly and avowedly on his behalf, is deemed to be, though in fact he was not, a party to the contract. Does the fiction cover the case of a person who makes no avowal at all, but assumes to act for himself and for no one else? If TINDAL, C.J.'s, statement of the law is accurate, it would seem to exclude the case of a person who may intend to act for another, but at the same time keeps his intentions locked up in his own breast; for it cannot be said that a person who so conducts himself does assume to act for anybody but himself.

But ought the doctrine of ratification to be extended to such a case? On principle I should say certainly not. It is, I think, a well-established principle in English law that civil obligations are not to be created by or founded upon undisclosed intentions. That is a very old principle. LORD BLACKBURN, enforcing it in *Brogden v. Metropolitan Rail. Co.* (3), traces it back to the Year Books of Edward IV (17 Edw. 4, 2 Term Pasc.) and to a quaint judgment of BRIAN, C.J., a great authority in those days, who said:

"It is common learning that the thought of a man is not triable, for the Devil has not knowledge of man's thoughts."

SIR F. FRY quotes the same observation in his work on Specific Performance (2nd Edn.), s. 282. It is, I think, a sound maxim—at least, in its legal aspect—and, in my opinion, it is not to be put aside or disregarded merely because it may be that in a case like the present no injustice might be done to the actual parties to the contract by giving effect to the undisclosed intentions of a would-be agent.

A I have nothing more to add on the question of principle. But I should like to say a word or two on *Bird v. Brown* (4), on which COLLINS, L.J., seems to place his chief reliance. The case is instructive, I think, and useful, because it tends to shake one's confidence in the infallibility of reporters, whose words always seem to carry the more weight the less opportunity there is of testing their accuracy. *Bird v. Brown* (4) was heard by four judges. Only one judgment was given. The report at 4 Exch. 786 attributes the judgment to ROLFE, B. The report at 19 L.J.Ex. 154 ascribes it to PARKER, B., and that at 13 Jur. 132 puts it in the mouth of POLLOCK, C.B. No one gives it to the fourth judge, but then there were only three sets of reports current at the time. The WEEKLY REPORTER did not begin till the next year. The passage in the EXCHEQUER REPORTS on which the learned lord justice relies is in these words :

C "If A. B. unauthorised by me makes a contract on my behalf with J. S. which I afterwards recognise and adopt there is no difficulty in dealing with it as having been originally made by my authority. J. S. entered into the contract on the understanding that he was dealing with me, and when I afterwards agreed to admit that such was the case, J. S. is precisely in the condition in which he meant to be."

D So far no exception can be taken to the language of the learned judge, whoever he was. Then follows this passage, on which COLLINS, L.J., lays a stress denoted by italics in his printed judgment :

E "or if he did not believe A. B. to be acting for me his condition is not altered by my adoption of the agency, for he may sue A. B. as principal, at his option, and has the same equities against me if I sue which he would have had against A. B."

I cannot say that I quite understand that passage. The assumption is that A. B. unauthorised by me has made a contract on my behalf with J. S. Why J. S. should not believe that A. B. was acting for me when A. B. said he was, I do not understand, nor can I see why his want of belief should give him a right to sue A. B. as principal when the contract was made on the representation that A. B. was not principal. I think that there must be some mistake somewhere, and it is a consolation to one who is greatly puzzled by the passage to find that it does not occur in the report of the case in the LAW JOURNAL*. I think that the appeal must be allowed.

G LORD SHAND.--I am also of opinion that the judgment of the Court of Appeal should be reversed and the respondent's action dismissed, and, as your Lordships' opinions deal so exhaustively with the grounds of judgment on which the decision of the case depends, I propose to make only a very few observations. It may be assumed that Roberts in the contract which he made with the respondent, intended to buy, and did buy, on the joint account of himself and the appellants, hoping and expecting that the appellants would, when informed of the terms of his purchase, ratify or adopt the transaction as on joint account. The evidence of this is certainly meagre and unsatisfactory, and involves, as I think, the admission of the entry made in Roberts's book, to which the appellants were no parties, which was not evidence of contract against them. But at the utmost the respondent can only plead that he has proved by his own testimony that in buying he did so on the joint account, in the hope and expectation that the appellants would adopt or ratify the transaction. On the other hand, it is clear that Roberts made no suggestion that he was acting for anyone but himself, or even that he had hope or expectation that the appellants would be parties to the contract. The contract was made avowedly for himself alone, and not on the statement that he acted on behalf of any principal, or joint contractor or proposed joint contractor with himself. It is equally clear that he had no authority from the appellants to make any contract

* The report in 14 L.T.O.S. 399 agrees with the LAW JOURNAL in attributing the judgment to PARKER, B., and in omitting the disputed passage.

for them, or to make any contract in which they would be interested, for he agreed to pay a price which was in excess of that which the appellants were prepared to give. It is to be further noted that it cannot be said or suggested that the appellants, by any communication with the respondent, or by their conduct in relation to the respondent by any dealing with him, ratified or adopted his contract with Roberts, so as in a question with them to entitle the respondent on any such ground to maintain that the appellants had become liable on the contract to him.

The question which arises on this state of the facts is whether, where a person has avowedly made a contract for himself—first, without a suggestion that he is acting to any extent for another (an undisclosed principal), and, secondly, without any authority to act for another, he can effectually bind a third party as principal, or as a joint obligant with himself, to the person with whom he contracted, by the fact that in his own mind merely he made a contract in the hope and expectation that his contract would be ratified or shared by the person as to whom he entertained that hope and expectation. I am clearly of opinion, with all respect for the majority of the Court of Appeal, that he cannot. The only contract actually made is by the person himself and for himself; and it seems to me to be conclusive against the argument for the respondent, that if his reasoning were sound it would be in his power, on an averment of what was passing in his own mind, to make the contract afterwards, either one for himself only, as in fact it was, or one affecting or binding on another as a contracting party, even although he had no authority in this. The result would be to give one of two contracting parties in his option, merely from what was passing in his own mind, and not disclosed, the power of saying that the contract was his alone, or a contract in which others were bound to him. That I think he certainly cannot do in any case where he had no authority when he made the contract to bind anyone but himself. I have only to add that, for the reason stated by LORD ROBERTSON, I do not think that the Roman law gives any support to the decision of the Court of Appeal.

LORD DAVEY.—The question of law is whether a contract made by a man purporting and professing to act on his own behalf alone, and not on behalf of a principal, but having an undisclosed intention to give the benefit of the contract to a third party, can be ratified by that third party so as to render him able to sue or liable to be sued on the contract. In the course of his judgment COLLINS, L.J., says that the point has never been actually decided, although he admits that there are numerous dicta upon it which have become the foundation of statements in text-books more or less adverse to the present respondent's contention, and he says that the question must now be determined on principle. The learned Lord Justice does not cite a single judicial statement of the doctrine of ratification, or any single statement of it by text-writers, which is in favour of his view. So far as authority is concerned, he is driven to rely upon some words attributed in the EXCHEQUER REPORTS to ROLFE, B., in *Bird v. Brown* (4) and a case of *Soumes v. Spencer* (5). In *Bird v. Brown* (4) ROLFE, B., stated the general doctrine thus (4 Exch. at p. 798):

"If A. B., unauthorised by me, makes a contract on my behalf with J. S., which I afterwards recognise, there is no difficulty in dealing with it as having been originally made by my authority. J. S. entered into the contract on the understanding that he was dealing with me, and when I afterwards agree to admit that such was the case, J. S. is precisely in the condition in which he meant me to be."

The statement of the doctrine is so far entirely in favour of the appellants' contention, but he is reported to have added (*ibid.* at pp. 798, 799):

"Or if he did not believe A. B. to be acting for me, his condition is not altered by my adoption of the agency, for he may sue A. B. as principal at his option, and has the same equities against me if I sue which he would have had against A. B."

A These are the words relied on by the lord justice. ROLFE, B., if he was the author of these words, or if the words were really used, may have been thinking of the class of cases where a person contracts professedly on behalf of a principal, but without naming him (as was said by WILLES, J., in *Watson v. Swann* (6), and see *Lyett v. Kennedy* (7)).

B This interpretation would satisfy his language, or he may have overlooked the point now in question. I do not know. But whatever ROLFE, B., may have intended, the words relied on are not sufficient to raise a doubt in my mind as to the accuracy of the statement of the law by other learned judges. *Soames v. Spencer* may, perhaps, be explained on the principle that fraud will not be presumed, and, therefore, a man who assumes to sell another person's property really professes to be acting for the true owner. But, however this may be, the point now before
C your Lordships does not appear to have been raised or argued. On the other hand, A. L. SMITH, L.J., has cited a large number of cases, extending over a period of seventy years or more, and containing the opinions of such judges as PARKE, B., TINDAL, C.J., ERLE, C.J., WILLES, J., and BOWEN, L.J. These eminent persons all state the law one way. I refer in particular to *Vere v. Ashby, Rowland and Shaw* (8), *Wilson v. Tamman* (2), *Watson v. Swann* (6), and *Falcke v. Scottish Imperial Insurance Co.* (9). I do not think that the propositions of law to be found in these cases can be brushed aside as mere dicta. *Watson v. Swann* (6), for example, was an action upon a policy of insurance entered into by one John Smith in his own name.
D ERLE, C.J., says (11 C.B.N.S. at p. 769):

E "It is clear law that no one can sue upon a contract unless it has been made by him, or has been made by an agent professing to act for him and whose act has been ratified by him. Now here the contract was not made by the plaintiff, nor did it purport to be made on his behalf; it purported to be made by Smith on his own behalf."

WILLES, J., adds (*ibid.* at p. 771):

F "It is not necessary that he should be named, but there must be such a description of him as shall amount to a reasonable designation of the person intended to be bound by the contract."

STORY ON AGENCY and KENT'S COMMENTARIES were also referred to. Section 251A of the former work contains a very full statement of the doctrine, and shows that
G the learned author understood the law in the same way as the learned judges already quoted or referred to. I think that counsel for the appellants successfully showed that s. 251A is in the language of STORY himself. To these authorities should be added the learned note of Mr. SERJEANT MANNING to the case of *Wilson v. Tamman* (2). The weight of authority is, therefore, against the opinion of the learned lords justices, and I may be permitted to add that an examination of the
H cases has confirmed my own previous impression of what the law is upon the point in question. Indeed, it appears from a note in SMITH'S LEADING CASES to *Armory v. Delamirie* (10) (10th Edn.), vol. 1, p. 349, that the point now taken was raised in an unreported case of *Matheson v. Kilburn* (11), and that LORD CAIRNS, L.C., and BRITT, L.J. (COCKBURN, C.J., dissenting), were of opinion that a contract made by
I one on his own behalf, though intending to buy on behalf of a third person, was incapable of ratification by that third person. It is, however, stated that the case went off on the failure to prove the alleged intention.

I might content myself with these grounds for my judgment, but COLLINS, L.J., has given reasons for his opinion that this case ought to be decided otherwise on principle and (to use his own expression) common sense, and has also referred to the Roman law on the subject. I will, out of respect to him, shortly state my views upon this portion of his judgment. The argument seems to be that, as the law permits an undisclosed principal on whose behalf a contract has been made to sue and be sued on the contract, and as the effect of ratification is equivalent to a

previous mandate, a person who ratifies a contract intended, but not expressed, to be made on his behalf is in the same position as any other undisclosed principal. Further, it is said that, whether the intention of the contractor be expressed or not, its existence is mere matter of evidence, and when once it is proved, the conclusion ought to follow. ROMER, L.J., held that on principle it ought to be held that ratification (in the case before the court) is possible, and that to hold the contrary would be to establish an anomaly in the law; and, moreover, a useless one. I cannot agree. There is a wide difference between an agency existing at the date of the contract, which is susceptible of proof, and a repudiation of which by the agent would be fraudulent, and an intention locked up in the mind of the contractor, which he may either abandon or act on his own pleasure, and the ascertainment of which involves an inquiry into the state of his mind at the date of the contract. Where the intention to contract on behalf of another is expressed in the contract, it passes from the region of speculation into that of fact, and becomes irrevocable. In what sense, it may be asked, does a man contract for another when it depends on his own will whether he will give that other the benefit of the contract or not. To the next place, the rule which permits an undisclosed principal to sue and be sued on a contract to which he is not a party, though well settled, is itself an anomaly, and to extend it to the case of a person who accepts the benefit of an undisclosed intention of a party to the contract would, in my opinion, be adding another anomaly to the law, and not correcting an anomaly. The passages in the Digest cited by the lord justice are from DIGEST 111, tit. 5 "De negotiis gestis." If the whole of the title be read it does not appear to me to bear out the meaning placed upon it by the lord justice, and I can find no warrant for the gloss put by him on the words *meâ contemplatione* and *meo nomine*. I need not however, pursue this topic, because I believe that one of your Lordships will discuss it with a more complete knowledge of Roman law than I can command. I am, therefore, of opinion that the appeal should be allowed.

LORD JAMES OF HEREFORD. The facts in this case are not in dispute, and I do not purpose referring to them in detail. The grounds upon which I have arrived at the conclusion that the judgment of the Court of Appeal should be reversed can be shortly stated. Roberts, the so-called agent, entered into a contract with the respondent for the purchase of two quantities of wheat. When doing so he had no principal—he made the contract for himself alone. The cause of action in this case is founded upon the statement made by Roberts, that at the time he made the contract he had mentally formed the intention of offering to the appellants the option of ratifying the contract and becoming parties to it. But no notice of this intention was given to the respondent; he contracted with Roberts alone, and knew no one else. He knew of no disclosed principal other than Roberts, and there was no undisclosed principal—no such person existed. But the day after Roberts had made the contract for himself he met the agent for the appellants, who agreed to share the contract with Roberts. The question is: Does this latter agreement amount to a ratification of the contract between Roberts and the respondents? In my judgment, it does not. Common-sense and authority are alike opposed to it. Doubtless a person can confirm and ratify a contract which was in fact made on his behalf. But an undisclosed principal must exist at the time of the contract. He cannot be brought into life as a principal after the contract has been made without any recognition of his existence. No doubt a third person, by agreement with one of the principals, may as between those two persons take an interest in the contract, but that subsidiary contract does not create any privity between the third person and the other principal to the original contract. To establish that a man's thoughts, unexpressed and unrecorded, can form the basis of a contract so as to bind other persons, and make them liable on a contract they never made with persons they never heard of, seems a somewhat difficult task. Hitherto, a man's untold thoughts have been regarded to be of a merely nominal value, and the offers generally made

A for them certainly do not represent large sums of money. If the judgment of the majority of the Court of Appeal be right, these hidden thoughts may represent very large sums of money. An interesting academic discussion took place at the Bar for the purpose of discovering the effect of certain passages to be found in a portion of the Civil Law. Whatever the effect of these quotations from the Digest may be, they cannot do more than throw light upon the meaning of doubtful passages in our own law; and I cannot discover that there are doubts requiring solution in the law of this country affecting this case. A. L. SMITH, L.J., has in his judgment very laboriously and clearly traced the authorities bearing upon the subject of ratification. In *Sanderson v. Griffiths* (12), HOLROYD, J., I think, very correctly stated the following proposition (5 B. & C. at p. 915):

C "It was said, however, that A. at a subsequent time assented to the agreement and that such subsequent assent made it his agreement ab initio. There might have been weight in that argument if the agent when he made the agreement had professed to have authority to act for A., because then the subsequent ratification would have been a recognition of the authority which the agent professed to have when he made the agreement. But here A. never previously authorised the agent to make the agreement on his behalf nor is he named as a party for whom the latter proposed to act."

D This judgment, delivered more than seventy years ago, has been followed by many most eminent judges in the cases quoted by A. L. SMITH, L.J., in his judgment and placed before your Lordships by counsel at the Bar. Fully accepting the principles laid down by HOLROYD, J., I concur in the views already expressed by your Lordships that they should be applied to this case, and that, therefore, the judgment of the majority of the Court of Appeal is erroneous, and should be reversed.

E LORD BRAMPTON stated the facts and continued: I have carefully avoided all mention of or comment upon an entry made in Roberts's sale book dated May 11, but not made until the 12th, after the interview at Manchester, for, to my mind, it is clear that it could not be admitted as evidence against Keighleys; and, looking at the time and the circumstances under which it was made, I doubt if it could be used even to refresh the memory of Roberts.

F At the trial before DAY, J., it was contended on behalf of Keighleys that the only authority ever given, either by them or their manager Wright, was that which I have already mentioned, which Roberts was unable to carry out. This was not disputed. It was not suggested that in any of the several telegrams in which the contract was contained, or in any other way, Durant was made aware, or that Roberts ever hinted to him, that in making it he was acting by the authority or on behalf of an undisclosed principal. Had he so made it—though at that time no authority from Keighleys was in existence—Keighleys might have ratified and adopted it; and having done so both they and Durant would have been as responsible upon it, each to the other, as if Keighleys had been a party to it from the beginning; but, as this contract was clearly not so made, but was a simple written contract between Durant, the vendor, and Roberts, acting apparently for himself only, as vendee, it could not be so ratified by Keighleys, for there was no contract open for them to ratify, and it could not have been adopted by them, for after a contract has been finally concluded between two persons it cannot be altered so as to make a third person liable upon it. If this is desired, it must be done through the medium of a new contract. But it is said for the respondent that when Roberts made his contract he had within his mind an intention, though he never communicated or disclosed it to anybody, to make it on the joint account of Keighleys and himself, and that such secret intention was quite sufficient to empower Keighleys to ratify or adopt it. I cannot assent to this view. I have always been under the impression that a concurrence of intention was an essential element of a contract. Nobody can doubt that it is essential in making an agreement to ascertain who are then intended

to be made parties to it. It is impossible in construing a contract to give any weight to such a reserved intention as that suggested in this case. To do so would be to open wide a doorway to fraud and deception; and it would necessitate the addition of the doubtful sentence of thought-reading to the requirements of a mercantile education. I reject, therefore, the doctrine of mental reservation, and strip from the case the element of secret intention.

The case, then, is reduced to this—that there is a contract between Roberts and Durant simply, to which it was never avowedly contemplated that Keighleys should be parties. Neither Keighleys nor Durant could make Keighleys liable by adoption or ratification of a contract to which, when it was concluded, it was not in contemplation of themselves or Durant that they should or could be parties. This action, therefore, which is based on a contract to which Keighleys were not parties, must fail. I say nothing about any new contract which it was open for the parties or any of them to have made if they had so thought fit—a new contract between themselves. It may or may not be that some contract between Roberts and Keighleys might have been formulated out of the interview with Wright on May 12 at Manchester. I am now dealing only with the contract made on the 11th between Roberts and Durant, to which, in my opinion, the appellants (Keighleys) could not make themselves, or be made by Durant, parties. I will not detain your Lordships by again referring to the numerous cases cited at the Bar, nor to those so fully discussed by the Court of Appeal; in addition to these I desire only to refer to that of *Kelner v. Baxter* (13), decided by ERLE, C.J., and WILLIS and BYLES, JJ. I agree in the judgment of A. L. SMITH, L.J., in the Court of Appeal. It follows that, with all respect to the opinions expressed by the majority of that court, I cannot concur in their views. In my opinion, therefore, the judgment of the Court of Appeal should be reversed, the judgment of DAY, J., restored, and this appeal allowed with costs.

LORD ROBERTSON. After so much has been said in which I agree, I shall confine my observations to the briefest statement of my view of the case generally, and a few remarks on the inferences which have been drawn from certain texts of the Civil Law. With A. L. SMITH, L.J., and in his words, I hold that

“unless the contract made by the unauthorised agent purports or professes . . . to have been entered into on behalf of another . . . then that contract made by the unauthorised agent was not capable of being ratified by a stranger to it.”

To speak of the “purporting or professing” as in this were one condition, more or less, of ratification, seems to me to be rather an understatement. All are agreed that there must be some special relation between the ratifier and the contract other than and antecedent to his claiming the contract. To hold otherwise would be to admit extravagant results. It seems to me that the whole hypothesis of ratification is that the ultimate ratifier is already in appearance the contractor, and that by ratifying he holds as done for him what already bore, purported, or professed to be done for him. There is, as it seems to me, no room for ratification (unless all the world may ratify) until the credit of another than the agent has been pledged to the third party. Whether the unauthorised agent be marked out as an agent by what he says, or by what he writes, is, of course, a mere matter of circumstance and of evidence; but an agent he must be known to be, and as agent he must act. On the other hand, the only theory consistent with the respondent’s argument is that the essential condition is that the person making the contract did so in a state of mind which may more accurately be described as hope than intention that the person who *ex hypothesi* ultimately “ratified” would “ratify.” The difficulty of stating this theory, and the difficulty of working it, having regard to its basis being unexpressed and very likely half-formed expectations, are not, indeed, exclusive objections, but they challenge scrutiny of the supposed origin of the theory.

A This leads me to what COLLINS, L.J., has said about the Civil Law. It is remarkable that, the question in hand being the ratification of contracts, nothing that is cited from the Civil Law relates to contracts. The passage first and mainly relied on by COLLINS, L.J., relates to the exaction of a debt by a negotiorum gestor. I agree that in the text importance is attached to the contemplatio with which the negotiorum gestor had acted. But in order to ascertain the relevancy of this element it is necessary to grasp the thesis of the long discussion of which the passage cited is a mere episode. The question being discussed is in what cases shall a person interfering in the affairs of an absent man have an action (for reimbursement or the like) against that man. And one of the conditions of this purely equitable remedy (followed by the liberality of the later Roman law) is that the intervention shall have been really a friendly intervention in the interest of the absent dominus, and not a selfish intervention truly in the interest of the intervener himself or a third party. In that question the contemplatio is of essential relevancy, while the avowal of it is of no relevancy at all except as evidence. Accordingly, in the case of *Seius* the negotiorum gestor has his remedy, because, although it turns out that the true creditor of the man who was made to pay was some one else altogether, yet the intervention was motivated by regard to the interest of the other, who made it his own by ratifying. In this case, as throughout this part of the Digest, the argument is as to the relations between the negotiorum gestor and the absentee, not as to the relations between the negotiorum gestor and the third party, and there is, therefore, no occasion for any analysis of ratification. In the passage cited, the act ratified not having been a contract, there is not even (as I view it) an incidental elucidation of the present controversy; but it is difficult to suppose that the debtor paid except to a professed agent of the supposed dominus, and we know that as matter of practice a negotiorum gestor had to give security *ratam rem dominum habiturum*. The other texts from the Digest cited by COLLINS, L.J., relate to torts, and the juridical considerations which ought to determine liability or non-liability for a tort acceded to *ex post facto* by the person in whose interest it has been committed are not the same as those which apply to a man being introduced into a contract with a third party, although the word "ratification" and its Latin equivalents may with propriety be applied to describe his accession in the one case as well as in the other. But again I must add that I fail to find in any of those passages any discussion of the question now agitated or anything implying that the person injured did not know that the wrong was done in the service of the person who ultimately ratifies. On these grounds I must respectfully decline to hold that the Civil Law supports the judgment appealed against.

LORD LINDLEY.—I do not propose to trouble the House by stating the facts or by examining in detail the numerous authorities cited in the course of the argument. I propose to confine my observations to what appear to me to be the real difficulties in the case, and to the legal doctrines involved in it.

So much turns on the position of undisclosed principals that I will first say a few words about them. The explanation of the doctrine that an undisclosed principal can sue and be sued on a contract made in the name of another person with his authority is that the contract is in truth, although not in form, that of the undisclosed principal himself. Both the principal and the authority exist when the contract is made; and the person who makes it for him is only the instrument by which the principal acts. In allowing him to sue and be sued upon it, effect is given so far as he is concerned to what is true in fact, although that truth may not have been known to the other contracting party. At the same time, as a contract is constituted by the concurrence of two or more persons, and by their agreement to the same terms, there is an anomaly in holding one person bound to another of whom he knows nothing, and with whom he did not, in fact, intend to contract. But middlemen, through whom contracts are made, are common and useful in business transactions, and in the great mass of contracts it is a matter of indifference

to either party whether there is an undisclosed principal or not. If he exists it is, to any the least, extremely convenient that he should be able to sue and be sued as a principal, and he is only allowed to do so upon terms which exclude objection. The reasons upon which a real principal not disclosed can sue or be sued on a contract made on his behalf by an agent acting with his authority have no application to contracts made by one person for another, but without any authority from him. Some other reason must be found to permit a person to sue or be sued upon a contract not entered into by him through an agent or otherwise.

The principle relied on, and the only principle which by our law can be invoked with any chance of success, is that known as ratification, by which an approval of what has been done is sometimes treated as equivalent to a previous authority to do it. The mere statement of the general nature of what is meant by ratification shows that it rests on a fiction. Where a man acts with an authority conferred upon him, no fiction is introduced; but where a man acts without authority and an authority is imputed to him, a fiction is introduced, and care must be taken not to treat this fiction as fact. It is not necessary to write a treatise on the doctrine of ratification in order to dispose of this case. Historically that doctrine is no doubt derived from the Roman law, but it has been extended and developed in this country conformably to our own legal principles and to meet our own commercial necessities; and it is to our own decisions rather than to the Digest and commentaries upon it that English courts must look for guidance. It is well known that in matters of contract we pay far less attention judicially to unexpressed intentions than is paid to them in other countries which have followed the Roman law more closely than we have: see *Byrne v. Van Tienhoven* (14).

Roberts' evidence, on which the case turns, may be summed up by saying that it amounts to one or other of the two following statements—namely, first, that he intended to buy and did buy as a principal, hoping and expecting that Keighley, Maxsted & Co. would afterwards join him in his speculation; or, secondly, that he intended to buy and did buy on the joint account of himself and Keighley, Maxsted & Co. as principals, hoping and expecting that they would, when informed of what he had done, ratify the transaction. The first of these views of his evidence will not avail the respondent; for in this view Roberts's contract, not having been made for Keighley, Maxsted & Co. as possible principals, will not admit of ratification by them. The respondent's counsel did not contend that it would, and they did not press the first view in argument. The second view is not open to this objection, and ought to be left to a jury if there is any evidence that Roberts not only intended to buy, but did buy, on the joint account of himself and Keighley, Maxsted & Co. He swears that he did; so far as his intention is concerned, I will give him credit for what he says, but I am unable to discover any evidence of anything more. Had Keighley, Maxsted & Co. authorised Roberts to buy for them, there would have been a contract in fact, although Durant & Co. did not know of them and did not intend to sell to them. This is no doubt an anomaly, as already pointed out, but there is a reality behind it. To apply the same sort of reasoning to a different state of facts, from which the reality is absent, is to go further than any existing authority, and to extend a fiction further than is required by those necessities or conveniences of trade which led to its introduction. The doctrine of ratification as hitherto applied in this country to contracts has always, I believe, in fact given effect in substance to the real intentions of both contracting parties at the time of the contract, as shown by their language or conduct. It has never yet been extended to other cases. The decision appealed from extends it very materially, and I can find no warrant or necessity for the extension.

I have examined all the authorities referred to in the judgments of the Court of Appeal and those cited by counsel in this House, and with two apparent exceptions they are all, in my opinion, adverse to the plaintiff. One exception is the passage in *Bird v. Brown* (4), already commented on, which I did not clearly understand. The other apparent exception is *Soames v. Spencer* (5), which, when examined, does

not really help the respondent. There, one of two co-owners of oil sold the oil to the defendants. The buyers—that is, the defendants—apparently did not know that the oil did not wholly belong to the seller. When informed that there was a co-owner who objected to the bargain, the defendants insisted that he was bound by it, and he acquiesced in their view. Both parties treated the contract as if made between both owners as sellers and the buyers. Afterwards, when sued by both co-owners for not accepting the oil, the defendants—that is, the buyers—changed their tactics, and contended that there was no ratification, and no contract in writing to satisfy the Statute of Frauds. It is plain from the judgment of ABBOT, C.J., that the conduct of the defendants themselves removed any real difficulty as regards ratification which otherwise might have arisen. It may be that if one of several co-owners of a chattel sells it, without the authority of his co-owners, to a person who believes that he is dealing with the sole owner of the property sold, the transaction can be ratified by the undisclosed co-owners, and they can then sue or be sued on the contract as undisclosed principals. Their interest in the property may justify this view. In *Soames v. Spencer* (5) it was assumed, rather than decided, that ratification in such a case is possible and I am far from saying that it is not. The co-ownership shows that the seller, if acting honestly, must in fact have been acting for his co-owners, as well as for himself. His intention is supplemented by a fact which completes the proof of what is necessary. In the present case there is no co-ownership, which was the foundation of the decision in *Soames v. Spencer* (5), and consequently the decision, when carefully looked at, is not really an authority for the plaintiffs. That ratification, when it exists, is equivalent to a previous authority is true enough (subject to some exceptions which need not be referred to). But before the one expression can be substituted for the other, care must be taken that ratification is established. It was strongly contended that there was no reason why the doctrine of ratification should not apply to undisclosed principals in general, and that no one could be injured by it if it were so applied. I am not convinced of this. But in this case there is no evidence of the fact that at the time when Roberts made his contract, he was really acting as distinguished from intending to act for the defendants as possible principals, and the decision appealed from, if affirmed, would introduce a very dangerous doctrine. It would enable one person to make a contract between two others by creating a principal and saying what his own undisclosed intentions were, and these could not be tested. To return to the question whether there was any evidence proper to be left to the jury which would justify a verdict in favour of the respondent against Keighley, Maxsted & Co., I am of opinion that there was none. There was no evidence of any purchase by Roberts for Keighley, Maxsted & Co. as expected principals, except—first, what he says of his own intention; secondly, what he says about the telegram which he afterwards sent to Keighley, Maxsted & Co.; and thirdly, his own entry in his own book. Assuming all this to be admissible for any purpose, what Roberts intended was never disclosed to Durant & Co., and cannot be inferred from the nature of the transaction itself. His intention, therefore, cannot be allowed to affect the rights of the parties. What he afterwards did unknown to Durant & Co. cannot in any way affect their position. The appeal, therefore, in my opinion, ought to be allowed, with costs here and below.

Appeal allowed.

Solicitors: *Chester, Broome & Griffiths*, for *Holden, Sons & Hodgson*, Hull; *Thorowgood, Tabor & Harcastle*.

[*Reported by C. E. MALDEN, ESQ., Barrister-at-Law.*]

The judgment of **A. L. SMITH, L.J.**, referred to in the above case was delivered on Mar. 2, 1900, and is as follows :

The question in this case is whether a contract made by a principal with what I will call an unauthorized agent in the latter's name, and which contract does not

purport or profess to be made by the unauthorised agent on behalf of another excepting himself, and as regards which contract he has not when he made it assumed to be acting on behalf of anyone excepting himself, is capable of being ratified by a stranger if it be shown that the unauthorised agent had at the time he made the contract the undeclared intention in his own mind of making the contract for a person who had never authorised him to make it.

It was said by the learned counsel for the appellants that this question had never been decided, and that the law was that, if an unauthorised agent—that is, anyone—had in his own mind, when he entered into a contract with another, the undeclared intention of making it on behalf of himself and of some other person, or of some other person alone, that other person could ratify the act of the unauthorised agent and become as if he had been a party to the contract ab initio. It struck me, when I heard this proposition put forward by the appellants' counsel, that it was not in accord with my recollection of the law; for I thought it had been long ago well engrained into the law of England that a stranger in such circumstances could not ratify, and, having had my memory refreshed at great length by the cases upon the subject, I find that my recollection has not played me false. It will be seen hereafter that very learned judges over and over again have stated the law as regards ratification to be that, unless the contract made by the unauthorised agent purports or professes (which, in my judgment, is the same thing) to have been entered into on behalf of another, or the unauthorised agent, when he made the contract, assumed to be making it on behalf of another, then that contract made by the unauthorised agent was not capable of being ratified by a stranger to it; for, to be capable of being ratified, the contract must purport or profess to have been entered into by the unauthorised agent on behalf of another, or the agent must have assumed by what he did when he entered into the contract to have been acting on behalf of some person who afterwards proposed to ratify. I find that every learned judge who has dealt with the question during the last three-quarters of a century, at least, has affirmed the doctrine of ratification to be as above stated, with a most remarkable unanimity of opinion; and there is only one solitary instance to the contrary to be found in the books—namely, the judgment of COCKBURN, C.J., in *Matheson v. Kilburn* (11), which I will refer to hereafter, and in which LORD CAIRNS and BRETT, L.J., differed from the Lord Chief Justice and, in my opinion, decided the point now raised in this case adversely to the appellants.

Before I deal with this consensus of judicial opinion I would point out that the learned junior counsel for the appellants, in order to meet this undeniable difficulty in his way, with a courage which distinguishes him, roundly asserted that what was to be found in the books stated by the judges were mere obiter dicta, and should be discarded as worthless, and were no decisions on the subject. This struck me as remarkable; but I find that my brothers COLLINS and ROMER are of opinion that the doctrine of ratification has never yet been decided, and they think that it is, therefore, necessary to begin ab ovo, and go back to the Roman law and other ancient works to try and ascertain what is or ought to be the law upon the subject; and to see whether what all the learned judges (with the one exception) have been saying throughout the last century is correct or not. The point argued is that it is an anomaly that the law relating to contracts entered into by an unauthorised agent without any principal behind him, should not be the same as that relating to contracts entered into by an authorised agent with an undisclosed principal behind him, and it is said that according to first principles the law should be the same as regards each. In my opinion, as I will try to point out, it is far too late to deal with this case upon such considerations, and indeed it seems to me, if it were not so, that the law relating to authorised agents with undisclosed principals behind, is far more anomalous than that relating to unauthorised agents with no principals behind; and why, therefore, the law should be held to be the same in each case does not appear to me to be of weight; and why the law applicable to an unauthorised agent should be levelled down to that of an authorised agent I do not see. In 187

A judgment, to call the phalanx of judicial authority to which I must necessarily refer mere dicta is a misnomer altogether; and I must point out that, with the exception of COCKBURN, C.J., the appellants cannot produce a single decision or even a dictum of a single judge in opposition to what they now call mere dicta, and which are all adverse to the appellants' contention.

I will now state how the present case arises. F. O. Roberts, one of the defendants, by contracts in writing in the months of April and May, 1898, purchased certain wheat of the plaintiffs. The only material part of the contracts as regards the point in hand is this: "Bought of Messrs. Durant & Co., London, . . . for F. O. Roberts, Esq., Wakefield, five hundred tons of wheat. (Signed) Barlett and Newing, Brokers." This contract, it will be noticed, is made solely in the name of Roberts, so far as the buyer is concerned, and gives no intimation that it is made on any other person's behalf (which in fact it was not), nor did Roberts or the brokers assume that he or they were acting on any person's behalf, excepting that of Roberts, when the contracts were made. Roberts having failed to take the wheat purchased by him, the plaintiffs Durant & Co. thereupon sued him and also the firm of Keighley, Maxsted & Co. for damages for breach of these contracts. Roberts, who had become bankrupt, let judgment go by default, and the question is, Can the plaintiffs now make Keighley, Maxsted & Co. liable upon these contracts? It is admitted that Roberts had no authority whatever to enter into these contracts on behalf of Keighley, Maxsted & Co. He had no principal behind him whatever. Roberts says that in his own mind he intended, when he entered into the contracts, that they should be on joint account of himself and Keighley, Maxsted & Co.; in other words, he expected and hoped that Keighley, Maxsted & Co. would join him in the contracts after he had made them, as he in fact did, in his own name and on his own account. To raise the point of law which has been argued before us, I will take it that Roberts is to be believed when he states what he expected and hoped Keighley, Maxsted & Co. would do after he (Roberts) had entered into the contracts with the plaintiffs—that is, to be a joint venture in the wheat speculation; and there is evidence fit to be left to a jury that Keighley, Maxsted & Co. did afterwards decide to do so. The question argued before us is this: In these circumstances, are the contracts made by Roberts, not professing or purporting to be made for anyone excepting himself, capable of being what is called ratified by Keighley, Maxsted & Co., so as to make them parties to the contracts made by Roberts—in which case the plaintiffs Durant & Co. can sue Keighley, Maxsted & Co. upon those contracts, and they could sue Durant & Co. upon them?

To see how the law stands as to this, I will first take *Saunderson v. Griffiths* (1826), 5 B. & C. 909, decided over seventy years ago, in the remarkable sequence of authority to which I am now coming. There the question arose whether A., who was no party to the contract sued on, could take advantage of and sue upon the contract. The doctrine of ratification was resorted to on his behalf. The contract sued on purported to be made by an agent on behalf of B. and C., not of A. HOLROYD, J., when dealing with the doctrine of ratification, said (5 B. & C. at p. 915):

"It was said, however, that he [A.], at a subsequent time assented to that agreement, and that such subsequent assent made it his agreement ab initio. There might have been weight in that argument if the agent at the time when he made the agreement had professed to have authority to act for the husband [A.] because then the subsequent ratification would have been a recognition of the authority which the agent assumed to have when he made the agreement. But here the husband [A.] never previously authorised the agent to make the agreement on his behalf, nor is he named as a party for whom the latter professed to act."

It is said that this case is not in point; but I do not agree, for it shows that HOLROYD, J., when dealing with ratification, distinctly says that the argument as to ratification would have had weight if the agent had professed to act for A. at the

time he made the contract. In my judgment, a man keeping his intention locked up in his own mind is not "professing" to act for another when he makes the contract; and to hold otherwise would not, I think, be in accord with plain language. Many years afterwards, in *Bohlfelt v. Pinkett* (1870), 1 E.R. 676, 678; *Swinnerton v. B.*, expressly recognised what HOLROYD, J., had said in *Hamden v. Griffiths*, saying:

"Suppose B., professing to act as A.'s agent, but in fact not authorised, enters into a contract with C., would not A., by subsequently ratifying B.'s act, be entitled to sue C. on the contract in his own name?"

This is a dictum, but the learned Baron fully recognises the judgment of HOLROYD, J., which I think was no dictum at all; and again he lays stress upon the phrase "professing to act." In the year 1829, in *Fere v. Ashby* (10 B. & C. at p. 288), PARKE, J., states the rule as to ratification thus. He says:

"The rule as to ratification applies only to the acts of one who professes to act as the agent of a person who afterwards ratifies. Here Rowland, at the time when the first bill was discounted, did not profess to act as the agent of SNOW."

I have already said what I think is the meaning of the word "profess." It does not describe an undisclosed intention locked up in a man's own mind. The junior counsel for the appellants may call this a dictum if he likes. In my judgment, it is the deliberate declaration of a most learned judge as to what is the rule of ratification according to the law of England, and, as will be seen hereafter, is repeated by the learned judge, when LORD WENSLYDALE, in the House of Lords. In *Wilson v. Tumman* (1843), 6 M. & G. 236 the question arose whether the defendant was liable for a seizure of the plaintiff's goods by the sheriff, and it was argued that, although the defendant had given no precedent authority to the sheriff to take the plaintiff's goods, yet he had ratified the taking after it was made. The sheriff when he took the plaintiff's goods did not purport to do so on behalf of TUMMAN. TINDAL, C.J., in delivering the unanimous judgment of the Court of Common Pleas, said (*ibid.* at p. 242):

"The question, therefore, is a dry question of law, whether the subsequent ratification by this defendant of a taking under such circumstances, is the same in its consequences as a precedent command of the defendant. And we think, under the authorities, and upon the reason of the thing itself, that it is not. That an act done for another by a person, not assuming to act for himself but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract."

The Lord Chief Justice then cites the YEAR BOOK, 7 Hen. 4, fo. 25; GODDARD'S REPORTS, 109, and he adds: "They"—the sheriff's officers—"did not assume to act at the time as agents or bailiffs of the then plaintiff TUMMAN"; and the court, therefore, held the defendant not liable. The junior counsel for the appellants calls this a mere dictum of the Court of Common Pleas. He may say so, but I do not agree with him. Moreover, twenty years afterwards, in the year 1862, in *Woollee v. Wright* (1 H. & C. 554) in the Exchequer Chamber, consisting of WIGHTMAN, WILLIAMS, CROMPTON, WILLIS, BYLES, and BLACKBURN, JJ., WIGHTMAN, J., delivering the unanimous judgment of the Exchequer Chamber, expressly approves of the decision in *Wilson v. Tumman* (6 M. & G. 236) and stated that "It has not been disputed until the present case." In the year 1850, ROBERT, B., when delivering the unanimous judgment of the Court of Exchequer in *Bird v. Brown* (1850), 4 Exch. 786 has again dealt with the doctrine of ratification. He says (*ibid.* at pp. 798, 799):

"The doctrine *Omnis ratihabitio retrotrahitur et mandato equiparatur* is intelligible in principle, and easy in its application, when applied to cases of

A contract. If A. B., unauthorised by me, makes a contract on my behalf with J. S., which I afterwards recognise and adopt, there is no difficulty in dealing with it as having been originally made by my authority. J. S. entered into the contract on the understanding that he was dealing with me, and when I afterwards agreed to admit that such was the case, J. S. is precisely in the condition in which he meant to be. . . . In cases of tort there is more difficulty. If A. B., professing to act by my authority, does that which, *prima facie*, amounts to a trespass, and I afterwards assent to and adopt his act . . . so far there is no difficulty in applying the doctrine of ratification even in cases of tort. . . . But the authorities go much further, and show that in some cases where an act which, if unauthorised, would amount to a trespass has been done in the name and on behalf of another, but without previous authority, the subsequent ratification may enable the party on whose behalf the act was done to take advantage of it, and to treat it as having been done by his direction."

In the year 1857 LORD WENSLEYDALE, in the House of Lords, in *Ridgway v. Wharton* (6 H.L. Cas. at p. 296) said: "If a man professing to act for another makes a contract for him, and authority is afterwards given by that other," there is effectual ratification. Here I find PARKE, J., when LORD WENSLEYDALE, reiterating in the House of Lords what he had declared eight and twenty years before (1829) to be the rule as to ratification in *Vere v. Ashby* (10 B. & C. 288). Again, in 1862, in *Watson v. Swann* (11 C.B.N.S. 756) which was an action upon a policy of insurance entered into by John Smith in his own name, ERLE, C.J., and WILLES, J., both deal with ratification as follows: The Chief Justice says:

"It is clear law that no one can sue upon a contract unless it has been made by him, or has been made by an agent professing to act for him, and whose act has been ratified by him. [There was no question in this case nor in the present of an authorised agent acting for an undisclosed principal]. Now, here the contract was not made by the plaintiff, nor did it purport to be made on his behalf; it purported to be made by Smith on his own behalf."

And WILLES, J., says the contract must clearly show

"that he himself made it [that is, the person suing upon it] or that it was made on his behalf by an agent authorised to act for him at the time, or whose act has been subsequently ratified and adopted by him. . . . It is not necessary that he should be named; but there must be such a description of him as shall amount to a reasonable designation of the person intended to be bound by the contract."

In the same year (1862), in *Ancona v. Marks* (7 H. & N. 686) and apparently before the judgment in *Woollen v. Wright* (1 H. & C. 554) had been delivered, WILDE, B., adopts and distinctly approves of *Wilson v. Tumman* (6 M. & G. 236), and MARTIN, B., in his judgment does the same, and adds: "In the note to *Armory v. Delamirie* (Hil. 8 Geo. 1) in SMITH'S LEADING CASES (1 Sm. L.C., 10th Edn., 357; 1 Str. 505) there occurs the following passage:

"And on similar reasoning seems to rest the well-known doctrine that a subsequent ratification is tantamount to a prior command of an act done in the name of the party who ratifies' . . . the doctrine is too well established."

In 1868 BLACKBURN, J., in *Lord v. Lee* (L.R. 3 Q.B. at p. 407), when dealing with a question involving that of ratification, is in line with all those who had preceded him upon this point. The learned judge says:

"Now, it is also a principle of the common law that whenever an act is done by a person professing to act for another, though in reality he had no authority at the time . . . the ratification of that other had the same effect as if the authority had been originally conferred, so as even to affect the vested rights of third

... It was argued for the defendant that such an enlargement of time amounted only to the making of a fresh submission; but that is not so, the act having been done under the professed authority of the previous submission."

Are all the above dicta? I cannot think so, for indeed they are not. In 1875, in *Matheson v. Kilburn* (11 Am.L.C., 10th Edn., 349), the point now taken was expressly raised, and, as it seems to me, determined by LORD CAIRNS and BRETT, L.J., dissents COCKBURN, C.J. In that case a person intending to buy on behalf of another, but without authority and without avowing that he was acting for another, bought goods in his own name. LORD CAIRNS and BRETT, L.J., were of opinion that a contract so made was incapable of ratification by the person for whom the buyer intended to buy, as the latter did not assume to buy on behalf of another. I know that COCKBURN, C.J., dissented, but can anything be clearer than what the majority—LORD CAIRNS and BRETT, L.J.—hold to be the law? It is said this is a dictum. This case is, I believe, only reported in SMITH'S LEADING CASES (10th Edn., vol. I, at p. 349). The last case which I will cite—and I have cited, in my opinion, ample—is *Falcke v. Scottish Imperial Insurance Co.* (34 Ch.D. 234). In that case BOWEN, L.J., states clearly what I believe the law to be, and what in my opinion is shown by the cases I have had to cite at such length to be the law. The very learned lord justice says (34 Ch.D. at p. 249):

"There is nothing more vague than the way in which the word 'adoption' is used in arguments at law, and sometimes ambiguous language used about adoption is imported into arguments about ratification. There is no such thing in law as adopting or ratifying anything except where there is the sanctioning of an act professedly done on your behalf in such a sense as to make you liable for it. A man can ratify that which purports to be done for him . . . There have been many attempts to make people liable by what is called adoption of a contract, or of some other act, which never purported to be made or done on their behalf, and such attempts have failed."

It will be seen that every one of the learned judges whose judgments I have cited from, when dealing with the question of ratification, have always used the following expressions as to when a contract made by an unauthorised agent is capable of being ratified by a stranger. The contract must (i) have "professed" to have been made on behalf of another; (ii) have "purported" to have been made on behalf of another; (iii) have been made on behalf of another; (iv) have been made in the name of another; or (v) the agent must have "assumed to act on behalf of another"; every one of which expressions, in my judgment, is wholly inconsistent with an unauthorised agent keeping locked up in his own mind a more undisclosed intention that another shall afterwards participate in the contract.

It is not necessary, I think, to go through the textbooks, in which, as far as I have gone, I have found nothing inconsistent with what I believe to be the law as regards this doctrine of ratification. But I will cite two—the one in STORY ON AGENCY, s. 251a, where it is laid down "that a ratification can only be effectual between the parties when the act is done by the agent avowedly for and on account of the principal"; and the other, KENT'S COMMENTARIES, vol. 2, p. 616, note 1, "Ratification," where he states: "A person cannot ratify acts done without his authority unless they were done for him by a person assuming to act as his agent," and for this he cites *Wilson v. Tummen* (6 M. & G. 236) and *Walton v. Swales* (11 C.B.N.S. 756), each of which is now said to be mere dicta. The appellants, in my judgment, as I have before said, are unable to produce a single authority during the last two or three hundred years, even if they can produce one before, which I doubt—excepting the judgment of COCKBURN, C.J., dissented from by LORD CAIRNS and BRETT, L.J.—in support of the proposition they have avoweded for. They do produce *Sumes v. Spence* (1 Dow. & Ry. 32), in which it does not appear what was

A the form of contract sued on, and they also seize upon an expression of PARKE, B., as reported in *Foster v. Bates* (12 H. & W. at p. 287), which is inconsistent with what I have cited of that learned judge, both as PARKE, J., and LORD WENSLEYDALE; and it appears from the contemporaneous reports of the case (Dow. & L., p. 404; 13 L.J.Ex., p. 90; and 7 Jur., p. 1093) that the expression is not accurately reported in MEESON AND WELSBY, for a serious omission has therein been made, and which expression, when the accurate report is read, is not in the appellants' favour. In my judgment, upon this doctrine of ratification the law has been settled for years. If I were to accede to the appellants' contention, I should have to differ and disagree (i) with LORD WENSLEYDALE in the House of Lords; (ii) with the Exchequer Chamber—which I could not do even if I had desired to do so, which I do not; (iii) with the Court of Appeal, consisting of LORD CAIRNS, COCKBURN, C.J., and BRETT, L.J. (presided over by LORD CAIRNS) to which the same remark applies; (iv) with the full Court of Common Pleas, presided over by TINDAL, C.J.; (v) with the full Court of Exchequer, presided over by ROLFE, B., and then with PARKE, B., before he went to the House of Lords, HOLROYD, J., ERLE, C.J., WILLES and BLACKBURN, JJ., WILDE, MARTIN, and AMPHLETT, BB., and last, but not least, BOWEN, L.J.

D With all submission to my learned brothers who disagree with me, I think, even if I had the courage to try to differ with all these very learned judges, which I have not, it not only would be useless, but it would be most mischievous at this date to try to overturn what for years has been laid down as law by these most eminent judges without a single discordant voice, with the exception of COCKBURN, C.J.'s, and in my judgment, for the reasons above, this appeal must be dismissed. As my brothers, however, disagree with me, the action must go down for a new trial.

R. v. GRAY

[QUEEN'S BENCH DIVISION (Lord Russell of Killowen, C.J., Grantham and Phillimore, JJ.), May 27, 28, 1900]

[Reported [1900] 2 Q.B. 36; 69 L.J.Q.B. 502; 82 L.T. 534; 64 J.P. 484; 48 W.R. 474; 16 T.L.R. 305; 44 Sol. Jo. 362]

H *Contempt of Court—Scandalous attack on judge—Liability of judges to criticism—Extent of liberty of the Press—No greater than that of every subject.*

Any act done or writing published which is calculated to bring the court or a judge of the court into contempt or to lessen his authority is a contempt of court, characterised by LORD HARDWICKE as "scandalising the court itself."

I At the same time judges and courts are open to criticism if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good. No court could treat that as contempt, and the courts should not be astute adversely to criticise what is stated in such cases and with such an object, but it is to be remembered that in this matter the liberty of the Press is no greater and no less than the liberty of every subject of the Queen.

Contempt of Court—Summary process—Exercise with scrupulous care—Clear case.

The jurisdiction of the court to deal summarily with a contempt by attachment or commitment is as old as the common law, but it should be exercised with

scrupulous care and only where the case is clear beyond reasonable doubt. If there is any reasonable doubt, the court should leave the Attorney-General to proceed by criminal information.

Notes. Applied: *R. v. New Shaleman, Ex parte D.P.P.* (1928), 44 T.L.R. 301. Referred to: *R. v. Tibbitts*, (1902) 1 K.B. 77; *Leath North Devonian Case* (1911), 6 O.M. & H. 103; *Scott v. Scott*, [1911] 13 All E.R. Rep. 1; *Forbes v. A.O.* (1910) *Trinidad and Tobago*, [1936] 1 All E.R. 704.

As to punishment for contempt of court and attacks on judges, see 8 HARRISON'S LAWS (3rd Edn.) 3-7, or for cases see 16 DIGEST (Repl.) 18, 22, 57.

Cases referred to :

- (1) *Re Read and Haggenson* (1742), 2 Atl. 469; 26 L.R. 683; sub nom. *Feather v. Garvan*, Dick. 794, L.C.; 16 Digest (Repl.) 6, 1.
- (2) *R. v. Almon* (1765), Wilm. 243; 97 E.R. 94; 16 Digest (Repl.) 6, 2.

Also referred to in argument :

Skipworth's Case (1873), L.R. 9 Q.B. 230; 28 L.T. 227; sub nom. *R. v. Skipworth*, *R. v. Castro*, 12 Cox, C.C. 371; 37 J.P. Jo. 85, D.C.; 16 Digest (Repl.) 23, 171.

Rule Nisi for a writ of attachment directed to Howard Alexander Gray calling on him to show cause why he should not be committed for contempt of court.

At the Birmingham Spring Assizes on Mar. 15, 1900, a man named Wells was to be tried for publishing an obscene libel. DARLING, J., was the presiding judge in the Crown Court, and before the case was opened he made the following statement :

"Before this case of Wells is gone into, I wish to say a word for the benefit of the Press. This is a case which, whatever may be the rights of it, is bound to involve the giving in evidence or the discussion of matters which it would be wholly inexpedient to have published in anything like detail. The basis of this prosecution is that things were said which (whether they ought to be said in certain places, or at all, is another matter) are not things that ought to be published to all and sundry, such as newspaper readers. I wish to say this because I feel that any well-conducted newspaper represented in this court today will not give anything like a full or detailed account of what may pass in the hearing of the case. I say that because I hope and believe my saying so will be sufficient. However, I will say this one word in case any newspaper should be inclined not to act upon the advice I now give them, and it is this: Although a newspaper has the right to publish accounts of proceedings in a law court, and although for many purposes they are protected in doing so, there is absolutely no protection to a newspaper for the publishing of objectionable, indecent, and obscene matter, and any newspaper which does so may be as easily prosecuted as anybody else, and if I find my advice disregarded I shall make it my business to see that the law is in that respect enforced."

On the same day Wells was convicted and sentenced. While the Birmingham Assizes were still going on and DARLING, J., was still sitting as one of Her Majesty's judges of assize, Gray wrote and published in the "Birmingham Daily Argus" dated Mar. 16 an article, headed "A Defender of Decency," as follows :

"Mr. Justice DARLING, having so few prisoners to try in Birmingham, and feeling the inspiration strong upon him to be a terror to evil-doers, filled in a pleasant five minutes yesterday by 'giving fits' to the reporters. If anyone can imagine Little Tich upholding his dignity upon a point of honour in a public house, he has a very fair conception of what Mr. Justice DARLING looked like in warning the Press against the printing of indecent evidence. His diminutive Lordship positively glowed with judicial self-consciousness. He was determined

there should be no reporting of improper details in the case before him. He felt himself bearing on his shoulders the whole fabric of public decency. Under the evident impression that newspapers were always on the prowl for unseemliness, he warned their representatives against giving a full report of what was about to transpire in their hearing. He hoped his words would be sufficient, but, if not, he warned them of the penalties which he should make it his business to enforce in the event of disobedience. The terrors of Mr. Justice DARLING will not trouble the Birmingham reporters very much. No newspaper can exist except upon its merits, a condition from which the Bench, happily for Mr. Justice DARLING, is exempt. There is not a journalist in Birmingham who has anything to learn from the impudent little man in horse-hair, a microcosm of deceit and empty-headedness, who admonished the Press yesterday. It is not the credit of journalism, but of the English Bench, that is imperilled in a speech like Mr. Justice DARLING'S. One is almost sorry that the Lord Chancellor had not another relative to provide for on the day that he selected a new judge from among the larrikins of the law. One of Mr. Justice DARLING'S biographers states that 'an eccentric relative left him much money.' That misguided testator spoiled a successful bus conductor. Mr. Justice DARLING would do well to master the duties of his own profession before undertaking the regulation of another. There is a batch of quarter sessions prisoners awaiting trial, who should have been dealt with at this assize. A judge who applies himself to the work lying to his hand has no time to search the newspapers for indecencies."

The Attorney-General (Sir Richard Webster, Q.C.) (H. Sutton with him) for the Director of Public Prosecutions.

Hugo Young, Q.C. (Gilbertstone Tangye with him) for the defendant.

The judgment of the court was delivered by

LORD RUSSELL OF KILLOWEN, C.J.—One Wells was indicted at the Birmingham Assizes for certain indecent publications. The case came to be tried before DARLING, J., sitting under the Queen's Commission of Oyer and Terminer at Birmingham, and before the trial the learned judge thought it right to call public attention to the nature of the trial and to the character of the evidence which would be necessarily brought forward, evidence of various indecent matters very undesirable from every point of view for publication. The learned judge thought it right to warn all concerned, including the Press at Birmingham, against the publication of any of those indecent details, taking care at the same time that his observations should not in any sense prejudge the matter to be tried, because he was careful to point out that, although necessarily indecent matter was to be put in evidence, it did not follow that the publication of it under the circumstances in the actual case necessarily constituted a criminal offence. The learned judge proceeded, after giving this warning, to point out the means existing in point of law for the punishment of persons who did publish any of the indecent matter which probably might be given in evidence. I do not think for one single instant that the learned judge meant at all thereby to insult the Press of Birmingham. His warning may have been unnecessary; he may not have been aware of the fact, which evidenced the good sense and the propriety of conduct of that Press, that there was no publication of indecent details in the reports during the preliminary proceedings before the magistrates, and before the defendant was committed for trial. I think the probability is that he had in his mind the popular, but erroneous, impression that there was impunity for the publication of any matter that transpired in a court of justice. That having taken place upon Mar. 15, on the evening of the next day, and after the trial of the man Wells had taken place resulting in his conviction, the article in question was published. It was read in extenso yesterday by the Attorney-General, and I do not propose to read it again. Of its character there can be no question.

and no one has described it in stronger language of condemnation than Howard Alexander Gray himself in the affidavit to which I shall presently allude. It is not too much to say that it is an article of scurrilous abuse of the judge in his character of judge; scurrilous abuse in reference to his conduct when sitting under the Queen's Commission, and scurrilous abuse published in the town in which he was still sitting in discharge of the Queen's Commission. It cannot be denied, and indeed it has not been doubted or argued to the contrary by the learned counsel who represented the defendant, that it does constitute a contempt of court, but as these applications are happily of an unusual character, we have thought it right to explain a little more fully than is perhaps necessary what does constitute a contempt of court, and what are the means which the law has placed at the disposal of the judiciary for checking and punishing contempt of court.

Any act done or writing published, calculated to bring the court or a judge of the court into contempt or to lessen his authority, is a contempt of court. That is one class of contempt. Another class is any act done, or writing published, calculated to obstruct or interfere with the due course of justice, or the lawful process of the court. That is another class of contempt. The former class belongs to that category which Lord HARDWICKE characterised as "scandalising the court itself": *Re Read and Haggenson* (1), 2 Atk. at p. 471; but that description of that class is to be taken subject to one qualification—and an important qualification. Judges and courts are alike open to criticism if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good. No court could or would treat that as contempt, and the courts would not be, and ought not to be, a-stute to criticise adversely what in such cases, and with such an object, is stated; but it is to be remembered that in this matter the liberty of the Press is no greater and no less than the liberty of every subject of the Queen. No one would, I think, suggest, and, as I have already mentioned, it has not been suggested, that this is not a contempt of court, and that it does not fall—and nobody has suggested that it does fall—within the right of public criticism in the sense that I have described. I repeat that it is personal scurrilous abuse of the judge as a judge.

We have, therefore, to deal with it as a case of contempt, and we have to deal with it *brevi manu*. This is not a new-fangled jurisdiction; it is a jurisdiction as old as the common law itself, of which it forms part—a jurisdiction, the history, the purpose, and the extent of which are admirably treated in the opinion of WILMET, C.J., when a justice of the Queen's Bench, in *R. v. Almon* (2), given in his *OPINIONS AND JUDGMENTS*, at p. 243. It is a jurisdiction, however, to be exercised with scrupulous care; to be exercised only where the case is clear beyond reasonable doubt. If a case is not clear beyond reasonable doubt the court ought to and will leave the Attorney-General to proceed by criminal information. How, then, are we to deal with this matter? That it is a serious case no one can doubt, and I do not hesitate to say, speaking for myself and for my brethren, that if it had not been for the conduct of the defendant since the publication, and especially if it had not been for the affidavit which he has put before the court for its consideration, we all think that it would have been our duty to have sent Howard Alexander Gray to prison for a not inconsiderable period of time. But he has come forward and frankly acknowledged his own individual and sole responsibility in the matter. He has done more; he has in his affidavit, we hope and we believe sincerely, expressed his regret for what he has done. In that affidavit he makes reference to the fact that other publications and other newspapers in Birmingham had made comments upon the conduct of the learned judge in question. I have to make but this observation in that regard. So far as they have been all adverted to, they were obviously comments of a very different character. They are not before us, and we must assume that they are not before us because the Attorney-General in his discretion did not think that they were sufficiently serious to be called to the attention of the court in order that the punitive jurisdiction of the court should be exercised in regard to those responsible for their publication. After referring to this matter,

A the defendant, in his affidavit, says that he wrote the article under a strong feeling that the learned judge had not in effect shown sufficient confidence in the judgment and good taste and discretion of the Press in Birmingham, and he then proceeds:

B "That was the only motive present to my mind in writing the article, and I wrote it on the impulse of the moment. In doing so, I used language referring to Mr. Justice DARLING in terms which were intemperate, improper, ungentlemanly, and void of the respect due to his Lordship's person and office. The expressions applied to Mr. Justice DARLING were not deliberately intended to bring discredit upon his Lordship, but were the outcome of my strong feelings. I know they cannot be justified, and I do not seek to justify them. I am entirely responsible for the article and for everything which it contains. I deeply regret the publication of the article and the inexcusable and insulting language in which it referred to one of Her Majesty's judges, and I humbly apologise to his Lordship and to the court for my conduct, which I now upon consideration see reflected not only upon the individual judge, but upon the Bench of judges and the administration of justice, and I submit myself to the merciful consideration of the court."

D Howard Alexander Gray, the judgment of the court is that you be fined £100 and ordered to pay a further sum of £25 for costs, and that you be detained and, if necessary, lodged in Holloway Gaol until these sums be paid.

Order accordingly.

E Solicitors: Solicitor to the Treasury; Pepper, Tangye & Co., for Pepper, Tangye & Winterton, Birmingham.

[Reported by W. W. ORR, Esq., Barrister-at-Law.]

IN THE GOODS OF HISCOCK

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Francis Jeune, P.), December 3, 1900]

[Reported [1901] P. 78; 70 L.J.P. 22; 84 L.T. 61; 17 T.L.R. 110]

Will—Soldier's will—“Actual military service”—Acts in obedience to orders—Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 11.

By s. 11, of the Wills Act, 1837, it is provided: “Provided always, and be it further enacted that any soldier being in actual military service . . . may dispose of his personal estate as he might have done before the making of this Act.”

As soon as a soldier has done something under his orders, actual military service has commenced within the meaning of the section.

Per SIR FRANCIS JEUNE, P.: “It would be going too far to say that he was in actual military service as soon as he had received his orders.”

Notes. Applied: *Guthward v. Kuce*, [1902] p. 99. Considered: *Re Wernher, Wernher v. Beit*, [1918] 1 Ch. 339; *In the Estate of Grey*, [1922] All E.R. Rep. 124; *Re Booth, Booth v. Booth*, [1926] All E.R. Rep. 594. Referred to: *In the Estate of Stanley*, [1916-17] All E.R. Rep. 352; *In the Estate of Gossage, Wood v. Gossage*, [1921] All E.R. Rep. 107; *In the Goods of Newland*, [1952] 1 All E.R. 841.

As to privileged wills by members of the Royal Forces, see 16 HALSBURY'S LAWS (3rd Edn.) 176 et seq.; and for cases, see 30 DICTY 632 et seq. For the Wills Act, 1837, see 26 HALSBURY'S STATUTES (2nd Edn.) 1326.

Cases referred to:

- (1) *Drummond v. Parish* (1843), 3 Curt. 522; 2 Notes of Cases, 318; 1 L.T.O. 207; 7 Jur. 538; 163 E.R. 812; 39 Digest 333, 195.
- (2) *Bowles v. Jackson* (1854), 1 Ecc. & Ad. 294; 164 L.R. 170; 39 Digest 334, 201.

Motion on behalf of George Hiscock to prove the will of his son, Percy Joseph Hiscock.

According to an affidavit of Captain Gibbings, the deceased, who was twenty years of age, was a member of the 2nd Volunteer Battalion Royal Sussex Regiment. Early in 1900 he volunteered for active service in South Africa. On Feb. 3 he was medically examined at Chichester and accepted. On Feb. 12 he went into barracks along with other volunteers in accordance with orders. On Mar. 2 he received the order for embarkation, and on Mar. 10 he sailed from Southampton for South Africa. With the exception of one or two short intervals of leave, he resided in barracks from Feb. 19 until he left England. The will, which it was now sought to prove, was made on Mar. 8. He died on July 27 at Vaal Krantz, from wounds received at Retief's Nek.

Wills for the motion.

SIR FRANCIS JEUNE, P.—I have had the opportunity of discussing these matters with high military authorities, and I am of opinion that the principle of law to be applied is perfectly clear. The words of s. 11 are:

“Provided always, and be it further enacted that any soldier being in actual military service . . . may dispose of his personal estate as he might have done before the making of this Act.”

The principle here involved is not identical with that of the Roman law. In *Drummond v. Parish* (1) the learned judge arrived at the conclusion that the principle of the exception was borrowed from the civil law, and that probate could only be granted of the will of a soldier as a military will, if it was made while he was engaged on a military expedition. The argument should be put in the broadest way, and I am of opinion that for a man to be “in actual military service,” it is necessary, first, that there should be a state of war in existence; and, secondly, that the man should be for that purpose in some place where otherwise he would not have been. It would be going too far to say that he was in actual military service as soon as he had received his orders. But as soon as he had done anything under those orders, actual military service might be said to have commenced. That is the test which commends itself to me. In holding thus I am only following *Bowles v. Jackson* (2), where the real question raised was whether the soldier had taken any step in consequence of his orders. As soon as the first step has been taken, although the step may be a small one, a man is in actual military service. Therefore probate of the will in this case will be granted.

Solicitors: *Preston, Stow, & Preston.*

[Reported by J. A. SLATER, Esq., Barrister-at-Law.]

BYNOE v. BANK OF ENGLAND AND ANOTHER

[COURT OF APPEAL (Sir Richard Henn Collins, M.R., Romer and Mathew, L.JJ.),
January 29, 31, 1902]

Reported [1902] 1 K.B. 467; 71 L.J.K.B. 208; 86 L.T. 140; 50 W.R. 359;
18 T.L.R. 276]

Criminal Law—Evidence—Witness—Protection—False evidence—Liability of witness to action by defendant while conviction still standing.

So long as the conviction of a crime stands unreversed the person convicted cannot bring an action alleging he had been wrongfully convicted because the defendant had falsely and negligently given false evidence and had acted in breach of duty.

Notes. Applied: *Turley v. Daw* (1906), 94 L.T. 216. Considered: *Norman v. Mathews* (1916), 85 L.J.K.B. 857.

Cases referred to:

- (1) *Duchess of Kingston's Case* (1776), 1 East, P.C. 468; 1 Leach, 146; 20 State Tr. 355; 2 Smith, L.C. (12th Edn.) 754; 21 Digest (Repl.) 225, 225.
- (2) *Basibé v. Matthews* (1867), L.R. 2 C.P. 684; 36 L.J.M.C. 93; 16 L.T. 417; 31 J.P. 391; 15 W.R. 839; 33 Digest 482, 179.
- (3) *Vanderbergh v. Blake* (1662), Hard. 194; 145 E.R. 447; 21 Digest (Repl.) 202, 45.
- (4) *Castrique v. Behrens* (1861), 3 E. & E. 709; 30 L.J.Q.B. 163; 4 L.T. 52; 7 Jur.N.S. 1028; 1 Mar.L.C. 45; 121 E.R. 608; 33 Digest 480, 151.
- (5) *Cotterell v. Jones* (1851), 11 C.B. 713; 21 L.J.C.P. 2; 16 Jur. 88; 138 E.R. 655; 33 Digest 507, 505.
- (6) *Barber v. Lesiter* (1859), 7 C.B.N.S. 175; 29 L.J.C.P. 161; 6 Jur.N.S. 654; 141 E.R. 782; 33 Digest 471, 47.

Application for leave to appeal from an order of JELF, J., in chambers whereby he struck out the plaintiff's action on the ground that no reasonable cause of action was disclosed in the statement of claim in which damages of £25,000 were claimed against the Bank of England and one C. J. Williams. The plaintiff had been convicted of forgery and sentenced to nine years' penal servitude and his claim arose out of the circumstances of his conviction.

In his statement of claim the plaintiff said that he was, at the time of the matters complained of, a qualified physician and surgeon, registered on the General Medical Register. By virtue of divers Acts of Parliament, charters, and provisions of government passed, granted, and made, as well for the profit of the defendant corporation as for the public benefit, the governor and company of the Bank of England were constituted and were the issuers and custodians for value of the note issue of the Bank of England. It was one of the duties of the Bank of England as such issuers and custodians to check the return from circulation of Bank of England notes, and for that purpose to keep proper books of account, and to make and preserve entries showing the dates on which and the times at which the notes of the Bank of England were returned from circulation, and to be and remain prepared, in the interests of public justice and for the prevention of fraud, with evidence of the dates and times, and generally of the circumstances, of such returns from circulation. On Jan. 14, 15, and 16, 1892, the plaintiff was put upon his trial at the Central Criminal Court on a charge of forgery, and in the course of the trial it became, and was held by the judge who tried the case to be, material to the issue and of the utmost importance and necessity in determining the value of the alibi set up by the defence, which alibi the judge declared was "perfect" up to one o'clock, that the prosecutor should prove on what day and at what time or times of such day certain

Bank of England notes of the aggregate value of £115, were returned to the Bank of England from circulation and by whom. The Bank of England, in pursuance of such duty as aforesaid, attended by their proper officers, namely, by the defendant C. J. Williams, at the said court, and by such officer informed the court, purporting to give such information from the records of the Bank of England, that the said notes were returned to the Bank of England from circulation as and the same time and by the same person "after lunch" on May 5, 1894. That information was admitted both by the Bank of England and by the defendant Williams to have been erroneous and given from erroneous and negligently prepared records, and was given by the defendant bank falsely and negligently and in breach of their duty as aforesaid. Owing to the negligence, misfeasance and breach of duty of the Bank of England the plaintiff was wrongfully convicted of forgery and sentenced to nine years' penal servitude, and had thereby suffered damage.

The plaintiff, in person.

C. W. Mathews for the defendants.

Cur. adv. vult.

Jan 31, 1902. **SIR RICHARD HENN COLLINS, M.R.**, read the following judgment of the court.—The plaintiff was unrepresented by counsel in this case, and no authorities were cited by the defendants. We, therefore, thought it well to look a little closer into the law before giving judgment.

The plaintiff asks leave to appeal from an order of JELF, J., dismissing his action on the ground that the statement of claim discloses no cause of action. The claim is against the Bank of England and their officer, C. J. Williams, on the grounds stated substantially in the statement of claim. This claim is obviously open to many objections, based on the immunity of witnesses and other points, some of which might possibly have been cured by amendment. There is, however, one broad principle lying at the root of the whole matter, to which we draw attention during the argument, that is, that as long as the conviction stands, "no one against whom it is producible shall be permitted to aver against it": see note to *Duchess of Kingston's Case* (1), 2 SMITH, L.C. (12th Edn.) 754, where the authorities are collected. In a modern case, *Basché v. Matthews* (2), the point was raised that this doctrine could not be held to defeat an action for malicious prosecution which resulted in a conviction, from which, as here, there could be no appeal, and which, therefore, remained unreversed. That case arose on a demurrer which admitted malice and want of reasonable and probable cause. The court, however, overruled the argument. BYLES, J., said (L.R. 2 C.P. at p. 687):

"I think we should be disturbing foundations if we were to admit there is any doubt that the criminal proceeding must be determined in favour of the accused before he can maintain an action for malicious prosecution. If this were not so, almost every case would have to be tried over again upon its merits. In my judgment, it makes no difference that the party convicted has no power of appealing. This doctrine is as old as the case of *Vanderburgh v. Blake* (3) where HALE, C.J., says that 'if such an action should be allowed,' that is, an action against a custom-house officer for seizing goods, which were afterwards condemned as forfeited by judgment of the proper court, 'the judgment would be blown off by a side-wind.'"

MONTAGUE SMITH, J., was of the same opinion, and cited the judgment in *Castrique v. Behrens* (4), in which CROMPTON, J., said (3 E. & E. at p. 721):

"There is no doubt, on principle and on the authorities, that an action lies for maliciously and without reasonable and probable cause setting the law of this country in motion to the damage of the plaintiff, though not for a mere conspiracy to do so without actual legal damage: *Coltwell v. Jones* (5); *Barber*

v. Lester (6). But in such an action it is essential to show that the proceeding alleged to be instituted maliciously and without probable cause has terminated in favour of the plaintiff, if from its nature it be capable of such termination. The reason seems to be that, if in the proceeding complained of the decision was against the plaintiff, and was still unreversed, it would not be consistent with the principles on which law is administered for another court, not being a court of appeal, to hold that the decision was come to without reasonable and probable cause."

A witness charged with negligence only is clearly not in a worse position than a prosecutor who admits malice and want of reasonable and probable cause. It is clear, therefore, that the plaintiff has no possible cause of action, and his application must be dismissed.

Solicitors : *Freshfields.*

Application dismissed.

[*Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.*]

BLACKBURN AND ANOTHER *v.* LIVERPOOL, BRAZIL AND RIVER PLATE STEAM NAVIGATION CO.

[KING'S BENCH DIVISION (Walton, J.), November 26, 27, 1901]

[Reported [1902] 1 K.B. 290; 71 L.J.K.B. 177; 85 L.T. 783; 50 W.R. 272; 18 T.L.R. 121; 9 Asp. M.L.C. 263; 7 Com. Cas. 10]

Shipping—Bill of lading—Exception—"Peril of the seas"—Damage to cargo caused by failure to keep ship watertight.

A cargo of sugar was shipped under a bill of lading which contained an exception of "any loss or damage resulting from any peril of the seas, rivers, or navigation of whatever nature or kind soever (whether arising from the negligence, default, or error in judgment of the pilot, master, mariner, engineers, or others of the crew, or otherwise howsoever)." During the voyage the engineer, intending to fill a ballast tank with sea water to be used for the boilers in discharging the cargo, opened the sea-cock, and then, instead of opening the valve of the ballast tank, by mistake opened the valve of a tank in which part of the sugar was stored, with the result that the sea water flowed into the tank where the sugar was instead of into the ballast tank, and the sugar was damaged.

Held: the cargo had been damaged through the failure to keep the ship tight and prevent sea-water coming in, which was a peril to which every ship while afloat was exposed, and, therefore, the damage was caused by a peril of the seas within the exception.

Notes. Considered: *The Stranna*, [1937] 2 All E.R. 383. Referred to: *The Torbryan* (1903), 9 Com. Cas. 1.

As to the exception of perils of the sea, see 35 HALSBURY'S LAWS (3rd Edn.) 292-3; and for cases see 41 DIGEST 430 et seq.

Cases referred to :

- (1) *William, Sons & Co. v. Xantho (Cargo Owners), The Xantho* (1887), 12 App. Cas. 308; 56 L.J.P. 116; 57 L.T. 701; 36 W.R. 353; 3 T.L.R. 700; 6 Asp. M.L.C. 207, H.L.; 41 Digest 414, 2573.
- (2) *Hamilton, Fraser & Co. v. Pandorf & Co.* (1887), 12 App. Cas. 318; 57 L.J.Q.B. 24; 57 L.T. 726; 52 J.P. 196; 36 W.R. 369; 3 T.L.R. 708; 6 Asp. M.L.C. 212, H.L.; 41 Digest 414, 2574.

Also referred to in argument :

- The Accomac* (1896), 15 P.D. 208; 59 L.J.P. 91; 66 L.T. 737; 39 W.R. 123; 6 T.L.R. 482; 6 Asp. M.L.C. 579, C.A.; 41 Digest 430, 2700.
- Carmichael v. Liverpool Sailing Ship Owners' Mutual Indemnity Association* (1887), 19 Q.B.D. 242; 56 L.J.Q.B. 428; 57 L.T. 550; 35 W.R. 793; 3 T.L.R. 636; 6 Asp. M.L.C. 184, C.A.; 29 Digest 439, 3397.
- Canada Shipping Co. v. British Shipowners' Mutual Protection Association* (1889), 23 Q.B.D. 342; 58 L.J.Q.B. 462; 61 L.T. 312; 38 W.R. 87; 5 T.L.R. 700; 6 Asp. M.L.C. 422, C.A.; 29 Digest 439, 3398.
- Good v. London Steam-Ship Owners' Association* (1871), L.R. 6 C.P. 563; 20 W.R. 33; 29 Digest 439, 3396.
- Thames and Mersey Marine Insurance Co. v. Hamilton, Fraser & Co.* (1887), 12 App. Cas. 484; 56 L.J.Q.B. 626; 57 L.T. 695; 36 W.R. 337; 3 T.L.R. 764; 6 Asp. M.L.C. 200, H.L.; 29 Digest 197, 1575.
- The Southgate*, [1893] P. 329; 41 Digest 431, 2709.
- The Cressington*, [1891] P. 152; 60 L.J.P. 25; 64 L.T. 329; 7 T.L.R. 298; 7 Asp. M.L.C. 27, D.C.; 41 Digest 430, 2706.

Action in the Commercial List brought by the plaintiffs, holders of the bills of lading of a cargo of sugar, against the defendants, charterers of the steamship *Tropic*, for damages for breach of duty in and about the carriage and the delivery of the cargo.

Carver, K.C. (Bailhache with him) for the plaintiffs.
Horridge, K.C., and Maurice Hill for the defendants.

WALTON, J.—I think the law on this subject is really cleared up and established by the cases which have been referred to of *The Xantho* (1) and *Hamilton, Fraser & Co. v. Pandorf & Co.* (2), of which I think the latter is the example best applicable to the present case. It is to be noted that in those two cases no question arose with regard to what is called the negligence clause; and in neither of them was the shipowner exempt from damage arising from the negligence of the crew. As I understand the law when there is no negligence clause, it is this: That the shipowner is bound absolutely as an insurer to deliver safely, subject to the exception of perils of the seas, or any other exceptions which there may be in the bill of lading. If the shipowner fails to carry safely, but the loss is caused by one of the excepted perils, then *prima facie* he is not liable; but in cases which came long before *Hamilton, Fraser & Co. v. Pandorf & Co.* (2) the effect of which is there recognised, and in *The Xantho* (1), the contract of the shipowner was not merely as an insurer to deliver safely subject to the excepted perils, but there was the further contract—namely, that he would use due care and diligence to deliver safely. The exceptions, therefore—and I am assuming that they contain no exception of negligence—relieve him from his absolute obligation as an insurer to deliver safely, but do not relieve him from his obligation to exercise due care and diligence in carrying cargo. Therefore, even when the loss is occasioned by one of the excepted perils—again assuming that negligence is not an excepted peril—if the shipowner has failed to use due care and diligence in carrying the cargo, although he may be exempt so far as the absolute obligation to deliver safely is concerned, he is not exempt from the consequences of the breach of his contract to use due care and diligence, and

therefore, if the loss, although occasioned by perils of the sea, has been brought about by want of due care and diligence on the part of the shipowner, the shipowner renders himself liable, notwithstanding the exceptions.

In the present case there is what is sometimes called a negligence clause, and the shipowner is exempt by an exemption of perils of the seas, even though the loss by such perils is brought about by the negligence of the crew. Therefore in this case we have not got to consider the liability of the shipowner arising from the want of due care and diligence on the part of his servants, the crew of the vessel. The only question is whether the loss was occasioned by perils of the seas or of navigation. If it was so occasioned, the shipowner is protected by the exemption, although the loss was brought about by the negligence of some of his servants, the crew of the vessel. It is perfectly true that in the first place to bring the case within the exception there must be an accident. By that I understand the loss must have been something which might happen, not something which must happen, as LORD HALSBURY, L.C., said in *Hamilton, Fraser & Co. v. Pandorf & Co.* (2), as, for instance, wear and tear is not a casualty or accident, because a ship must decay, and wear and tear must take place. He says (12 App. Cas. at p. 524):

"I think the idea of something fortuitous and unexpected is involved in both words 'peril' or 'accident': you could not speak of the danger of a ship's decay; you would know that it must decay, and the destruction of the ship's bottom by vermin is assumed to be one of the natural and certain effects of an unprotected wooden vessel sailing through certain seas."

In the next place, the accident must not only be an accident that is something in the nature of a casualty, something fortuitous, but it must be an accident of the seas, and a peril of the seas. That is pointed out by LORD HERSCHELL in his judgment in *The Xantho* (1). But it appears to me to be entirely a fallacy to say that because the loss has been occasioned by mistake or neglect—mistake if you like on the part of the vessel—it is not an accident. It is obviously not a thing which must happen; it is a thing which may happen, and in the ordinary popular sense, which is the sense in which one must interpret the words of a bill of lading, and in the sense in which I am now using the word, whether arising from some negligence of a servant or not, it is an accident. It is a casualty, something fortuitous, and it seems to me that this loss now in question did arise from an accident, that it was fortuitous.

Was it an accident of the seas? As I understand the judgments in *Hamilton, Fraser & Co. v. Pandorf & Co.* (2) and in *The Xantho* (1), one of the perils of the seas is this, that if the ship is not kept tight the sea water will come in. It may damage the cargo, or sink the ship, and if by some accident the ship is not kept tight, and the water does come in and sink the ship, we say that is a loss of the ship by perils of the seas. Those considerations afford a very simple answer to the question which arises in this case. The engineer, intentionally, it is true, opened the sea-cock. After he had done that the ship remained perfectly tight. Opening the sea-cock no doubt allowed sea water to flow into what we may call certain parts of the ship, but the ship was perfectly tight. The sea water could not come into the carrying part of the ship, and could never sink the ship, or do any damage to anybody or to anything. It was exactly as if the water had been admitted into the ballast tank; then the ship would have remained perfectly tight, although the sea water was flowing in from the sea-cock, so that those parts of the vessel into which the sea is flowing are no doubt open to the sea. That being the position of things, the engineer, not doing in the least what he intended to do, but entirely by mistake, which probably was an act of negligence—which makes no difference in the present case—opened a valve or cock by which he let the water into the carrying part of the ship. He let the sea into the ship, and when this cock was opened the ship was no longer tight, and if it had been left open the ship would have gone to the bottom of the sea if the deep tank was not tight. As it

was, it only damaged the cargo in that carrying space in which the sugar was stowed. I cannot distinguish that from the case in which one of the crew accidentally and by mistake opens or leaves open a port. That is an act of one of the crew, and in that sense it is an act of one of those under the shipowner's control. It is an act of negligence. He opens the port, or leaves the port open, and the ship is no longer tight, and therefore the water comes in. In either case an opening is accidentally made by mistake, the effect of which is that the ship ceases to be tight, and consequently begins to leak, and damage follows. It seems to me that in either case the ship, by negligence—by an accident—is exposed to the peril that every ship while afloat is exposed to—namely, that if she is not kept tight the water will come in. That seems to me to be one of the essential perils of the seas, and a peril to which every ship is necessarily exposed while she is afloat, because she is afloat. Damage arising from that peril appears to me to be within this exception, and therefore I think the shipowners bring the case within the exception and are exempt from liability. Therefore there must be judgment for the defendants with costs.

Judgment for defendants.

Solicitors: *Walker, Son & Field*, for *Weightman, Pedder & Weightman*, Liverpool; *Field, Roscoe & Co.*, for *Thornely & Cameron*, Liverpool.

[*Reported by W. W. ORR, Esq., Barrister-at-Law.*]

NEW SHARLSTON COLLIERIES CO., LTD. v. EARL OF WESTMORLAND

[HOUSE OF LORDS (the Earl of Halsbury, L.C., Lord Macnaghten, Lord Morris, Lord Davey, Lord Brampton and Lord Robertson), March 29, 30, April 3, 1906]

[*Reported* [1904] 2 Ch. 443, n.; 73 L.J.Ch. 338, n.; 82 L.T. 725]

Land—Right to support—Conveyance of minerals—No express power or necessary implication permitting mineral owner to let down surface—Provision for compensation for damage to surface.

The owner of the surface of land does not by parting with the minerals under such land lose his common law right of support, and in the absence of express power, or necessary implication in the conveyance, the grantee of the minerals has no right to work them so as to let down the surface. This obligation is not affected by a provision that compensation shall be payable for damage to the surface.

Notes. Applied: *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co. op. Soc.*, [1904-7] All E.R. Rep. 977. Considered: *Beard v. Meira Colliery Co.*, [1915] 1 Ch. 257; *Thomson v. St. Catherine's College, Cambridge, etc.* (1918), 118 L.T. 758. Distinguished: *Welldon v. Butterley Co.*, [1920] 1 Ch. 130. Considered: *Consett Industrial and Provident Society v. Consett Iron Co.*, [1922] All E.R. Rep. 285. Referred to: *Davies v. Powell Duffryn Steam Coal Co.*, [1917] 1 Ch. 488;

L.R. Comrs. v. New Sharlston Collieries Co., [1937] 1 All E.R. 86; *Earl Fitzwilliam's Collieries Co. v. Phillips*, [1942] 2 K.B. 92.

As to easements and rights affecting mines, see 26 HALSBURY'S LAWS (3rd Edn.) 339 et seq.; and for cases see 34 DIGEST 700 et seq.

Cases referred to:

- (1) *Love v. Bell* (1884), 9 App. Cas. 286; 53 L.J.Q.B. 257; 51 L.T. 1; 48 J.P. 516; 32 W.R. 725, H.L.; 34 Digest 708, 947.
- (2) *Davis v. Trecharne* (1881), 6 App. Cas. 460; 50 L.J.Q.B. 665; 29 W.R. 869, H.L.; 34 Digest 710, 954.

Appeal from a decision of the Court of Appeal (SIR NATHANIEL LINDLEY, M.R., SIR FRANCIS JEUNE, P., and ROMER, L.J.), reported 80 L.T. 846, affirming a decision of NORTH, J., in an action brought by the respondent claiming an injunction and damages against the appellants.

The respondent, who was the plaintiff in the action, was the tenant for life of certain lands in the townships of Sharlston, Wragby, and Snydale, in the West Riding of Yorkshire, known as the Sharlston estate. The appellant company had for more than twenty years past, under a lease dated May 1, 1874 and granted by John Crossley & Sons, Ltd., been in possession and occupation of certain mines, veins, and seams of coal situate beneath the surface of the Sharlston estate. By an indenture dated June 24, 1865, Priscilla Ann, Dowager Countess of Westmorland, the respondent's predecessor in title, granted and conveyed unto John Crossley & Sons, Ltd., the mineral strata therein described as "all and every the mines, veins, and seams of coal, iron, and other ores" under the Sharlston estate, with powers to do certain acts on the surface of the Sharlston estate (or portions thereof) and in the strata thereunder not comprised in the said grant (or portions of such strata) which might be deemed necessary or convenient for working, searching for, getting, and raising coal, iron, and other ores. The acts so authorised did not include, nor did the indenture in any way authorise, any working, winning, digging, or getting of coal or other minerals in or from the mines, veins, and seams, or any other act in derogation of the right of the vendor, her heirs or assigns, to the support of the surface of the lands and of the houses and other buildings thereon, by the land adjacent thereto, and by the soil and minerals thereunder. The appellant company in the course of working withdrew minerals required for the support of the respondent's land and property, in consequence whereof the surface of the land subsided, and certain buildings erected thereon were injured. The appellant company denied liability, and the question was referred to arbitration and decided in favour of the respondent, who was awarded damages. The appellant company nevertheless continued their workings and caused further subsidence.

Warmington, Q.C., Strachan, Q.C., Upjohn, Q.C., and O. L. Clare, for the appellants.

W. Phipson Beale, Q.C., and Roskill, for the respondent.

THE EARL OF HALSBURY, L.C.—There is one observation of the learned counsel with which I heartily agree—namely, that we must find out what is the meaning of the contract between the parties, whether it be by deed or a simple contract, by looking at the whole of the instrument; and, looking at the whole instrument in the present case, I am of opinion that there is no ground for the contention of the appellants. The state of the law is now perfectly clear. The mere fact of giving a right to sink pits and to work or get coal does not of itself establish a right to get rid of that which is the common law right of the surface owner, to have his surface undisturbed. That is a plain proposition of law, and, when one approaches the question from that point of view, it is manifest that in all the cases the learned judges were talking of the particular instrument which they had then to construe, and their problem was to find out whether by the express language of the grant, or by that which might be construed to be the general

effect and intent of the whole instrument, there was a power to interfere with that covenant law right. I do not think that those principles were so firmly established some ten or twenty years ago as they are now, but that is the proposition of law, and it must be applied to the particular instrument when the court has to construe in each case. In this instrument I confess that I am wholly unable to find any such permission to let down the surface. One objection which lies very plainly before one is that there is no express permission to do it; and if the arrangement between the parties was that it was contemplated, as was pointed out, I think, in *Lane v. Bell* (1), it is not an immaterial circumstance that it is not mentioned, when they are dealing with such a subject, and dealing with it in a way which would naturally suggest the question whether that is to be the state of relation between the parties, the lessor and lessee, or the vendor and vendee, as the case may be. The absence of such an express permission is not without its significance.

Then we have to deal with the question whether upon the whole instrument one is to discover from its language that the parties did contemplate the right to let down the surface. I can find no such right here; and it appears to me that, applying the principles of *Davis v. Trehearne* (2) and the long line of cases which have now settled the law, it would be a reversal of what has been so settled if your Lordships were to assume or to imply from anything which you can find in this deed a right to let down the surface. It appears to me that the law upon the question must now be regarded as settled, and, there being no express permission, the onus lies on the person who says that he has a right to do it to show something in the instrument which gives him that right. Where the language of the instrument is plain, I confess that I do not follow Lord Watson in speaking of it as a very nice question, because I should have thought that when once you have the broad proposition that the grantees are to have every right which the owners both of the surface and the minerals had, who now purport to grant that right, the ordinary proposition that a man may do what he likes with his own would carry you the whole way. But, whether I am right in that connection or not, undoubtedly where the provision did exist, Lord Watson pointed out that that provision, together with other provisions in the instrument, satisfied him that the right to let down the surface was given. It is enough to say that there is no such provision here, and nothing like it, and nothing has been urged, as it appears to me, before your Lordships upon this instrument which would rationally and properly lead to the inference that that was the intention of the parties. Under these circumstances I move that this appeal be dismissed with costs.

LORD DAVEY. I agree. The case has been so fully dealt with by North, J., and in the Court of Appeal by the lords justices, and now by the Lord Chancellor, that I shall not give any reasons at length. There is only one observation that I wish to make, having regard to what has fallen from the Bar and to what has been said in other cases. Speaking for myself, I cannot see why a covenant providing a particular measure or mode of obtaining compensation is in any way inconsistent with the existence of an obligation not to let down the surface, even though that covenant extends beyond the surface, and is applicable also—or even exclusively, I should say—to underground operations. The use of the words, “by reason of the exercise of the powers” does not seem to me to carry it any further, because it may apply to any injury incidentally done—whether accidentally or wilfully it makes no difference—while exercising the powers. It does not seem to me to give a licence to do the injury if you say that a person shall pay compensation if he does it. A covenant to pay compensation for doing a thing which you are prohibited from doing is in no way contrary to or inconsistent with the continuance of the obligation not to do it. Indeed, one may go further and say that if the thing is done notwithstanding the prohibition, there is no other means by which you can obtain a remedy for what is past (an injunction, of course, will not extend to the past) except by provision for payment of compensation. Therefore I do not recede

to the argument that the existence of a covenant for payment of compensation for letting down the surface is—whether it applies wholly or partially to underground operations or not—in any way inconsistent with the continuance of the common law obligation.

LORD BRAMPTON, LORD ROBERTSON, LORD MACNAGHTEN and LORD MORRIS concurred.

Appeal dismissed.

Solicitors: *Debenham & Walker*, for *Mason*, *Fernandes & Greaves*, Wakefield; *Horn & Francis*.

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

EAST FREMANTLE CORPORATION v. ANNOIS

[PRIVY COUNCIL (the Earl of Halsbury, L.C., Lord Macnaghten, Lord Shand, Lord Davey, Lord Robertson and Lord Lindley), November 5, December 18, 1901]

[Reported [1902] A.C. 213; 71 L.J.P.C. 39; 85 L.T. 732; 67 J.P. 103; 18 T.L.R. 199]

Public Authority—Statutory powers—Exercise—Injury to individual—Right to compensation.

Highway—Statutory powers—Exercise by authority—Reducing gradient of road—Injury to frontager—Right to compensation.

Where a public body, acting in the execution of a public trust and for the public benefit, does an act which it is authorised by law to do, and does it in a proper manner, though the act so done works a special injury to a particular individual, the individual injured cannot maintain an action. He is without remedy unless a remedy is provided by the statute.

The appellant municipal council, acting in pursuance of powers conferred by the Western Australia Municipal Institutions Act, 1895, s. 109, at the request of the ratepayers reduced the gradient of a street in order to improve it, thereby leaving the respondent's house on the edge of a cutting with a drop of about six or eight feet to the road. The Act made no provision for compensation in respect of consequential injury.

Held: the appellants had not exceeded their authority, and, as no remedy was given by the Act, the respondent could not maintain an action against the appellants.

Notes. Considered: *Ash v. Great Northern, Piccadilly and Brompton Rail Co.* (1903), 67 J.P. 417; *Roberts v. Charing Cross, Euston and Hampstead Rail Co.*, post p. 157; *Howard-Flanders v. Maldon Corpn.*, [1926] All E.R. Rep. 110; *Dormer v. Newcastle-upon-Tyne Corpn.*, [1940] 1 All E.R. 219; *East Suffolk Rivers Catchment Board v. Kent*, [1940] 4 All E.R. 527. Referred to: *A.-G. v. Dorchester Corpn.* (1905), 93 L.T. 290; *Edgington v. Swindon Borough Council*, [1938] 4 All E.R. 57; *Provender Millers (Winchester), Ltd. v. Southampton County Council*, [1939] 4 All E.R. 157; *Ching Garage v. Chingford Corpn.*, [1961] 1 All E.R. 671.

As to the exercise of statutory powers by public authorities, see 30 HALSBURY'S LAWS (3rd Edn.) 685 et seq.; and for cases see 38 DIGEST (Repl.) 13 et seq. As to right of access to highway by adjoining owner, see 19 HALSBURY'S LAWS (3rd Edn.) 78 et seq.

Cases referred to:

- (1) *Bullish Clay Plate Manufacturers (Incorporated & Co.) v. Metcalfe* (1792), 4 Term Rep. 794; 100 E.R. 1306; 38 Digest (Repl.) 19, 78. A
- (2) *Boulton v. Crowther* (1894), 3 B. & C. 766; 2 L.J.Q.B. 110; 107 E.R. 544; sub nom. *Bolton v. Crowther*, 4 Dow. & Ry. K.B. 195; 38 Digest (Repl.) 19, 83.
- (3) *Gaddis v. Dean Haywood Proprietors* (1878), 3 App. Cas. 426, 11 T.L.R. 38; 38 Digest (Repl.) 16, 64. B
- (4) *Metropolitan Asylum District v. Hill* (1881), 6 App. Cas. 103; 50 L.J.Q.B. 358; 44 L.T. 633; 45 J.P. 664; 29 W.R. 617, H.L.; 38 Digest (Repl.) 36, 163.
- (5) *Fernon v. St. James', Westminster, Vestry* (1880), 16 Ch.D. 449; 50 L.J.Ch. 81; 44 L.T. 229; 29 W.R. 222, C.A.; 38 Digest (Repl.) 36, 160.
- (6) *King v. Kew Corpn.*, unreported. C
- (7) *Sutton v. Clarke* (1815), 6 Taunt. 29; 1 Marsh 429; 128 E.R. 948; 38 Digest (Repl.) 13, 49.
- (8) *Galloway v. London Corpn.* (1864), 2 De G.J. & Sm. 213; 4 New Rep. 77; 10 L.T. 439; 28 J.P. 452; 10 Jur.N.S. 552; 12 W.R. 891; 46 E.R. 356, L.J.J.; on appeal (1866), L.R. 1 H.L. 34; sub nom. *Galloway v. London Corpn. and Metropolitan Rail Co., London Corpn. v. Galloway*, 35 L.J.Ch. 477; 14 L.T. 865; 30 J.P. 580; 12 Jur.N.S. 747, H.L.; 42 Digest 722, 1415. D
- (9) *Southwark and Vauxhall Water Co. v. Wandsworth Board of Works*, [1898] 2 Ch. 603; 67 L.J.Ch. 657; 79 L.T. 132; 62 J.P. 756; 47 W.R. 107; 14 T.L.R. 576, C.A.; 26 Digest (Repl.) 554, 2240.
- (10) *London and Brighton Rail Co. v. Truman* (1885), 11 App. Cas. 43; 55 L.J.Ch. 354; 54 L.T. 250; 50 J.P. 388; 31 W.R. 657, H.L.; 38 Digest (Repl.) 41, 212. E

Appeal from a decision of the Supreme Court of Western Australia (Stoke and HENSMAN, JJ.), reversing a decision of ONSLOW, C.J., in favour of the defendants.

The facts are set out in the judgment of the Board.

Haldane, K.C. and *Romer* for the appellants. F

The respondent did not appear.

LORD MACNAGHTEN.—The appellants are the council of East Fremantle, a municipality duly incorporated under the provisions of the Municipal Institutions Act, 1895 (59 Vict., No. 10). By that Act (s. 109), the council of a municipality is authorised to

“make, alter, level, grade . . . repair . . . and otherwise improve all public places, streets, thoroughfares, . . . and other premises within the municipality.” G

There is nothing said about compensation in respect of any consequential injury. In July, 1899, before the commencement of the work which has led to the present controversy, Sewell Street was a public street within the municipality. At that time it was little better than a cart track. In places it was almost impassable for vehicles owing to the unevenness of the ground. At its highest point, where the respondent has a wooden house which she bought in 1897 for £200, and on which, according to her own account, she laid out about £220 more, there was there a hillock or ridge with a gradient varying from 1 in 6 to 1 in 8. In accordance with the representations of a meeting of ratepayers, the appellants resolved to improve Sewell Street. They determined to reduce the gradient opposite the respondent's house to 1 in 14½. The work was carried out according to the plans of their surveyor, and under his direction. It is in evidence that, before the street was improved, it was impossible to go with a load of five to seven cwt. up to the respondent's house with a single horse. It is clear that the alteration was not more than was reasonably necessary. The result, however, so far as the respondent was concerned was, that her house was left on the edge of a cutting with a drop of about

6ft. or 8ft. to the road. This, no doubt, was a serious inconvenience to her. But it was proved that steps down to the road might be made at a cost of about £15.

In these circumstances the respondent brought her action against the appellants alleging in her statement of claim that they had "wrongfully, arbitrarily, negligently, and oppressively," made an excavation in front of her premises, and had thereby deprived her of access to her house. She claimed an injunction, or in the alternative £1,000 damages. The action was tried before the Chief Justice and a common jury. In the course of his summing up, His Honour said:

"It is well established that where a mayor and corporation do a public work in the interest of the public, if a person suffers, unless the Act gives compensation to that private person, that private person cannot recover damages at the hands of the jury unless the mayor and councillors have gone outside their powers and have acted oppressively, arbitrarily, and unnecessarily. The question here for you, gentlemen, is to consider whether the town council in this case have gone outside their bounds or have acted arbitrarily or oppressively. . . . The one question for you is, Have the town council acted in such a manner?"

His Honour concluded his address to the jury by telling them that, if they were of opinion that the appellants had been acting wrongfully, arbitrarily, unnecessarily and oppressively then they might give a verdict for the respondent, but that, if they were of opinion that the council had been acting in the best interests of the public at large, and that the respondent, though she might have suffered some loss, had been more than compensated for it by the increased value of her property, then they could not hold the appellants liable for damages because the Act of Parliament made no provision for it. The jury returned a verdict for the appellants, and judgment was given for them with costs.

The respondent appealed to the Full Court. The order of the Full Court was that the verdict and judgment be set aside, and a new trial had on the grounds that: "(i) The learned judge should have directed the jury that if the [appellants] undertook the work of cutting down the street complained of without properly considering or weighing the injury that must thereby accrue to the [respondent], or that if the [appellants] carried out such work without any attempt to lessen or mitigate the injury to the [respondent's] property, the [appellants] were acting wrongfully, negligently, and oppressively. (ii) The learned judge misdirected the jury by directing that if the [appellants] carried out the work skillfully and for the benefit of the public the [respondent] had no legal cause of complaint." The opinion of the Full Court, consisting of STONE and HENSMAN, JJ., was delivered by HENSMAN, J. After stating the facts and citing *British Cast Plate Manufacturers (Governor & Co.) v. Meredith* (1), decided in 1792 by KENYON, C.J., and BULLER and GROSE, JJ., and *Boulton v. Crouther* (2), before ABBOTT, C.J., and BAYLEY, HOLROYD and LITTLEDALE, JJ., in 1824, His Honour expressed the opinion of the court that

"the doctrine of those earlier cases had been modified by principles which had been affirmed by the highest Courts of Appeal."

In support of that view reference was made to two cases in the House of Lords—*Geddis v. Bann Reservoir Proprietors* (3) in 1878, and *Metropolitan Asylum District v. Hill* (4) in 1881—and to an observation of JAMES, L.J., in *Vernon v. St. James'*, *Westminster, Vestry* (5) in the Court of Appeal in 1880. His Honour added that, in Victoria, in *King v. Kew Corpn.* (6) the Supreme Court had applied the general principle of those later cases to facts almost precisely similar to those then before the court. The court, he said, had some doubt whether they ought not to follow the Supreme Court of Victoria and hold that the respondent was entitled to judgment; they thought that there certainly ought to be a new trial.

Their Lordships are of opinion that the order of the Full Court cannot be maintained. They think that the charge of the learned Chief Justice was, if anything, too favourable to the respondent. Topics were introduced which might have confused

the issue. For example, it was not for the jury to consider whether the respondent had been compensated for the loss and inconvenience she might have suffered by the increased value of her property. In their Lordships' opinion, there was no case to go to the jury, and the jury ought to have been directed to return a verdict for the appellants. The law has been settled for the last hundred years. If persons in the position of the appellants acting in the execution of a public trust and for the public benefit, do an act which they are authorised by law to do, and do it in a proper manner, though the act so done works a special injury to a particular individual, the individual injured cannot maintain an action. He is without remedy unless a remedy is provided by the statute. That was distinctly laid down by LORD KENYON and BULLER, J., and their view was approved by ABBOTT, C.J., and the Court of King's Bench. At the same time, ABBOTT, C.J., observed that if, in doing the act authorised, the trustees acted arbitrarily, carelessly, or oppressively, the law, in his opinion, had provided a remedy. Those words, "arbitrarily, carelessly, or oppressively," were taken from the judgment of GIBBS, C.J., in *Sutton v. Clarke* (7), decided in 1815. As applied to the circumstances of a particular case they probably create no difficulty. When they are used generally and at large it is not, perhaps, very easy to form a conception of their precise scope and exact meaning. In simpler language, TURNER, L.J., observed in a somewhat simpler case (*Galloway v. London Corpn.* (8), 2 De G. J. & Sm. at p. 229) that "such powers are at all times to be exercised bona fide and with judgment and discretion." And in a recent case (*Southwark and Vauxhall Water Co. v. Wandsworth District Board of Works* (9)), where persons acting in the execution of a public trust were sued in respect of an injury likely to result from their act, HENN COLLINS, L.J., observed ([1898] 2 Ch. at p. 613) that

"the only obligation on the defendants was to use reasonable care to do no unnecessary damage to the plaintiffs."

In a word, the only question is, Has the power been exceeded? Abuse is only one form of excess.

Their Lordships are of opinion that the principles laid down by LORD KENYON and ABBOTT, C.J., have not been in the slightest degree modified by the more recent cases referred to by HENSMAJ, J. They were all cases where, on the true construction of the particular statute under consideration, the court held that there was no intention of authorising interference with private rights. In *Geddis v. Bann Reservoir Proprietors* (3), the defendants had flooded the lands of the plaintiffs, and had done so, as the court held, without any statutory authority. In *Metropolitan Asylum District v. Hill* (4), the remarks of LORD WATSON must be taken in connection with the circumstances of the case with which his Lordship was then dealing. As his Lordship observes, "what was the intention of the legislature in any particular Act is a question in the construction of the Act." There it was held, as LORD SELBORNE, L.C., pointed out, that there was no statutory right to commit a nuisance, and that no use of any land which must necessarily be a nuisance at common law was authorised. As LORD BLACKBURN observed in a later case—*London and Brighton Rail. Co. v. Truman* (10) (11 App. Cas. at p. 64)—quoting BOWEN, L.J., there was not to be found in the Act under consideration in *Metropolitan Asylum District v. Hill* (4) "any element of compulsion, or any indication of an intention to interfere with private rights." In *Vernon v. St. James, Westminster, Vestry* (5), in the very sentence quoted by HENSMAJ, J., JAMES, L.J., went on to say that he was of opinion that there was no legislation in the case authorising the vestry to interfere with private rights. In an earlier part of his judgment, the lord justice had observed "there are no words here that authorise the vestry to commit a nuisance." The learned counsel for the appellants was unable to refer their Lordships to a report of the Victorian case of *King v. Kew Corpn.* (6). If the effect of the judgment is correctly stated by HENSMAJ, J., their Lordships are compelled to express their dissent from it.

Their Lordships, therefore, will humbly advise His Majesty that the order of the Full Court ought to be discharged with costs, and the judgment of the Chief Justice restored. The respondent must pay the costs of the appeal.

Solicitors : *Trinder & Capron*.

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

ASHCROFT v. ASHCROFT AND ROBERTS

[COURT OF APPEAL (Vaughan Williams and Mathew, L.JJ.), August 11, 1902]

[Reported [1902] P. 270; 71 L.J.P. 125; 87 L.T. 229; 51 W.R. 292; 18 T.L.R. 821]

Divorce—Maintenance of wife—Guilty wife—Discretion of court—Matrimonial Causes Act, 1857 (20 & 21 Vict., c. 85), s. 32.

The court **held** that there was no rule of practice which interfered with the absolute discretion of the court under s. 32 of the Matrimonial Causes Act, 1857, to order that a decree nisi granted to a husband should not be made absolute until the husband had secured provision for the support of the wife. Thus, the court would order a husband, against whom no imputation of any kind could be made, to secure provision for the guilty wife if it were proved that the wife was entirely without means of support and unable to earn her own living through ill-health.

Dictum of SIR GEORGE JESSEL, M.R., in *Robertson v. Robertson and Favagrossa* (1) (1883), 8 P.D. at p. 96, applied.

Notes. The Matrimonial Causes Act, 1857, s. 32, has been replaced by s. 19 (2) of the Matrimonial Causes Act, 1950.

Referred: *Fergusson v. Fergusson* (1931), 146 L.T. 212; *Dailey v. Dailey* (otherwise *Smith*), [1947] 1 All E.R. 847; *Trestain v. Trestain*, [1950] 1 All E.R. 618, n.

As to permanent maintenance, see 12 HALSBURY'S LAWS (3rd Edn.) 430 et seq.; and for cases see 27 DIGEST (Repl.) 612 et seq. For the Matrimonial Causes Act, 1950, s. 19, see 29 HALSBURY'S STATUTES (2nd Edn.) 407.

Case referred to:

(1) *Robertson v. Robertson and Favagrossa* (1883), 8 P.D. 94; 48 L.T. 590; 31 W.R. 652, C.A.; 27 Digest (Repl.) 614, 5753.

Also referred to in argument:

Winstone v. Winstone and Dyne (1861), 2 Sw. & Tr. 246; 30 L.J.P.M. & A. 109; 3 L.T. 895; 164 E.R. 989; 27 Digest (Repl.) 614, 5749.

Keats v. Keats and Montezuma (1859), 1 Sw. & Tr. 334; 28 L.J.P. & M. 57; 32 L.T.O.S. 321; 5 Jur.N.S. 176; 7 W.R. 377; 164 E.R. 754; 27 Digest (Repl.) 395, 3260.

Edwards v. Edwards and Francis, [1894] P. 33; 63 L.J.P. 62; 70 L.T. 39; 27 Digest (Repl.) 423, 3539.

Parry v. Parry, [1896] P. 37; 73 L.T. 759; 12 T.L.R. 126; sub nom. *Parry v. Parry*, *Millis v. Millis and Brown*, 65 L.J.P. 35; 27 Digest (Repl.) 426, 3561.

Appeal by the husband from a decision of BARNES, J.

In proceedings for dissolution of his marriage, a husband obtained the finding of a special jury that his wife and the co-respondent had committed adultery. No

imputation of any kind could be made against the husband. The decree nisi was suspended in order to allow the wife to make an application for permanent alimony under s. 32 of the Matrimonial Causes Act, 1857. It appeared that the parties had been married for upwards of twenty years, and that there were five children of the marriage, the eldest of whom was given to the husband. It appeared also that the wife was without means of subsistence, and without near relatives of her own, and that her health was bad. Therefore she could not support herself or earn her own living. The husband's only means consisted of an income of about £20 per annum from his business.

GORELL BARNES, J., held that s. 32 gave the court an absolute discretion to make such order as it thought right in the circumstances of the case, and that, the state of the wife's health and the means of the husband being considered, the court would pronounce a decree nisi, which would not be made absolute until the husband had secured to the wife by deed the sum of £1 a week for life—*dum sola et casta vixerit*.

Newson for the husband.

Barnard for the wife.

VAUGHAN WILLIAMS, L.J.—Under the terms of s. 32 of the Matrimonial Causes Act, 1857, the court has an absolute discretion. The language of the section is quite plain. It enacts as follows:

"The court may, if it shall think fit, on any such decree, order that the husband shall to the satisfaction of the court secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it shall deem reasonable. . . ."

That being so, the objection that is made here to the order pronounced by the learned judge in the court below is really only based on the practice of the court. It is said that that practice was correctly stated by Mr. Inderwick in his argument in *Robertson v. Robertson and Favagrossa* (1) (8 P.D. at p. 95) thus:

"The practice under the Divorce Act in this respect has not been similar to that of the House of Lords under the old law. Up to this time permanent alimony for a guilty wife has not been ordered except with the consent of the husband, or under special circumstances."

Thereupon SIR GEORGE JESSEL, M.R., said (*ibid.*):

"I am sorry to hear it. I am not giving a final opinion, but it appears to me that s. 32 was intended to give the court a discretion which was to be exercised according to the circumstances of each case, and that it was not intended that a guilty wife should be turned out in the streets to starve."

When the Master of the Rolls came to deliver his judgment, he said (*ibid.* at p. 96):

"Now under the 32nd section the practice seems to have grown up of not allowing maintenance to the guilty wife unless a special case is shown. I am not prepared to say on the present occasion that this is the correct rule. I am not going to lay down that it is not. I should require further consideration and argument before doing so, but it appears to me that the 32nd section of the Act has left an absolute discretion in the court."

Then he goes on to deal with what he considered was the intention of the legislature. He said (*ibid.* at p. 97):

"I am only stating my present impression that the court, under s. 32, has full discretion, and is under no obligation to require special circumstances to be shown to entitle the guilty wife to some provision."

A Referring to the particular case then before the court, he found it not necessary to decide as a part of that case whether there was the practice referred to, for he said (ibid.):

B "Now considering the learned judge's acquaintance with all the facts, and his great experience in these matters, we should be very slow indeed to interfere with his discretion, either as regards enlarging the time or as regards the circumstances which in his opinion entitled the wife on the merits to any allowance, and therefore it appears to me that we ought not to interfere."

C When you come to LINDLEY, L.J.'s judgment, you see that he refused in that case to give any assent to what Mr. Underwick had stated was the practice of the court, because he says (ibid. at pp. 97, 98):

"I agree. The question whether what we understand to be the ordinary practice in the Divorce Court is right or wrong is to be considered as left an open question; but I am not prepared to dissent from the conclusion of the President on the present occasion."

D In the case now before us there is no imputation of misconduct on the part of the husband. But the learned judge in the court below was of opinion that it had been proved before him that the wife had no means of subsistence, and could not support herself or earn her own living. In some cases a guilty wife has no difficulty in obtaining employment and earning her own living. But there is a difference where the wife has not been educated to earn her own living. In the present case, GORELL BARNES, J., was of opinion that the state of the wife's health was such as to prevent her from earning her own living. In these circumstances we ought, in my judgment, to affirm the view of SIR GEORGE JESSEL, M.R., in *Robertson v. Robertson and Favagrossa* (1) that the court has an absolute discretion, and we cannot recognise any practice which interferes with that discretion. It is quite true, as has been said, that the husband has only what he derives from his business; but the exercise of the learned judge's discretion ought not, in my opinion, to be interfered with. The appeal must, therefore, be dismissed with costs.

F
I **MATHEW, L.J.**—I am of the same opinion. The order for an allowance to the wife is purely a matter of discretion; and counsel for the husband has been wholly unable to shake off the discretion of the judge. I think it is clear that to the exercise of that discretion there is no such limitation as is contended for. The learned judge saw the wife, heard the evidence, and had no doubt that she was wholly unable to support herself. Under the circumstances, I think that the very moderate allowance which he has ordered to be made was rightly so ordered. The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Jaques & Co.*, for W. & E. W. Bullen, Liverpool; *J. Sykes*, for *Pennington & Higson*, Liverpool.

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

Re HARGREAVES. HARGREAVES v. HARGREAVES

[Court of Appeal (Sir Richard Henry Collins, M.R., Romer and Cozens-Hardy, L.JJ.), February 5, 1903]

[Reported 88 L.T. 100]

Will. Gift of income of residue to children for life in equal shares subject to annuity to widow. Advances to some children. Hotchpot clause—Adjustment between advanced and unadvanced children.

A testator, by his will and codicil, dated May 5, 1880, and July 12, 1882, respectively, after giving certain legacies, devised and bequeathed his residuary estate to trustees upon trust to pay out of the income thereof the annual sum of £2,000 to his widow during her life, and, subject thereto, to divide the residuary estate into as many shares as there should be children living at his death, and to pay the annual income of such shares to his children, and then upon trusts therein expressed. He further provided that advances already made to some of his children, and any future advances to them exceeding at any one time the sum of £1,000, should be treated as capital of the original shares and be brought into hotchpot and accounted for accordingly. The testator died on July 3, 1887, and left surviving him six children, of whom three had received advances and three had not. The widow died in March, 1900.

Held: to ascertain the proportions of the settled shares of the six children, the value of the net residuary estate of the testator at the day of his death should be ascertained, and there should be added thereto the several advances; the actual income received from the testator's death should be divided in the proportions so ascertained, and the share of each child in such income should be debited with one sixth part of the testator's widow's annuity; and, therefore, any calculation of interest on the amount advanced to any child was unnecessary.

Notes. Applied: *Re Gilbert, Gilbert v. Gilbert*, [1908] W.N. 63. Distinguished: *Re Poyser, Landon v. Poyser*, [1908] 1 Ch. 828. Considered: *Re Willoughby, Willoughby v. Decies*, [1911] 2 Ch. 581. Applied: *Re Hart, Hart v. Arnold* (1912), 107 L.T. 757. Distinguished: *Re Craven, Watson v. Craven*, [1914] 1 Ch. 358; *Re Forster-Brown, Barry v. Forster-Brown*, [1914] 2 Ch. 584; *Re Cooke, Randall v. Cooke*, [1916] 1 Ch. 480. Not followed: *Re Tod, Bradshaw v. Turner*, [1916-17] All E.R. Rep. 1054. Followed: *Re Mansel, Smith v. Mansel*, [1929] All E.R. Rep. 189. Distinguished: *Re Wills, Dalrerton v. Macleod*, [1939] 2 All E.R. 775. Referred to: *Re Whiteford, Inglis v. Whiteford*, [1903] 1 Ch. 889; *Re Dary, Hollingsworth v. Dary*, [1908] 1 Ch. 61; *Re Hillas-Drake, National Provincial Bank v. Liddell*, [1944] 1 All E.R. 375.

As to hotchpot of prior advances, see 34 HALSBURY'S LAWS (2nd Edn.) 424 et seq.; and for cases see 44 DIGEST 1238 et seq.

Appeal from a decision of JOYCE, J., reported 86 L.T. 43.

By his will, dated May 5, 1880, the testator, Henry Hargreaves, after giving certain legacies, bequeathed the sum of £7,000 stock to his trustees upon trust to pay the annual income thereof to his son Henry Percy Hargreaves, and then upon the trusts therein declared for the benefit of the children and wife of Henry Percy Hargreaves; and the testator declared that this provision was intended to be in addition to the sum of £12,000 which he had already advanced to Henry Percy Hargreaves and in addition to any other sums which he might advance to him in his lifetime, unless he should by writing direct the contrary, and that the sum of £12,000 and any further advances should not be brought into hotchpot

by his said son in calculating the sum bequeathed to trustees for his benefit and the benefit of his children and wife as aforesaid. And the testator devised all the real estate and bequeathed all the residue of the personal estate, of or to which he should be seised, possessed, or entitled, at his death, to his trustees on trust that his trustees should permit such part of the same as they should think fit to remain in its then state or on the investments existing at his death for such period as they should think proper, and should, as soon as conveniently might be after his death, collect and get in all moneys which should belong or be due to him, and should sell and dispose of and convert into money all such parts of his real and residuary personal estate as should not consist of money or of real estate or investments which they should think fit to retain as aforesaid until the sale of such real estate or the variation of such investments under the trusts of his will. The trustees should out of the moneys which should belong to him at his death and the moneys which should arise from any such sale, disposition, or conversion, as aforesaid, pay his funeral and testamentary expenses and the pecuniary legacies bequeathed by that his will or any codicil thereto, and should stand possessed of the then residue upon the trusts thereafter declared.

The testator, after giving directions as to the sale of his real and residuary personal estate, and as to the investment of the trust funds, and directing that the income of the unconverted estate until its conversion should be disposed of in the same manner as the converted estate, declared that his trustees should stand possessed of his residuary trust moneys and of the stocks, funds, shares, and securities from time to time representing the same, and the annual income thereof, upon trust out of the income to pay certain annuities, and the annual sum of £2,000 to his wife during her life until she should marry, and on trust to divide the same into as many shares as there should be children of his who should be living at his death, or should have died in his lifetime leaving children living at his death, or born in due time afterwards, other than his son Henry Percy Hargreaves, who was thereinbefore provided for, and to pay the annual income of such shares unto his children other than Henry Percy Hargreaves; and then upon certain trusts therein expressed, in favour of the children and wife of his son George Hamilton Hargreaves, and in favour of the children and husbands of his daughters.

After reciting that on the marriage of his daughter Alice Hargreaves he had settled the sum of £12,000 stock on her, and had advanced to his son George Hamilton Hargreaves the sum of £6,000 to set him up in business, the testator then declared that those sums respectively should be treated as part of the capital of the original shares, the annual income of which was thereinbefore directed to be paid or applied to or for the benefit of Alice Mackenzie and George Hamilton Hargreaves, and in fixing the amount of such original share the same sums respectively should be brought into hotchpot and accounted for accordingly—and for that purpose he directed at what amounts they were to be taken. The testator then provided and declared that if he should thereafter during his lifetime advance or covenant to advance any sum or sums exceeding at any one time the sum of £1,000 sterling or any stocks, funds, shares, or securities, of that value on the marriage of his son George Hamilton Hargreaves, or for his further preferment or advancement in the world, on the marriage of any of his daughters (including any future marriage of his daughter Alice Mackenzie), or for the preferment or advancement in the world of any daughter, then and in such case, unless he should by any writing in his lifetime or by any codicil thereto declare the contrary, the sum or sums so advanced or covenanted to be advanced should be treated as part of the capital of the original share, the annual income of which was thereinbefore directed to be paid or applied to or for the benefit of such son or daughter, and in fixing the amount of such original share the same sum or sums should be brought into hotchpot and accounted for accordingly; and for that purpose any such stocks, funds, or securities should be treated as of the value thereof at the average price of the day on the day of his death.

By a codicil, dated July 12, 1882, the testator, after reciting that he was desirous of putting all his sons and daughters on an equal footing in regard to the distribution of his property, revoked the bequest in his will of £7,500 stock in favour of his son Henry Percy Hargreaves, and also the direction that unless he should otherwise direct the contrary the sum of £12,000 and any further advances should not be brought into hotchpot; and thereby declared and directed that the words in his will declaring the trusts upon which the trustees of his will were to hold, divide, and distribute his said residuary estate, and the stocks, funds, shares, and securities from time to time representing the same and the annual income thereof should be read as if the words "other than my said son Henry Percy Hargreaves" had been omitted.

The testator died on July 3, 1887, and left surviving him six children, viz., Henry Percy Hargreaves, George Hamilton Hargreaves, and Alice Mackintosh, and three other daughters who had not received advances. On or about Jan. 3, 1882, the value of the testator's estate was ascertained to be about £137,500, and the investments in the names of the trustees consisted principally of railway ordinary shares and one sum of railway preference stock, all of which were taken at the values at which they were valued for probate, and the sum of £5,500 secured on mortgage, which was then valued at £1,500, but which was subsequently (in April, 1892) paid in full, all of which were investments existing at the date of the death of the testator.

The widow died in March, 1900. In bringing the sums advanced to children of the testator into hotchpot for the purpose of distributing the income of the testator's estate, the trustees had added to such advanced sums interest as from the date of the testator's death according to the average rate of income on the whole estate; and this interest had fluctuated between 3 and 5 per cent.

The trustees took out a summons before Joyce, J., raising the following questions: (i) Whether under the provisions contained in the will and codicils of the testator Henry Hargreaves, the plaintiff, Henry Percy Hargreaves, and other advanced children of the testator were liable to pay interest on the advances made to them respectively by their father in his lifetime, or on some and what portions of such advances, and, if so, whether such interest should have been paid at a rate varying according to the actual income derived from the investments for the time being representing the residuary estate of the testator, or at a fixed rate, and, if at a fixed rate, what such rate should have been; (ii) whether, if interest was properly payable on such advances or on portions of such advances, from which date or dates it should have been calculated; (iii) whether the accounts kept by the trustees had hitherto been kept upon a proper basis, and, if not, in what respect they were erroneous, and how they should now be rectified and be framed in future, and for what period the plaintiff was entitled to require the past accounts to be rectified.

Joyce, J., held that in bringing the advances into hotchpot for the purpose of determining the respective shares of the six children, the shares of the advanced children must respectively be debited with 4 per cent. on the amount of their respective advances from the testator's death down to the time when the estate ought, or should be deemed, to have been divided. The advanced children appealed.

Younger, K.C., and *Vaughan Hawkins* for the advanced children.

Hughes, K.C., and *Sargant* for the unadvanced children.

Sampson for the trustees.

SIR RICHARD HENN COLLINS, M.R.—So far as this case turns on a question of Chancery practice, I shall not venture to give an opinion upon it, but so far as it is a mere question of the construction of the will it seems to me there is no real doubt whatever that the testator here intended the rights of the parties to be ascertained at his death; and if the rights of the parties are to be ascertained at

the testator's death, it seems to me that, as a question of arithmetic, the principle is unimpeachable which was referred to by ROMER, L.J., in the course of the argument, and which he will re-state and explain further presently.

ROMER, L.J.—I think there is no real difficulty in this case, for it must be borne in mind that on the face of this will it is clear that the rights of the children inter se are fixed at the date of the death of the testator. The testator has clearly said that at his death the advances he has made to the different children shall be brought into account as against the share of the child advanced, and it must not be forgotten that here no tenancy for life is created, but the shares are given to the children at the death of the testator, and the trusts are declared of each child's share when that child's share is settled as from the death. Therefore, to my mind, it is very clear that if any question arises as between the children as to what their shares are, what burthens have to be borne by each share inter se, the matters must be considered as they stood at the death of the testator. Applying that principle to the case before us, it appears to me that there is no difficulty whatever on the question that we have to decide if the estate is treated as divided at the death. Then the only difficulty arises from this, that sums of money must be brought in as against properties that are not actually realised. But that occasions no real difficulty, because no one says here that it is not possible to ascertain exactly what was the value of the estate at the death.

Then the value of the estate at the death being known, and the amounts of the advances, the value in money of each child's share is accurately ascertained, and then it can be found exactly, in respect to an advanced child, how much of his share is made up from his advances, and how much is made up out of the estate. In other words, you inquire at once what is his true proportion of the estate as at the death, and it is to be remembered that the testator has directed that is the way it is to be done. He has not simply said the children are to take in equal shares, but that they are to take in shares which are to be ascertained by bringing in artificial sums as at his death, so that the true proportions of their shares in his actual estate can only be ascertained, as I have pointed out, by valuing the estate at his death, and seeing then what are the proportions of the different children in the estate apart from the sums they have to bring in. The value of the estate is taken, the advances to the children are added to the value of the estate, and the total represents what I may call the gross estate of the testator. The gross share of each child is known, it is known what portion of the share is made up of advances, and what portion is made up of the actual estate—in fact, the child's actual share of the estate as at the death is ascertained without any difficulty.

That being ascertained, and the shares of the children in the testator's estate being thus ascertained, the question arises, How is a certain annuity that is given to be provided for? It is undoubted that as between the six children here each child's share must bear its proportion of that annuity—namely, one sixth. There is again no difficulty, for you know exactly from year to year what each child's actual share in the estate is producing, because it is producing a certain proportion of each year's actual income. If you deduct that, in respect of one child, from the proportion of the annuity he has to bear, if his share of the income is not equal to his proportion of the full annuity, he must make good the deficiency in some form or other. Of course, if the income of his share exceeded his proportion of the annuity, he would be entitled to the surplus. In the case of the son George, who is the most advanced of the children, it appears that his portion of each year's income of the estate from the testator's death has never been sufficient to pay his one-sixth part of the annuity. Clearly, then, in favour of the other children, he will have to bring into account the difference in each year between the portion of his income that has actually gone to pay the annuity and the sum that, on account, he ought to have provided. That must be debited against him, and provided for in some shape or form. Of course, how it is to be provided for is very clear.

When the annuitant dies, and his income becomes enlarged, he can only receive the income on the terms of re-empowering the other children, and his income must be applied accordingly. I need not say anything further, for in all human probability, in the events which have happened, he will live long enough to provide for the re-empowerment of the other children out of his income; so that the question of having recourse to the corpus need not be further considered. This seems to me to be plain on the terms of the will and right as a mere question of practice and arithmetic; and that any calculation as to interest is wholly unnecessary. It is true that the court on occasions is obliged, in order to do justice between children or other parties, to put them on a state of equality, when no other method of doing it can be arrived at, to cause interest at some rate or other to be calculated, and treated as payable on account by some of the parties whose rights have to be adjusted; but the court never does that unless it is bound to. If the court can actually ascertain exactly what each child ought to account for, there is no necessity to go into an artificial computation of interest, and, as I have pointed out, in this case the amount each child ought to have paid in each year towards the annuity is clearly and definitely ascertained at the end of each year, so that you have no necessity here to go into artificial calculations of a rate of interest. The amount can be found exactly which each child has in each year omitted to pay and which his brothers have paid, and he has to account for that deficiency, and he is not bound to account on any artificial calculations of interest at all. This appears to me to be a perfectly simple, plain case.

COZENS-HARDY, L.J.—I entirely agree. On the language of this will I cannot doubt that an actual ascertainment of the shares as from the moment of the testator's death was contemplated. The hotchpot clause contains an express provision that the securities that are to be brought into hotchpot are to be ascertained at the average price of the day at his death. It would be very singular indeed if part were to be ascertained in that way and the rest not. I do not desire to add one word to what has been said by the Master of the Rolls and ROMER, L.J., but it appears to me that the following is the form of declaration which should be made—viz., "Discharge the order of JOYCE, J., except as to costs. Declare that for the purpose of ascertaining the proportions of the settled shares of the six children of the testator, the value of the net residuary estate of the testator at the day of his death ought to be ascertained, and there should be added thereto the several advances of £28,000, £22,000, and £15,000, made respectively to George, Percy, and Mrs. Mackenzie." That will require a little addition by bringing in those advances by way of deduction. Then "Declare that the actual income received at the testator's death ought to be divided in the respective proportions so ascertained, and that the share of each child in such income ought to be debited with one-sixth part of the widow's annuity. Liberty to apply." The costs of this appeal should come out of the estate.

Solicitors: *Cheston & Sons; Chester, Broome & Griffiths; Howard, Woolley & Co.*

[Reported by W. C. Biss, Esq., Barrister-at-Law.]

TURNBULL, MARTIN & CO. v. HULL UNDERWRITERS' ASSOCIATION

[QUEEN'S BENCH DIVISION (Mathew, J.), April 25, 30, 1900.]

[Reported [1900] 2 Q.B. 402; 69 L.J.Q.B. 588; 82 L.T. 818; 16 T.L.R. 359; 9 Asp.M.L.C. 93; 5 Com. Cas. 248]

Insurance—Marine insurance—Freight—Exception of "any claim consequent on loss of time"—Destruction of refrigerating plant—Detention of ship for repair.

A policy on freight of frozen meat contained the clause: "Chartered freights and freights are warranted free from any claim consequent on loss of time." Before the vessel loaded the meat, a fire destroyed her refrigerating machinery, so that she could not carry frozen meat. It would have been necessary to bring the materials to repair from England to Australia, where the fire occurred, which would have involved great delay. In an action to recover a total loss under the policy,

Held: as it was impossible for the ship to carry frozen meat until her machinery had been repaired, the loss was "consequent on loss of time" within the meaning of the clause in the policy, and the action failed.

Notes. Considered: *Scottish Shire Line v. London and Provincial Marine and General Insurance*, [1912] 3 K.B. 51; *Atlantic Maritime Co., Inc., v. Gibbon*, [1953] 2 All E.R. 1086. Referred to: *Carras v. London and Scottish Assurance Corp., Ltd.* (1935), 40 Com. Cas. 288; *Robertson v. Petros M. Nomikos, Ltd.*, [1939] 2 All E.R. 723.

As to total loss of freight with reference to marine insurance, see 22 HALSBURY'S LAWS (3rd Edn.) 147 et seq.; and for cases see 29 DIGEST 209 et seq.

Cases referred to:

- (1) *Jackson v. Union Marine Insurance Co.* (1874), L.R. 10 C.P. 125; 44 L.J.C.P. 27; 31 L.T. 789; 23 W.R. 169; 2 Asp.M.L.C. 435, Ex. Ch.; 29 Digest 258, 2087.
- (2) *Bensaude v. Thames and Mersey Marine Insurance Co.*, [1897] A.C. 609; 66 L.J.Q.B. 666; 77 L.T. 282; 46 W.R. 78; 13 T.L.R. 501; 8 Asp.M.L.C. 315; 2 Com. Cas. 238, H.L.; 29 Digest 47, 93.

Action to recover a total loss on a policy on freight of a cargo of frozen meat.

The insurance was on the outward voyage of the steamship *Buteshire* for freight expected to be earned on the homeward voyage, and the risk was described in the following terms:

"At and from London to any port or ports and/or place or places in any order or rotation in Australia and/or Tasmania and/or New Zealand, risk to continue until steamer sails from final loading port on homeward voyage."

The subject-matter was described as follows:

"Upon freight of frozen meat, chartered or as if chartered, on board or not on board, full interest admitted."

The policy also contained the following special clause:

"Chartered freights and freights are warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise."

It was not disputed that the words "or otherwise" meant other perils insured against.

The evidence showed that at the time when the vessel sailed no contracts had been entered by the plaintiffs for the shipment of frozen meat from the colonial ports, but such contracts were made, and the homeward cargo was booked at Newcastle, Melbourne, and New Zealand ports, while the vessel was making her outward voyage. Frozen meat must be shipped at the times specified in the contracts with shippers, and the shipments cannot be delayed. Where the vessel is disabled from fulfilling her engagements frozen meat would in the ordinary course be forwarded in another vessel. A delay involving no great length of time due to damage by perils insured against, either to ship or machinery, would prevent the vessel from earning freight contracted for, and would thus defeat the object of the adventure. The risk is therefore one which underwriters would be cautious about accepting. The *Dutshire* was fitted with refrigerating machinery of a special kind in three of her five holds. The other holds were used for ordinary cargo.

The ship arrived at Sydney on Oct. 15, 1898, and discharged her outward cargo. On Oct. 18 a fire occurred on board, and so damaged her refrigerating machinery that she was disabled from carrying a cargo of frozen meat. Materials for the repair of the refrigerating machinery could not be procured, and had to be brought from England, and the owners properly determined to send the vessel home with such ordinary cargo as she could procure and to have the damage repaired in England. The earning of the freight was in this way rendered commercially impossible.

Carver, Q.C., and *J. A. Hamilton* for the plaintiffs.

Joseph Walton, Q.C., and *Theobald Mathew* for the defendants.

April 30, 1900.—**MATHEW, J.**, read a judgment in which he stated the facts and continued: It was argued for the plaintiffs on the authority of *Jackson v. Union Marine Insurance Co.* (1) that a delay due to a peril insured against which frustrated the object of the voyage and prevented the vessel from earning her homeward freight entitled the plaintiffs to recover as for a total loss. For the defendants reliance was placed on the terms of the warranty and upon the decision in *Bensaude v. Thames and Mersey Marine Insurance Co.* (2). The loss, it was argued, was due not merely to the fire, but to the time which the repairs must have taken. The argument for the plaintiffs, on the other hand, that the claim was consequent not upon loss of time but upon the disablement of the vessel by a peril insured against was rejected by the Court of Appeal and the House of Lords in that case. The damage in both cases was of such a character that it became impossible to prosecute the voyage within the necessary time. An attempt was made to distinguish the present case from the decision in *Bensaude v. Thames and Mersey Marine Insurance Co.* (2) on the ground that this was not chartered freight; but the warranty applies not only to chartered freight but to all freights; and the several contracts of affreightment made with the shippers had the same operation as if they were grouped in a charter party. In each case the result of the peril insured against would have been the same—viz., to disable the ship from fulfilling her engagements in proper time. It seems to me that no such distinction can be reasonably made. The ship was damaged by a peril insured against; and her capacity to carry frozen meat was suspended until her machinery had been repaired. If she could have been repaired promptly there would have been no loss of freight. The loss, therefore, was "consequent on loss of time" within the meaning of the warranty. I give judgment for the defendants.

Judgment accordingly.

Solicitors: *Hollins, Son, Coward & Hawksley; Wiltons, Johnson, Bubb & Whetton.*

[Reported by W. DE B. HERBERT, ESQ., Barrister-at-Law.]

HANCOCK v. WATSON

HOUSE OF LORDS (The Earl of Halsbury, L.C., Lord Shand, Lord Davey, Lord Brampton and Lord Robertson), November 29, December 2, 16, 1901.

[Reported [1902] A.C. 14; 71 L.J.Ch. 149; 85 L.T. 729; 50 W.R. 321]

Perpetuities—Gift—Gift in trust for beneficiary or children after death—Gift over in default of issue.

A testator gave his residuary personal estate to his wife for her life and after her death to be divided into five equal portions, allotted as follows: two to D., one each to his brothers W. and C., and one to the sons of his late brother S. The two portions allotted to D. were to remain in trust for her separate use for life, and, after her decease, in trust for her children on attaining the age of twenty-five, if sons, or on attaining the age of twenty-one or marriage if daughters. In default of such issue the said two portions were to be divided among the children of his brother C. D. died without having had children.

Held: the gift over was not in the alternative, but was a single gift over which was void for remoteness; further, the gift to D. was an absolute gift in the first instance, and, the attempt to limit the effect of it having failed, the absolute gift was good, and her share passed to her legal personal representatives.

Notes. Applied: *Re Currie's Settlement, Re Rooper, Rooper v. Williams*, [1908-10] All E.R. Rep. 274. Extended: *Moryoseph v. Moryoseph*, [1920] All E.R. Rep. 216. Applied: *Re Atkinson, Atkinson v. Weightman*, [1925] W.N. 30. Distinguished: *Re Paine, Taylor v. Paine*, [1927] All E.R. Rep. 223. Applied: *Re Marshall, Graham v. Marshall*, [1928] All E.R. Rep. 694. Considered: *A.-G. v. Lloyds Bank, Ltd.*, [1935] All E.R. Rep. 518. Applied: *Re Gatti's Voluntary Settlement Trusts, De Ville v. Gatti*, [1936] 2 All E.R. 1489. Considered: *Re Currier's Will Trusts, Wgly v. Currier*, [1938] 3 All E.R. 574; *Re Hadson's Settlement, Brookes v. A.-G.*, [1938] 3 All E.R. 341; *Fyfe v. Irwin*, [1939] 2 All E.R. 271; *Re Hatch, Public Trustee v. Hatch*, [1948] 2 All E.R. 288. Applied: *Re Norton, Wyatt v. Bain*, [1949] L.J.R. 568; *Re Burton's Settlement Trusts, Public Trustee v. Montefiore*, [1955] 1 All E.R. 433. Referred to: *Re Wood, Wood v. Wood*, [1901] 2 Ch. 578; *Re Davies and Kent's Contract* (1910), 102 L.T. 622; *Re Norton, Norton v. Norton*, [1911] 2 Ch. 27; *Re Hewett's Settlement, Hewett v. Eldridge*, [1915] 1 Ch. 810; *Re Jones, Last v. Dobson*, [1915] 1 Ch. 246; *Re Harrison, Hunter v. Bush*, [1918-19] All E.R. Rep. 785; *Re Monk, Giffen v. Wedd*, [1927] 2 Ch. 197; *Greenwood v. Greenwood*, [1939] 2 All E.R. 150; *Re Litt, Parry v. Cooper*, [1946] Ch. 154; *Re Waller's Will Trusts, Stuart v. Pilman*, [1948] 2 All E.R. 955; *Re Bland-Sutton's Will Trusts, National Provincial Bank, Ltd. v. Middlesex Hospital*, [1951] Ch. 485; *Royal College of Surgeons of England v. National Provincial Bank, Ltd.*, [1952] 1 All E.R. 984; *Re Rooke's Will Trusts, Taylor v. Rooke*, [1953] 2 All E.R. 110; *Re Krawitz's Will Trusts, Krawitz v. Crawford*, [1959] 3 All E.R. 793; *Re James's Will Trusts*, [1960] 3 All E.R. 744.

As to the construction in wills of general and particular intentions, see 31 HALSBURY'S LAWS (2nd Edn.) 212-214. As to the application in general of the rule against perpetuities, see 29 HALSBURY'S LAWS (3rd Edn.) 308 et seq. For cases see 37 DIGEST 102 et seq.

Cases referred to:

- (1) *Jee v. Audley* (1787), 1 Cox, Eq. Cas. 324; 29 E.R. 1186; 37 Digest 57, 75.
- (2) *Lord Dungannon v. Smith* (1846), 12 Cl. & Fin. 546; 10 Jur. 721; 8 E.R. 1523, H.L.; 37 Digest 55, 9.
- (3) *Proctor v. Bishop of Bath and Wells* (1794), 2 Hy.Bl. 358; 126 E.R. 594; 37 Digest 105, 393.

- (4) *Longhead v. Phelps* (1770), 2 Wm Bl. 704; 96 E.R. 413; 37 Digest 102, 376.
 (5) *Lucy v. Challis* (1859), 7 H.L.C. 331; 11 E.R. 212, sub. name *Doe v. Lucas v. Challis*, 29 L.J.Q.B. 121; 33 L.T.O.S. 373; 5 Jur.N.S. 825; 7 W.B. 622, H.L.; 37 Digest 103, 384.
 (6) *Gulliver v. Wickett* (1745), 1 Will. 105; 95 E.R. 517; 37 Digest 65, 60.
 (7) *Leake v. Robinson* (1817), 2 Mer. 363; 35 E.R. 979; 37 Digest 92, 290.
 (8) *Lawsone v. Turney* (1849), 1 Mac. & G. 551; 2 H. & T. 115; 15 L.T.O.S. 557; 14 Jur. 182; 41 E.R. 1379, L.C.; 37 Digest 99, 346.

Also referred to in argument :

- Watson v. Young* (1885), 28 Ch.D. 436; 54 L.J.Ch. 502; 33 W.R. 637; 37 Digest 104, 388.
Re Harvey, Peck v. Savory (1888), 39 Ch.D. 289; 60 L.T. 79, C.A.; 37 Digest 105, 395.
Re Bence, Smith v. Bence, [1891] 3 Ch. 242; 60 L.J.Ch. 636; 65 L.T. 530; 7 T.L.R. 593, C.A.; 37 Digest 105, 396.
Jones v. Westcomb (1711), Pree.Ch. 316; Gilb.Ch. 74; 1 Eq. Cas. Abr. 245; 24 E.R. 149; 44 Digest 1175, 10165.
Kellett v. Kellett (1868), L.R. 3 H.L. 160, H.L.; 44 Digest 919, 7772.
Cooke v. Cooke (1887), 38 Ch.D. 202; 59 L.T. 693; 36 W.R. 756; 37 Digest 114, 458.

Appeal from an order of the Court of Appeal (LORD ALVERSTONE, C.J., RIGBY and VAUGHAN WILLIAMS, L.JJ.), reported [1901] 1 Ch. 482, affirming a decision of BYRNE, J. The question arose upon the construction of the will of Richard Hancock, who died on Jan. 23, 1852. The appellants were the children of the testator's brother Charles Hancock; the respondents were the trustees of the will, and the next of kin, other than the appellants, and the personal representatives of Susan Drake, a beneficiary under the will.

Levett, K.C., and Quin, for the appellants.

Haldane, K.C., Mulligan, K.C., and Fawcus, for the representatives of Susan Drake.

P. S. Stokes for the trustees.

Their Lordships took time for consideration.

Dec. 16, 1901. The following opinions were read.

LORD DAVEY.—In this case Richard Hancock, by his will dated June 17, 1850, gave the residue of his property to trustees upon trust to permit his wife (who died in 1876) to receive the income during her life for her separate use, and after her death upon trust to be divided into five equal portions which he allotted in the manner following: To Susan Drake he gave two of such portions, to his brother William one such portion, to his brother Charles one such portion, and to the sons of his late brother Sampson the remaining one such portion. The will then proceeds as follows :

"But it is my will and mind that the two fifth portions allotted to the said Susan Drake shall remain in trust, and that she be entitled to take only the interest and annual proceeds of the shares so bequeathed to her during her natural life and for her sole and separate use independent of her present or any future husband, but without power of anticipation, and from and after her decease in trust for the benefit of any child or children born unto her the said Susan Drake by her present or any future husband upon his or their attaining the age of twenty-five years, if a son or sons, or if a daughter or daughters upon her or their attaining the age of twenty-one years, or upon her or their marriage, whichever of these events may first happen, but in default of any such issue then and in that case the said two fifths of my residuary estate and any accumulation of interest thereon shall go and be divided subject to the appointment of my wife among the children of my brother Charles, but if there

be no such appointment then to be equally divided among such children, payable if a son or sons upon their attaining the age of twenty-five years, and if a daughter or daughters upon her or their attaining the age of twenty-one years, or upon her or their marriage, whichever event may first happen."

Susan Drake died on June 26, 1899, without ever having had any issue. The two fifths of the testator's residuary estate allotted to her are now represented by a sum of £12,399 10s. Reduced Three per Cent. Annuities. The appellants are the children of the testator's brother Charles, and in the events which have happened they claim to be entitled to Susan Drake's two fifths of the residuary estate under the gift over stated above. They are also next of kin of the testator, and if they fail on their first point they contend that the share in question is undisposed of.

Your Lordships will observe that the disposition under which the appellants claim is an executory limitation to take effect in default of such issue as mentioned of Susan Drake, i.e., her children, whether born before or after the testator's death, who shall attain the age of twenty-five years in the case of sons, and twenty-one years or be married in the case of daughters. This event may, of course, happen beyond the limits allowed by law. An executory devise is an infringement on the rules of the common law, and the conditions for its validity are well settled. So far back as the year 1787 LORD KENYON thus expresses himself in *Jee v. Audley* (1) (1 Cox, Eq. Cas. at p. 325):

"The general principles which apply to this case are not disputed: the limitations of personal estate are void, unless they necessarily vest, if at all, within a life or lives in being, and twenty-one years or nine or ten months afterwards. This has been sanctioned by the opinion of judges of all times, from the time of the Duke of Norfolk's case to the present; it has grown reverend by age, and is not now to be broken in upon."

And in advising this House in *Lord Dunsannon v. Smith* (2), a case to which I shall refer again, CRESSWELL, J., stated the rule thus (12 Cl. & Fin. at p. 563):

"It is a general rule, too firmly established to be controverted, that an executory devise to be valid must vest, if at all, within a life or lives in being and twenty-one years after; it is not sufficient that it may vest within that period; it must be good in its creation; and unless it is created in such terms that it cannot vest after the expiration of a life or lives in being, and twenty-one years, and the period allowed for gestation, it is not valid, and subsequent events cannot make it so."

All this is not disputed by the appellants, and it would therefore seem that the gift over to the children of Charles in the will before your Lordships must *prima facie* be held void. But the appellants contend that they are entitled to look at the events which happened, and to construe the event on which the gift over is to take effect as if it were two events. They say that the meaning of the testator's words rightly construed is: "if Susan Drake shall have no issue or if her children die without having fulfilled the prescribed conditions for the vesting of the property in them." In the first case they say the gift is good, and in the second only is it void. The first observation that occurs to one is that this is not the language of the will. The learned counsel for the representatives of Susan Drake pointed out grammatical difficulties in reading the words in that way. If one were at liberty to alter the language of the will in the manner suggested, I really do not see why one should not split the event into as many contingencies as can be pointed out in which the gift over would take effect within the allowed limits. For instance, why not divide the event in the present case into at least three: (i) If Susan has no children; (ii) if her children all die under twenty-one; or (iii) if they die under twenty-five? And there may be other contingencies into which the event could be broken up. In that case what becomes of the rule that you are not to look at

the event which actually happens for determining the validity of the gift? I A again quote LORD KENYON (1 Cox, Eq. Cas. at p. 826):

"Another thing pressed upon me is to decide on the events which have happened; but I cannot do this without overturning very many cases. The single question before me is, not whether the limitation is good to the events which have happened, but whether it was good in its creation; and if it were not I cannot make it so." B

But the same argument which has been pressed upon your Lordships was addressed to the Court of Common Pleas more than a hundred years ago, and over-ruled. In *Proctor v. Bishop of Bath and Wells* (3), decided in the year 1794, an advowson was devised to the first or other son of Thomas Proctor that should be bred a clergyman, and be in holy orders, but in case Proctor should have no such son, to one Moore in fee. There being no particular estates to support the devise as a contingent remainder, it could take effect only as an exoneratory devise. Proctor died without having had a son, and Moore claimed a right to present. It was argued that the limitations in the will were alternative; if Proctor should have a son in holy orders Moore was excluded, and if he had no son he could take. It was replied that in truth there was but one contingency on which the devise to Moore was limited, and the case was distinguished from *Loughhead v. Phelps* (4), where two contingencies were expressed in the disjunctive, the first of which was good. The Court of Common Pleas was clearly of opinion that the first devise to the son of Thomas Proctor was void from the uncertainty when such son, if he had any, might take orders, and that the devise over to Moore, as it depended on the same event, was also void, for the words of the will would not admit of the contingency being divided. Again in *Lord Dunsannon v. Smith* (2), a testator bequeathed leaseholds for years to trustees on trust for B. for life, after his death to permit such person who for the time being would take by descent as heir male of the body of B., to take the profits thereof until some such person should attain the age of twenty-one years, and then to convey the same to such person so attaining that age. Your Lordships will observe that there was no gift of the corpus of the estate except in the direction to convey, and the event upon which that was to take place might exceed the limits allowed by law. At the death of B. his son and heir had attained twenty-one. It was argued on his behalf that you might split the gift into two parts, and construe it as a direction to convey to the first heir male on his attaining twenty-one which would be good, and in default of his doing so to the successive heirs male. This argument was in principle and substance precisely that put forward by the appellant in the present case. I will quote only the opinion of MAULE, J., one of the learned judges who advised the House. He says (12 Cl. & Fin. at p. 579):

"With respect to this argument it may be observed that the words of the testator are clear and unambiguous; there is no difficulty in dealing with them as they stand in the will, unless it be sought to evade the rule against perpetuity. There is no such rule of construction as that any words which point out the same course of devolution [I pause to add 'or describe the same events'] as those used by the testator may, in construing a will, be substituted for those which he has used—a proposition which seems to be assumed in the argument in question. Such a rule would be manifestly inconsistent with the established law, that a gift to take effect on an event which may happen or may not happen within the legal limit is too remote, such a gift being always capable (consistently with the same order of devolution) of being divided into two gifts, one necessarily to take effect, if at all, within the legal time, and the other afterwards." H

I will not delay your Lordships by quoting what was said by noble and learned Lords to the same effect in giving judgment, because I do not find the point more clearly put than it was by MAULE, J. The appellants, however, rely on another case I

in this House, of *Erers v. Challis* (5). On a superficial view of this case, it appears to lend some support to their argument, but on a careful examination it will be found to have been decided on a totally different point, which has no application to the present case. The will in *Erers v. Challis* (5) contained a very complicated series of devises of a freehold estate. It is sufficient for the present purpose to say that there was a devise to the testator's daughter Ann for life, with remainder to her children, if sons, living to attain twenty-three, and if daughters, living to attain twenty-one, with a gift over, under which the appellant claimed, Ann having died childless. As an executory devise the gift over was admittedly too remote, but it was argued that it took effect immediately on Ann's death as a contingent remainder. It is a familiar principle of English real property law that if a devise can take effect as a remainder it shall do so, and it was accordingly held in this House that the gift over, in the event which had happened operated and took effect as a contingent remainder, and the question of remoteness therefore did not affect it. That this was the point decided is clear from the opinion of the judges who were called on to assist this House, delivered by WIGHTMAN, J., as well as from the judgments delivered by the noble and learned Lords who heard the case. WIGHTMAN, J., said (7 H.L.Cas. at p. 547):

"No case or authority has been cited to show that when a devise over includes two contingencies which are in their nature divisible, and one of which can operate as a remainder, they may not be divided though included in one expression; and our opinion does not at all conflict with the authority of the cases of *Proctor v. Bishop of Bath and Wells* (3) and *Jee v. Audley* (1), in neither of which cases was it possible for the limitation over to operate as a remainder."

LORD CRANWORTH said (*ibid.* at p. 548):

"I think that the gift to the children of John and Sarah on the death of Ann without issue in 1847, took effect as a contingent remainder and not as an executory devise, and so was good; because when the particular estate determined, the contingency on which the remainder was to take effect had happened."

And he supports his opinion by reference to *Gulliver v. Wickell* (6), which he discusses at some length. LORD BROUGHAM said (*ibid.* at p. 556):

"As to the cases, of which there are several, I need not go into them. One of them is *Proctor v. Bishop of Bath and Wells* (3). In that case there was no particular estate to support the contingent remainder, and it was clearly an executory devise."

On these grounds this House reversed the decision of the Exchequer Chamber and restored that of the Queen's Bench. It is apparent that the authority of *Proctor v. Bishop of Bath and Wells* (3) is untouched by anything decided or said in *Erers v. Challis* (5). I am, therefore, of opinion that the appellant fails on his first point. Some minds may be disposed to sympathise with SIR WILLIAM GRANT, M.R., when he says in *Leake v. Robinson* (7) (2 Mer. at p. 389):

"Perhaps it might have been as well if the courts had originally held an executory devise transgressing the allowed limits to be void only for the excess, where that excess could, as in this case it can, be clearly ascertained."

But the law is what it is.

The appellant's second point is that the two-fifths allotted to Susan Drake on failure of the gift over goes to the next of kin of the testator, and not to Susan's representatives as declared by the Court of Appeal. I confess to some surprise at hearing this point treated as arguable. For, in my opinion, it is settled law that if you find an absolute gift to a legatee in the first instance, and trusts are engrafted

—a gift in trust on that absolute interest which will, if not from lapse or impossibility of any other reason, then the absolute gift takes effect so far as the trusts have failed in exclusion of the residuary legatee or next of kin as the case may be. Of course, as LORD COTTESHAM pointed out in *Lassence v. Turner* (18), if the terms of the gift are ambiguous you may seek assistance in construing it—in saying whether it is expressed as an absolute gift or not—from the other parts of the will including the language of the engrafted trusts. But when the court has once determined that the first gift is in terms absolute, then if it is a share of residue (as in the present case) the next of kin are excluded in any event. In the present case I cannot feel any doubt that the original gift of two-fifths of the residuary estate to Susan Dyke was in terms an absolute gift to her. He used the words “I give” and speaks of the shares subsequently as “allotted” to her. Counsel for the appellants contended that there are words in the will which confine her interest in the allotted portions to her life. But that is not what the testator has said; he has directed that during her life she shall have only the income of her share for her separate use without power of anticipation. But that is quite consistent with a power of disposing of the capital after her death so far as it should not be exhausted by the trusts declared of it, and with the right of her representatives to claim it. In other words, as between herself and the estate there is a complete severance and disposition of her share so as to exclude an intestacy, though as between her and the parties taking under the engrafted trusts, she takes for life only. I am of opinion that the appeal should be dismissed with costs.

LORD SHAND.—I have had the opportunity of fully considering the opinion of LORD DAVEY, and I concur in the judgment and in all that his Lordship has said. I shall only add that on all the points raised on the appellants’ argument the authorities to which my noble and learned friend has referred seem to me to be conclusive against the appellants’ argument in all its bearings.

LORD BRAMPTON.—I entirely concur.

LORD ROBERTSON.—I concur.

THE EARL OF HALSBURY, L.C.—I concur, and I have only to say that I think that on both points the matters argued before your Lordships are so fully covered by the authorities that I do not think it necessary to add anything to what LORD DAVEY has said.

Appeal dismissed.

Solicitors : Wadeson & Malleon ; Bone & Heppell.

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

Re MANN. HARDY v. ATTORNEY-GENERAL

[CHANCERY DIVISION (Farwell, J.), December 9, 1902]

[Reported [1903] 1 Ch. 232; 72 L.J.Ch. 150; 87 L.T. 734; 51 W.R. 165]

Charity—Benefit to community—Bequest for existing public institution—Use for purposes not strictly charitable.

By her will E. S. M. gave £3,000 to trustees to be applied by them for the benefit of the M. Institute, founded by her for the benefit of the inhabitants of M., some of the purposes for which it was used not being strictly charitable. The property remained under her control during her life. It was not conveyed to trustees, nor was any trust created in relation thereto. The building had been used for the benefit of the inhabitants of M.

Held: the bequest was a good charitable gift of the £3,000, and a scheme must be directed for its application.

Notes. Considered: *Re Cunningham, Dulcken v. Cunningham*, [1914] 1 Ch. 427. Distinguished: *Re Thackrah, Thackrah v. Wilson*, [1939] 2 All E.R. 4. Doubted: *Baddeley v. I.R. Comrs.*, [1953] 2 All E.R. 233.

As to schemes for charities where the donor's directions are indefinite, ambiguous or insufficient, see 4 HALSBURY'S LAWS (3rd Edn.) 326-329; and for cases see 8 DIGEST (Repl.) 342-345.

Cases referred to in argument :

Cunnack v. Edwards, [1896] 2 Ch. 679; 65 L.J.Ch. 801; 75 L.T. 122; 61 J.P. 36; 45 W.R. 99; 12 T.L.R. 614, C.A.; 8 Digest (Repl.) 355, 344.

Re Clark's Trust (1875), 1 Ch.D. 497, 45 L.J.Ch. 194; 24 W.R. 233; 8 Digest (Repl.) 355, 343.

Re Dutton, Ex parte Peake (1878), 4 Ex.D. 54; 48 L.J.Q.B. 350; 40 L.T. 430; 27 W.R. 398; sub nom. *Re Dutton, Ex parte Tunstall Athenæum Trustees*, 43 J.P. 6; 8 Digest (Repl.) 437, 1281.

Re Davis, Hannen v. Hillyer, post; [1902] 1 Ch. 876; 71 L.J.Ch. 459; 86 L.T. 292; 50 W.R. 378; 46 Sol. Jo. 317; 8 Digest (Repl.) 417, 1086.

Summons to determine whether a bequest was a good charitable gift.

The testatrix by her will, after appointing trustees and making certain pecuniary bequests, proceeded thus :

"I bequeath to my trustees the sum of £3,000 to be applied by them in such manner as they shall consider most expedient for the benefit of the Mann Institute, Moreton-in-Marsh."

She died on May 30, 1902, without revoking or altering her will, and the same was proved in due course by the executors therein named.

The testatrix some years prior to her decease had been desirous of erecting some permanent memorial to her late father, who was born and had for many years resided in Moreton-in-Marsh, in the county of Gloucester. For this purpose she purchased a piece of freehold land, on which there were some old cottages, and had it conveyed to herself in her own name. She afterwards had the cottages pulled down, and at her own expense erected a building on the land, to which she gave the name of the Mann Institute, and which she intended to be used in various ways for the benefit of the inhabitants of Moreton-in-Marsh, subject to her own control. She had informally nominated four persons to act as trustees or a committee of the Mann Institute, but had never conveyed the building to them, or made any rules for its management, or executed any declaration of trust. Two of the persons nominated as trustees died in the lifetime of the testatrix, but she had never

appeared anyone in their place. The building had been formally opened at a public meeting at which the testatrix was present. A part of the building consisting of a reading room and billiard room was let to a working men's club at a nominal rent of 5s. a year, the club agreeing to contribute to the salary of a caretaker and pay a proportion of the rates and charges for coal and lighting. It also contained a hall, which was let at a fixed scale of charges for concerts, lectures, and religious and other meetings. During her life the testatrix had retained absolute control over the hall, subject to the agreement with the working-men's club.

This summons was taken out by the executors against the Attorney-General and the residuary legatees and devisees as defendants for the determination of the question whether this bequest of £3,000 took effect, and, if so, whether it constituted a good charitable bequest.

J. L. Beattie for the summons.

R. J. Parker for the Attorney-General.

Tyssen for the testatrix's residuary legatees and devisees.

FARWELL, J. In this case the ingenious argument of counsel for the residuary legatees has been dispelled by the reply of counsel for the Attorney-General. The latter is well founded in saying on the evidence that the testatrix intended to found an institute to be used in various ways for the benefit of the inhabitants of Moreton-in-Marsh. Then the evidence goes on to specify the various modes in which it was attempted to attain that benefit. I have to decide this question on the assumption that the testatrix did not convey the land on which the institute stood in a mode sufficient to satisfy the Statute of Frauds or the Mortmain Acts, for that question is not raised on the summons. Assuming, therefore, that this institute, used as stated in the affidavits during the testatrix's life, could no longer be so used against the will of her residuary legatees after her death, I find that she has by her will given £3,000 to trustees to be applied by them in such a manner as they may consider most expedient for the benefit of the Mann Institute in Moreton-in-Marsh. Counsel for the residuary legatees argued that that was for the building only, but I cannot adopt that construction. That is too narrow a view. I think it is for the purposes for which the Mann Institute was founded—that is to say, for the benefit of the inhabitants. That is a charitable purpose; and the two particular modes in which the building was used during the testatrix's lifetime—namely, for a working-men's club, and for a hall and gallery for concerts, lectures, and other meetings—were both public purposes for the benefit of the inhabitants, not inconsistent with the general charitable intention to which I have already referred. Therefore I answer the question by saying that the bequest of £3,000, to be applied as in the will mentioned, takes effect, and is a good charitable bequest. There must be a scheme for its application. The costs will come out of the residue of the estate.

Solicitors : *Treasury Solicitor; Leslie & Hardy.*

[*Reported by A. W. CHASTER, Esq., Barrister-at-Law.*] E

Re TELFAIR. GARRIOCH v. BARCLAY

[CHANCERY DIVISION (Farwell, J.), May 2, 1902]

[Reported 86 L.T. 496]

Will—Gift of income to two persons "so that they shall each receive half during their lives"—Death of one person—Implied gift to the other.

By his will a testator gave the income of his residuary estate to E. W. G. and H. H. G. "in equal parts—that is to say, that they shall each receive the half amount of the interest during their natural lives." After "their deaths" the income was given over to other persons.

Held: on the death of E. W. G., H. H. G. took by implication the income of the whole fund during her life.

Notes. Referred to: *Re Foster, Coomber v. Governors and Guardians of the Hospital for the Maintenance and Education of Exposed and Deserted Young Children*, [1946] 1 All E.R. 333.

As to gifts by implication under a will, see 34 HALSBURY'S LAWS (2nd Edn.) 427-439, and for cases see 44 DIGEST 1212-1215.

Cases referred to:

- (1) *Pearce v. Edmeades* (1838), 3 Y. & C.Ex. 246; 8 L.J.Ex. Eq. 61; 3 Jur. 245; 160 E.R. 693; 44 Digest 1213, 10487.
- (2) *Armstrong v. Eldridge* (1791), 3 Bro. C.C. 215; 29 E.R. 497, L.C.; 44 Digest 1212, 10481.
- (3) *Wills v. Wills* (1875), L.R. 20 Eq. 342; 44 L.J.Ch. 582; 23 W.R. 784; 44 Digest 1003, 8601.

Also referred to in argument:

- Tuckerman v. Jefferies* (1706), 11 Mod. Rep. 108; 88 E.R. 930; sub nom. *Turkerman v. Jeffrys*, Holt, K.B. 370; 44 Digest 974, 8290.
- Malcolm v. Martin* (1790), 3 Bro. C.C. 50; 29 E.R. 402, 44 Digest 1212, 10480.
- Re Richerson, Scales v. Heyhoe* (No. 2), [1893] 3 Ch. 146; 62 L.J.Ch. 708; 41 W.R. 583; 44 Digest 1215, 10501.

Summons.

Charles Robert Telfair, by his will made Aug. 18, 1869, directed his real and personal estate to be sold and the proceeds invested on the securities therein mentioned. And he continued:

"The interest due on such securities is to be paid to my widow for and during the term of her natural life. After her death that interest is to be paid to my sisters-in-law, Elizabeth Walcot Grant and Hughina Houston Garrioch, in equal parts—that is to say, that they shall each receive the half amount of the interest during their natural lives. After their deaths this interest is to be paid to Williamina Johan Garrioch, my wife's niece, during her natural life. And after her death this interest is to be paid to Euphemia Garrioch, another of my wife's nieces, during her natural life. And after her death . . . my will is that all the securities become the property of the Royal National Lifeboat Institution of England."

He appointed his widow and R. Telfair executors of his will. The testator died on Oct. 8, 1870, and his will was duly proved by the widow alone on Nov. 28, 1870. Elizabeth Walcot Grant died on Dec. 18, 1889, and the widow on Sept. 21, 1901. In these circumstances a summons was taken out by Hughina Houston Garrioch against the widow's executors, Williamina Johan Garrioch, and the Lifeboat Institution as defendants, asking, among other things, whether, according to the

the construction of the will and in the events which had happened, she was entitled during her life to the whole of the income of the residuary estate.

W. A. Peck for the plaintiff.

Marey and Robertson Macdonald for the defendant other than the Lifeboat Institution.

Pearson for the Lifeboat Institution.

FARWELL, J. I have come to the conclusion that the plaintiff's contention is right, although the will is open to various constructions. The true view is as suggested in the argument, that the interest which is dealt with is *whole* through-out, and that different generations are provided for in *due order*. First it is to the widow for life, then the entire interest is to the sisters-in-law, and then after their deaths the entire interest goes again to the nieces in succession, and after their deaths there is a gift over. Now, the words are somewhat curious. It is not after the death of the widow to pay merely to "my sisters-in-law in equal parts," but it goes on that each was to receive a half during their natural lives, and after their deaths, etc. Without going through the cases, it is established by various authorities, as laid down by LORD ABINGER, C.B., in *Pearce v. Edmunds* (1) (3 Y. & C.Ex. at p. 251) that :

"If in a will, after words creating a devise to two in common, you find by other words that the devise over is only to take effect after the death of both, the effect of that is to control the former words."

I do find here that the whole is to go over on the death of both. The court struggles against an intestacy, so that it cannot be given to residue if on a fair reading there is an implied gift of the whole interest to Williamina after the deaths of both. I read the words, "equal parts—that is to say, that they shall each receive the half amount of the interest during their natural lives," as really being a sort of qualification and not to indicate an ordinary tenancy in common. The real gift is to the two sisters-in-law, naming them, and then the words which follow are only an explanation of what is to happen during the lives of both, and he then gives the entire interest after the deaths of both; so that there is an implied gift to the survivor, and the explanatory words are intended only as an explanation of the term "during the lives of both." As to such a reading, there is ample authority in the judgments of the Lord Chancellor in *Armstrong v. Eldridge* (2) and of LORD ABINGER in the case above referred to. SIR GEORGE JESSEL, M.R., in *Wills v. Wills* (3) did not mean that the residue in the will went at once to the children of the tenants for life. So here the nieces take only subject to the interests of the sisters-in-law. But whether the will would bear that meaning or not, I think the testator intended that the survivor of the sisters-in-law should take the whole income for her life.

Solicitors: *Heath & Hamilton*, for *Ticehursts*, *M'Ilquham & Wyatt*, Cheltenham; *Crowders, Vizard & Oldham*; *Clayton, Sons & Fergus*.

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

Re GREENWOOD. SUTCLIFFE v. GLEDHILL

[CHANCERY DIVISION (Farwell, J.), February 15, 1901]

[Reported [1901] 1 Ch. 887; 70 L.J.Ch. 326; 84 L.T. 118; 49 W.R. 461]

Execution—Garnishee order—Forfeiture of life interest in income on attempt to charge same—Garnishee order obtained by creditor—Effect of forfeiture clause.

Under a will and settlements J. A. G. was entitled to the income of property for his life "or until he attempts to alien, charge, or anticipate the same . . . or until any other event happens whereby if the same income were payable to him absolutely for his life he would be deprived of the right to receive the same or any part thereof," with a gift over in any of those cases. J. A. G. having become indebted, a creditor obtained a garnishee order against the trustees as to the income in their hands.

Held: as a garnishee order only applied to moneys which were actually due it could not operate as a forfeiture of the life estate.

Sutton, Carden & Co. v. Goodrich (1) (1899), 80 L.T. 765, followed.

Bates v. Bates (2), [1844] W.N. 129, not followed.

Notes. Applied: *Re Gourju, Starling and Another v. Custodian of Enemy Property*, [1942] 2 All E.R. 605; *Re Westby's Settlement*, [1950] 1 All E.R. 479. Referred to: *Durran v. Durran* (1904), 91 L.T. 187; *Re Oppenheim's Will Trusts, Westminster Bank, Ltd. v. Oppenheim*, [1950] 2 All E.R. 86; *Re Pozol's Settlement Trusts, Westminster Bank, Ltd. v. Guerbois*, [1952] 1 All E.R. 1107.

As to attachment of debts, see 16 HALBURY'S LAWS (3rd Edn.) 79 et seq., and for cases see 21 DIGEST (Repl.) 713 et seq., and 44 DIGEST 1231-1238.

Cases referred to:

- (1) *Sutton, Carden & Co. v. Goodrich* (1899), 80 L.T. 765; 15 T.L.R. 397; 21 Digest (Repl.) 743, 2311.
- (2) *Bates v. Bates*, [1884] W.N. 129, 19 L.J.N.C. 67; 21 Digest (Repl.) 743, 2309.
- (3) *Webb v. Stenton* (1883), 11 Q.B.D. 518; 52 L.J.Q.B. 584; sub nom. *Re Hatton, Webb v. Stenton*, 49 L.T. 432, C.A.; 21 Digest (Repl.) 723, 2212.
- (4) *Re Stulz's Trusts, Ex parte Kingsford and Stulz* (1853), 4 De G.M. & G. 404; 1 Eq. Rep. 334; 22 L.J.Ch. 917; 22 L.T.O.S. 9; 17 Jur. 749; 1 W.R. 499; 34 E.R. 565, L.J.J.; 44 Digest 1233, 10661.
- (5) *Re Sampson, Sampson v. Sampson*, [1896] 1 Ch. 630; 65 L.J.Ch. 406; 74 L.T. 246; 44 W.R. 557; 40 Sol. Jo. 353; 44 Digest 1115, 9663.

Also referred to in argument:

- Re Sartoris's Estate, Sartoris v. Sartoris*, [1892] 1 Ch. 11; 61 L.J.Ch. 1; 65 L.T. 544; 40 W.R. 82; 8 T.L.R. 51; 36 Sol. Jo. 41, C.A.; 5 Digest (Repl.) 717, 6234.
- Hamer v. Giles, Giles v. Hamer* (1879), 11 Ch.D. 942; 48 L.J.Ch. 508; 41 L.T. 270; 27 W.R. 834; 21 Digest (Repl.) 741, 2292.
- Re Combined Weighing and Advertising Machine Co.* (1889), 43 Ch.D. 99; 59 L.J.Ch. 26; 61 L.T. 582; 38 W.R. 67; 6 T.L.R. 7; 1 Meg. 393, C.A.; 21 Digest (Repl.) 742, 2299.
- Rogers v. Whiteley*, [1892] A.C. 118; 61 L.J.Q.B. 512; 66 L.T. 303; 8 T.L.R. 418, H.L.; 21 Digest (Repl.) 727, 2230.
- Re Dugdale, Dugdale v. Dugdale* (1888), 38 Ch.D. 176; 57 L.J.Ch. 634; 58 L.T. 581; 36 W.R. 462; 44 Digest 437, 2640.

Originating Summons asking whether a garnishee order operates as the forfeiture of a life interest.

By her will, made Nov. 4, 1891, the testatrix, after appointing executors and trustees thereof, devised and bequeathed to them all her real and personal estate upon trust to sell and call in and convert into money with power to postpone such sale and conversion, and she directed them to pay her debts and funeral and testamentary expenses and stand possessed of the residue upon trust to invest as therein mentioned and to stand possessed of the investments and the income thereof

"Upon the trusts following (that is to say): Upon trust if my said son John Arthur Greenwood shall not at the time of my death be an undischarged bankrupt or shall not have executed, done, or suffered any act, deed, or thing or if no event shall have happened whereby the trust next hereinafter declared would if subsisting be determined, then to pay the said income to my said son John Arthur Greenwood during his life or until he attempts to alien, charge, or anticipate the same or any part thereof or is adjudged a bankrupt or takes proceedings for liquidation in bankruptcy or makes any arrangement or composition with his creditors having the effect of a charge upon or alienation of the said income or any part thereof or until he does or attempts to do or suffer any other act or thing or until any other event happens whereby if the same income were payable to him absolutely for his life he would be deprived of the right to receive the same or any part thereof, in any of which cases as well as on the death of the said John Arthur Greenwood, which first happens, the trust hereinbefore declared for payment to him of the said income is to determine."

Then the will provided for gifts over on the happening of those events or any of them. By an indenture dated Mar. 30, 1893, and made between the plaintiff Mary Helena Sutcliffe (then Greenwood) of the first part, the defendant Sarah Frances Sutcliffe (then Greenwood) of the second part, the testatrix of the third part, John Arthur Greenwood of the fourth part, and Mary Helena Sutcliffe, Sarah Frances Sutcliffe, and the testatrix (thereinafter called the trustees) of the fifth part, a portion of the income of the investments mentioned in the schedule thereto was, subject to the life interest of the testatrix, settled on J. A. Greenwood for his life upon the like terms as those above mentioned. The testatrix died on May 7, 1895, and her will was duly proved by some of the executors therein named on Aug. 12, 1895. By a further indenture of Feb. 20, 1896, and made between Mary Helena Sutcliffe of the one part and J. A. Greenwood of the other part, the income of the investments therein mentioned was declared by Mary Helena Sutcliffe to be held by her upon trust for J. A. Greenwood for his life upon the like terms as those above mentioned.

On Jan. 4, 1899, in an action in the Queen's Bench Division, wherein E. Williams was plaintiff and J. A. Greenwood defendant, judgment was recovered against the defendant for £250 6s. and £4 14s. costs. Garnishee proceedings were taken by the judgment creditor on the judgment, and a garnishee order absolute was made on July 3, 1899, wherein the plaintiff E. Williams was judgment creditor and J. A. Greenwood was judgment debtor, and Mary Helena Sutcliffe and J. T. Sutcliffe as trustees were garnishees. Under the garnishee order absolute the garnishees as the trustees of the will were ordered to pay and they did pay to the creditor the sum of £259 9s., representing the income then accrued under the will. By an order of the Queen's Bench Division, dated Nov. 12, 1900, in an action between the defendant J. Gladhill as judgment creditor and J. A. Greenwood as judgment debtor, and the plaintiffs and the defendant S. F. Sutcliffe as garnishees, it was ordered that all debts owing or accruing due from the garnishees to the debtor be attached to answer a judgment recovered against the judgment debtor by the creditor on Dec. 22, 1898, for the sum of £681 14s. 2d. and £5 6s. costs, on which judgment the sum of £687 0s. 2d. was claimed by the defendant J. Gladhill as remaining due and unpaid. Upon the application of J. Gladhill for a garnishee order absolute it was ordered that the application should stand over generally to

A enable the trustees of the will and the settlements respectively to take the necessary steps in the Chancery Division to ascertain the rights and interests of the parties claiming to be entitled thereto in the trust funds subject to the trusts of the will and settlements respectively. On Sept. 6, 1900, the trustees were informed of a bankruptcy notice being issued against J. A. Greenwood requiring payment of a judgment debt of £800 or thereabouts, but it did not appear that anything further had been done under it by the judgment creditor. The trustees at the date of the garnishee order nisi had in their hands £107, representing accrued income under the will and settlements. In these circumstances an originating summons was taken out by the trustees of the will and settlements asking whether in the events which had happened a forfeiture or cesser of the life interest of the said J. A. Greenwood under the will and settlements had taken place, and, if so, from what date.

P. F. S. Stokes, for the summons.

Upjohn, K.C., and E. Ford for one of the trustees of the settlements.

Lochnis for the judgment creditor Gledhill.

MacSwinney for the tenant for life.

D FARWELL, J.—In this case I come to the conclusion that the order absolute does not operate as a forfeiture. J. A. Greenwood is entitled under a will and settlements in similar terms, which are put in evidence on the application, under a trust in these words: [HIS LORDSHIP read the clause in the will above set out.] A creditor has obtained first an order nisi and then an order absolute for a garnishee order of the income accrued and due under the trust then actually in the hands of the trustees.

E It is plain from the decisions that a garnishee can only garnish a debt after it has become due. LORD LINDLEY in *Webb v. Stenton* (3) (11 Q.B.D. at p. 526) says:

F "But is a trustee a debtor to his cestui que trust? You cannot say he is unless he has got in his hands money which it is his duty to hand over to the cestui que trust; then of course he is a debtor, and there is no difficulty in attaching such a debt under this order. But take the case of a trustee of consols for me for life. Is he in any proper sense my debtor so long as he has no dividends which are payable to me? Clearly not; he individually may never receive those dividends; there may be a change of trustees before the next dividend day. You cannot possibly say that a trustee is a debtor to the G cestui que trust before he has or but for some fault of his might have had the money which it is his duty to hand over."

A garnishee order, therefore, proceeds on the footing that a trustee is not only a trustee, but also, by operation of the true construction of the will and the rules of law and equity, a debtor as well. It is by virtue not of a continuing trusteeship, H but by the new relation of debtor and creditor that a garnishee order can be obtained at all. That being so, there is this dilemma in the applicant's position: that either the order is ineffectual because there is no debt at all and therefore it is merely invalid, or it is effectual because there is a debt and, the debt arising as between the trustee and the tenant for life, it shows that the income has actually become payable in such a way as to constitute a debt.

I In my opinion, this latter is the true view of this will. First of all, we must bear in mind that the court does not construe gifts as forfeitures so as to extend the limits and the fair meaning of the words unless it is driven to it. Forfeitures are not regarded with favour, and there can be no particular desire to extend the terms of forfeiture to the case of a gift such as a present. In my view the order is only applicable to the case where the defendant "attempts to alien, charge, or anticipate the same [income] or any part thereof." Moreover, we must consider the effect if he were deprived of receiving any part of the income of the trust when the debt became due—which is a fair and reasonable construction of this

particular will and also what I may call the really necessary requirements of law for making it a valid gift. Sir John Rom's argument in *Re Stult's Trusts* (4) is well founded—namely, that you cannot give a man the income of a fund during his life, payable on quarterly or half-yearly days, and then take it away by reason of any event which happens after the money has actually become due. Such a gift is repugnant. Counsel for the trustees argue that there is no actual gift here. I do not agree. The gift is to pay the income to him during his life, and then, on the construction I put upon it, there are other matters which are to limit the issuance and operation of the gift in each particular quarter or half-year as the money becomes payable. Then the trust is to pay, and as the quarterly dividend becomes payable the trustee becomes a debtor as well as a trustee upon trust to pay it to J. A. Greenwood. That being so, it is not competent to the testator to attempt to deprive J. A. Greenwood of the debt to which he is so entitled and for which he can give a receipt and subsequent to becoming entitled to which he can give a discharge. That on the construction of this will is the true view.

This is to some extent confirmed by the decision of KENNEDY, J., in *Sutton, Carden & Co. v. Goodrich* (1), and still more by the decision of STIRLING, L.J., in *Re Sampson* (5), where he puts the proposition I adopt on that will in a way which seems to me equally applicable to this case. He says ([1896] 1 Ch. at p. 636):

"I think that the epoch at which the destination of any instalment of income is to be determined is the moment when that instalment either accrues due or is in the hands of the trustees ready for application in accordance with the trusts of the will."

Now, any other construction appears to me to lead to startling results. For example, the cestui qui trust after the income has been received may desire that the money should be applied to pay his bills. If they are left unpaid he may request the trustees to pay them and satisfy the creditors. He may say to them: "I am ill; the trustees will pay you." That would be a conclusion which I should be very loth to arrive at unless actually driven to do so. I do not think I am so driven for the reasons I have stated. The decision in *Bates v. Bates* (2) is the one which has caused me the most trouble. I cannot avoid the conclusion that I am really not following that case. Because I think the result of the view I take is that, inasmuch as you can only recover under a garnishee order moneys which are actually due, such an order cannot operate as a forfeiture. PEARSON, J., in that case held the contrary. I can only say that, with every respect for the decisions of that learned judge, no reasons are given for his decision in the report in the WEEKLY NOTES, and I am unable to follow it. It has already not been followed by KENNEDY, J., in *Sutton, Carden & Co. v. Goodrich* (1), and I do not think it is consistent with *Re Stult's Trusts* (4), which was decided by the Court of Appeal. I quite follow the argument of counsel for the trustees that the words in *Sutton, Carden & Co. v. Goodrich* (1) were very different, but I do not agree with him that the whole of the phrase is governed by the word "anticipate." It is not a fair way to construe a clause, "alien, charge, or anticipate," to make the word "anticipate" govern the words "alien and charge." The words are different, and are meant to apply to different things. That disposes of the case as to the garnishee order absolute. The same reasoning applies *à fortiori* as against the order nisi.

A bankruptcy notice cannot affect my judgment in any way. The debtor has done nothing to deprive himself of the right to receive the income, and the bankruptcy notice might be disputed. As to the costs, those of the client of counsel for the judgment creditor will be added to his security. The trustees will have theirs out of the fund. But I shall make no other order as to costs.

Solicitors: *Ridsdale & Son*, for *Sutcliffes*, Hellden Bridge, Yorks; *W. J. & E. H. Tremellen*, for *Eastwoods & Sutcliffes*, Todmorden.

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

Re SHUCKBURGH'S SETTLEMENT. ROBERTSON v. SHUCKBURGH

[CHANCERY DIVISION (Farwell, J.), October 30, 1901]

[Reported [1901] 2 Ch. 794; 71 L.J.Ch. 32; 85 L.T. 406; 50 W.R. 133;
46 Sol. Jo. 13]

Power of Appointment—Settlement—Marriage settlement—Life interest settled on wife—Reduction on re-marriage—Power of appointment to husband—Appointment by will in favour of elder son—Right of elder son to income set free on wife's re-marriage.

Under a marriage settlement the husband and the wife took successive life interests in a trust fund, the wife's interest being cut down to one moiety on her re-marrying. Subject thereto the fund was settled on trust for the issue of the marriage as the husband should appoint, and, in default of appointment, for the sons at twenty-one or daughters at twenty-one or marriage, with the usual hotchpot clause. By his will the husband appointed that after the death of his wife three-fifths of the fund be held in trust for his elder son and two-fifths for his younger son, these sons being the only issue of the marriage. The wife re-married after the husband's death.

Held: the moiety of the income set free on the wife's re-marriage passed under the appointment, the court finding on the face of the will an intention to appoint the whole fund subject to the wife's interest, and so the accumulations were to be transferred to the elder son.

Maddison v. Chapman (1) (1858), 4 K. & J. 709, applied.

Notes. Distinguished: *Re Wragg, Hollingsworth v. Wragg*, [1959] 2 All E.R. 717. Referred to: *Re Burden, Mitchell v. Trustees of St. Luke's Hospital*, [1948] 1 All E.R. 31.

As to the construction of wills where there is a vesting of remainders, see 34 HALSBURY'S LAWS (2nd Edn.) 376-380, and for cases see 37 DIGEST 446-449.

Cases referred to:

(1) *Maddison v. Chapman* (1858), 4 K. & J. 709; 70 E.R. 294; affirmed (1859), 3 De G. & J. 536, L.C. & L.J.J.; 44 Digest 1114, 9657.

Also referred to in argument:

Re Tredwell, Jeffray v. Tredwell, [1891] 2 Ch. 640; 65 L.T. 399; sub nom. *Re Tredwell, Jaffray v. Tredwell*, 60 L.J.Ch. 657, C.A.; 44 Digest 1175, 10162.

Jones v. Westcomb (1711), Prec. Ch. 316; Gilb. Ch. 74; 1 Eq. Cas. Abr. 245; 24 E.R. 149; 44 Digest 1175, 10165.

Re Akeroyd's Settlement, Roberts v. Akeroyd, [1893] 3 Ch. 363; 63 L.J.Ch. 32; 69 L.T. 474; 7 R. 405, C.A.; 5 Digest (Repl.) 723, 6267.

Stanford v. Stanford (1886), 34 Ch.D. 362; 35 W.R. 191; sub nom. *Re Stanford, Stanford v. Stanford*, 56 L.J.Ch. 273; 55 L.T. 765; 44 Digest 1174, 10160.

Originating Summons. By a marriage settlement dated June 21, 1879, and made between the intended husband, of the first part, the intended wife, of the second part, and trustees of the third part, it was declared that the trustees should stand possessed of a sum of £20,000 New Three per Cent. Annuities and the investments representing the same upon trust that they should pay the income to the husband during his life, and should from and after his death, if the wife should survive him, pay the income to the wife during her life unless and in such case until she should re-marry, and if she should re-marry should as from the day of her re-marriage pay the income of one moiety of the trust premises to her during her life for her separate use without power of anticipation; but from and after the failure or determination of and in the meantime subject to the trusts thereinbefore

declared the trustees should stand possessed of the trust premises in trust for the issue of the marriage in such shares as the husband should by deed or will appoint, and in default of appointment in trust for the children of the marriage who being sons should attain the age of twenty-one years or being daughters should attain that age or marry, in equal shares, with the usual hotchpot clauses. It was further provided that if at the husband's death any of the children of the marriage being sons should be under the age of twenty-one years or being daughters should be under that age and unmarried, then, subject to any appointment to the contrary, the trustees should so long as each such child should be under age and as to a female unmarried receive the income of the portion to which such child if of full age would for the time being be entitled in possession under the trusts thenbefore declared and apply a competent part or if need be the whole of the same income in or towards his or her maintenance and education during the continuance of his or her minority, and should accumulate the surplus of such income by investing such surplus in the manner in which the original trust funds were directed to be invested, and the funds so to be acquired should be added and form part of and be subject to the same powers and provisos as the principal funds from the surplus income whereof the same should have arisen.

The marriage took place on June 24, 1879. There was issue of the marriage two children and no more--viz., an elder son, born on June 20, 1880, and a younger son, born on Feb. 28, 1882. On June 5, 1882, the husband made his will and thereby, after reciting that under his marriage settlement he had power by that his will to appoint that after the death of his wife a sum of £20,000 New Three per Cent. Annuities should be held in trust for the issue of the marriage in such shares as he might think fit, appointed as follows:

"Now therefore in pursuance of the power given to me by the said settlement I do hereby appoint that after the death of my said wife the said sum of £20,000, or the investments for the time being representing the same, as to £12,000 thereof, or the investments for the time being representing the same, be held upon trust for my son Stewkley Frederick Draycott Shuckburgh, and as to the sum of £8,000, or the investments for the time being representing the same, upon trust for my son Gerald Francis Stewkley Shuckburgh."

The husband died on Jan. 12, 1884. The wife re-married on Nov. 25, 1886, from which date the trustees accumulated the income of one moiety of the trust funds then represented by £20,000 Consols, the accumulations being then represented by a sum of £3,696 India Three and a Half per Cent. Stock.

The elder son attained twenty-one on June 20, 1901, whereupon the following questions arose: 1. Whether the income of the free moiety of the trust fund during the wife's life was appointed by the husband's will or passed under the trusts of the settlement as unappointed. 2. If the income was so appointed, then whether the accumulations already made of that income, belonged as to three-fifths parts thereof to the elder son absolutely and ought to be transferred to him. 3. If that income was not appointed, but passed under the trusts of the settlement as unappointed, then whether it ought not to be brought into hotchpot. The summons was issued to decide these questions.

Wurtzburg for the summons.

Methold for the elder son.

Sargant for the younger son.

FARWELL, J.—In construing a will of this sort, one must be careful to avoid, on the one hand, saying what the testator must have meant and, on the other, adhering too closely to the letter of the will and disregarding the spirit. On the whole, I come to the conclusion that this is an appointment of the whole fund, subject to the life interest of the wife, or in such part as still existed. Assuming

A that counsel for the younger son is right, and, not expressing any opinion of my own, that there is no such presumption in the case of the execution of a power that a man intended to execute the power as there is in the case of a will disposing of property, still I do find, reading the will fairly, an intention to appoint the whole trust property. It is quite true that the testator begins by reciting the power to appoint after the death of his wife. That is accurate. But the point of time is not a very important matter, as she took an interest in all the fund during her life, but if she married again then it was to be reduced to one-half. The testator, in referring to the death of his wife, obviously refers to it for the purpose of showing that he does not intend to displace her life interest or any interest she has during her life. As was well said by Wood, V.-C., in *Maddison v. Chapman* (1), where he was referring to a case of a limitation over, which, though expressed in the form of a contingent limitation, was in fact dependent upon a condition essential to the determination of the interests previously limited (4 K. & J. at p. 719):

"I apprehend the true way of testing limitations of that nature is this: Can the words which in form import contingency be read as equivalent to 'subject to the interests previously limited'? Take the simplest case: A limitation to A. for life, remainder to B. for life, and upon the decease of B., 'if A. be dead,' then to C. in fee. There the limitation to C. is apparently made contingent upon the event of A.'s dying in the lifetime of B. Nevertheless, inasmuch as the condition of A.'s death is an event essential to the determination of the interest previously limited to him, the court reads the devise as if it were to A. for life, remainder to B. for life, and on B.'s death, subject to A.'s life interest (if any), to C. in fee."

I think that the point of time is not a material matter and that this is the meaning here, and, therefore, I am only acting on what the testator really meant in holding that the elder son is entitled to have three-fifths of the moiety of the fund paid to him. The question as to the proportion of the accumulations must also be answered in the affirmative.

Solicitors: *Kays & Jones.*

[Reported by A. W. CHASTER, ESQ., Barrister-at-Law.]

Re RAYER. RAYER v. RAYER

[CHANCERY DIVISION (Farwell, J.), January 22, 1903]

[Reported [1903] 1 Ch. 685; 72 L.J.Ch. 230; 87 L.T. 712; 51 W.R. 538]

Will—Codicil—Republication of will—Compromission by codicil—Devolution for payment of legacy duty—Replacement of legacy duty by succession duty before codicil—Falsa demonstratio—Customs and Inland Revenue Act, 1888 (51 & 52 Vict., c. 8), s. 21 (2).

By his will, made in 1882, a testator devised rentcharges to F. H. for life, and after her decease to her children, and declared that the same should be payable "without any deduction except for legacy duty and income tax." By the Customs and Inland Revenue Act, 1888, s. 21 (2), which came into force on May 16, 1888, succession duty was substituted for legacy duty in the case of legacies charged on real estate by any person dying after July 1, 1888. By a codicil, made July 12, 1888, the testator confirmed his will. The testator died in 1892. F. H. died in 1900, leaving three children. On a summons taken out to ascertain who was liable to pay the succession duty which became payable on the death of F. H.,

Held: as the testator must be presumed to have known that no legacy duty was payable when he executed the codicil, the case was one of falsa demonstratio and the devisees of the rentcharges were liable to pay the succession duty.

Re Champion, Dudley v. Champion (1), [1893] 1 Ch. 101, applied.

Notes. Legacy and succession duty were abolished in the case of a testator or intestate dying, or of a succession conferred, on or after July 30, 1949; and in the case of a testator or intestate dying, or a succession conferred, before that date, where the duty would only have become payable in connexion with some event that happens on or after that date. The Customs and Inland Revenue Act, 1888, s. 21 was repealed by the Finance Act, 1949, s. 52 (10).

Considered: *Re Smith, Prada v. Vandroy* (1916), 85 L.J.Ch. 657. Referred to: *Re Joseph, Pain v. Joseph* (1908), 98 L.T. 392; *Re Whiting, Ormond v. De Linnay* (1913), 108 L.T. 629; *Re Hardyman, Teesdale v. McClintock*, [1925] All E.R. Rep. 83; *Re Drake, Drake v. Wilson*, [1925] All E.R. Rep. 664; *Re Reeves, Reeves v. Pawson*, [1928] All E.R. Rep. 342; *Re Tredgold, Midland Bank Executor and Trustee Co. v. Tredgold*, [1943] 1 All E.R. 120; *Re Picton, Porter v. Jones*, [1944] Ch. 303.

As to codicils, see generally 34 HALSBURY'S LAWS (2nd Edn.) 97 et seq.; as to falsa demonstratio in wills, see *ibid.* pp. 228-229; as to the abolition of legacy and succession duties, see 15 HALSBURY'S LAWS (3rd Edn.) 106-107. For cases see 44 DIGEST 535-536. For the Customs and Inland Revenue Act, 1888, s. 21, see 9 HALSBURY'S STATUTES (2nd Edn.) 336-337; for the Finance Act, 1949, s. 52 (10), see 28 HALSBURY'S STATUTES (2nd Edn.) 527.

Cases referred to:

(1) *Re Champion, Dudley v. Champion*, [1893] 1 Ch. 101; 62 L.J.Ch. 372; 67 L.T. 694; 2 B. 162, C.A.; 44 Digest 649, 4888.

(2) *Jones v. Ogle* (1872), L.R. 14 Eq. 419; 41 L.J.Ch. 633; 27 L.T. 367; 20 W.R. 794; affirmed 8 Ch. App. 192; 42 L.J.Ch. 334; 28 L.T. 245; 21 W.R. 236; L.C. & L.J.J.; 44 Digest 535, 3516.

(3) *Re Bridger, Brompton Hospital for Consumption v. Lewis*, [1894] 1 Ch. 297; 63 L.J.Ch. 186; 70 L.T. 204; 42 W.R. 179; 10 T.L.R. 153; 38 Sol. Jo. 111; 7 R. 78, C.A.; 44 Digest 535, 3518.

Also referred to in argument:

Re Johnston, Cockrell v. Earl of Esser (1884), 26 Ch.D. 538; 53 L.J.Ch. 645; 52 L.T. 44; 32 W.R. 634; 44 Digest 676, 5171.

Re Parker-Jervis, Salt v. Locker, [1898] 2 Ch. 643; 67 L.J.Ch. 682; 79 L.T. 403; 47 W.R. 147; 21 Digest (Repl.) 86, 393.

Re Fitchardinge (Lord), Fitchardinge (Lord) v. Jenkinson (1899), 80 L.T. 376; 15 T.L.R. 225; 43 Sol. Jo. 296, C.A.; 21 Digest (Repl.) 86, 394.

Re Maryon-Wilson, Wilson v. Maryon-Wilson, [1900] 1 Ch. 565; 69 L.J.Ch. 310; 82 L.T. 171; 48 W.R. 338; 16 T.L.R. 256; 44 Sol. Jo. 312, C.A.; 21 Digest (Repl.) 95, 451.

Summons. The testator made his will on Aug. 10, 1882, and thereby devised his real estate to the uses thereafter declared—namely (so far as is material to this action), to the use and intent that his sister Frances Harmar might receive during her life the yearly rentcharge of £250 . . . during her life, and from and after the decease of the said Francis Harmar, if she should leave any child or children, that each such child might receive during his or her life a yearly rentcharge of £100. And he thereby declared as respected each of the several rentcharges thereinbefore devised that the same should be a charge upon the said hereditaments thereby devised, and should be payable by equal half-yearly payments without any deductions except for legacy duty and income tax. By a codicil made July 12, 1888, the testator, after making certain alterations in his said will not material to be here stated, added: “In all other respects I confirm my said will.”

The testator died on Jan. 11, 1892, without having revoked or altered his will save by the codicil, and the will and codicil were duly proved on Mar. 21, 1892, by the executors therein named. Francis Harmar died on July 22, 1900, leaving three children her surviving—namely, William Rayer Harmar, Marcella Jane Davidson, and Frances Harmar, spinster. On her decease a claim was made on the trustees by the Inland Revenue authorities for estate duty and succession duty which became payable on that event. As to the estate duty, it was not seriously contended but that in the circumstances that was payable out of the real estate. But as to the succession duty, the question had arisen whether it became payable out of the general personal estate or was payable by the annuitants to the extent of the benefit accruing to them respectively by reason of the decease. This summons was taken out for the purpose of having these questions determined.

By the Customs and Inland Revenue Act, 1888:

“Section 21 (2). The duties chargeable under the Acts now in force for charging duties on legacies and shares of the personal estates of deceased persons shall not be levied and paid under such Acts in respect of any legacy payable or having effect or being satisfied out of or charged or rendered a burden upon the real or heritable estate of any person dying on or after the 1st day of July, 1888, or any real or heritable estate or the rents or profits thereof which such person shall have had any right or power to charge, burden, or affect with the payment of money, or out of or upon any moneys to arise from the sale, mortgage, or other disposition of any such real or heritable estate or any part thereof, but the duties under the Succession Duty Act, 1853, and the additional duties under this Act shall be levied and paid in respect of every such legacy (whether given by way of annuity or in any other form) as a succession to personal property.”

O. Leigh Clare for the summons.

Butcher, K.C., and *Sheldon* for two of the annuitants.

Hewitt for a third annuitant.

Withers for two tenants for life and trustees.

S. B. L. Druce for certain residuary legatees.

FARWELL, J., stated the facts and continued.—The effect of s. 21 (2) of the Customs and Inland Revenue Act, 1888, was that legacy duty ceased and became succession duty. What the case would have been if the matter rested there, having regard to what has been said in other cases as to the effect of an

Act of Parliament on the confirmation of a will, it is not necessary for me to say Lord Stirling in *James v. Ogilvie* (2) points out that an Act of Parliament does not usually affect the construction of a will previously made, and it is quite clear that here it produces a somewhat curious effect, as will be seen from *Re Bridget, Drompton Hospital for Consumption v. Lewis* (3). It is not necessary to determine what the effect would have been at the present time, because on July 12, 1888, after the section of the Act came into operation, the testator made a codicil, and by it, after making certain alterations immaterial here in his will, confirmed in other respects his will. What was the effect of these words of confirmation as to be seen in the judgment of North, J., in *Re Chapman, Dudley v. Chapman* (4), which was affirmed by the Court of Appeal. He says ([1893] 1 Ch. at p. 109):

"It is settled by authority that the effect of such a clause as 'I confirm my will in other respects' is a republication of the will, and, when, under the old law, a testator had made a will which would merely pass the property he had at the date of it, and then by a codicil he confirmed and republished his will, the effect was to bring down the date of the will to the date of the codicil, and to make the devise in the will operate in the same way in which it would have operated if the words of the will had been contained in the codicil of later date. There is ample authority on this point."

Therefore I apprehend this case is to be regarded simply as if the testator had made the devise of these rentcharges with the direction in the words I have read, after the passing of the Act of 1888, and, notwithstanding the provisions of that Act, had used the words "legacy duty."

I pause here to observe that when he died, which he did on Jan. 11, 1892, the succession duty which had been substituted for the legacy duty was more onerous in some respect than that duty had been. There was a $1\frac{1}{2}$ per cent. increase, and it was payable in eight half-yearly instalments instead of in four yearly instalments. So that the duties are not identical. There would be great difficulty to my mind if I had to construe the will as if it were dated before the Act. But what we have here is the case of a testator directing payment of rentcharges without deduction except legacy duty when he must be taken to have known that there was no such thing as legacy duty. In the minds of many people succession duty is spoken of as legacy duty, and even Somerset House seems to confuse them, because they speak in their letters of legacy duty when they mean succession duty. People do not appear to realise the difference very accurately. I think that one of the most important principles in construing wills is to give effect as far as possible to everything in them. And if you find that a man uses words like these which direct a devisee to pay legacy duty when succession duty is payable, it must be taken to be a case of mere falsa demonstratio. He must be taken to mean that duty which is called in common parlance legacy duty. I think it would be doing a great injustice to the people coming after if I were to hold that the devisees of these rentcharges went free. It is quite clear the testator does not mean that. This duty, which he properly describes as legacy duty at the time when he made his will, afterwards became succession duty and was increased in amount, and the will was confirmed by a codicil, which was not in existence when the succession duty was substituted. Reading the will as if it had been made at the date of the codicil, I am bound to hold that when he says legacy duty he means that duty which is in fact payable in the capacity of legacy duty. Accordingly the answer to the question must be that the devisees of the rentcharges must pay the succession duty.

Solicitors: Wood, Bing & Nash, for H. M. James, Exeter; Withers & Withers, Clarke & Calkin, for Howlett & Clarke, Brighton; Woodcock, Ryland & Parker.

[Reported by A. W. CHASTER, ESQ., Barrister at-Law.]

Re RAYNER. RAYNER v. RAYNER

[COURT OF APPEAL (Vaughan Williams, Romer and Stirling, L.J.J.), November 5, 6, December 21, 1903]

Reported [1904] 1 Ch. 176; 73 L.J.Ch. 111; 89 L.T. 681; 52 W.R. 273; 48 Sol. Jo. 178]

Will—“Securities” Use of word in popular and wide sense—Stock and shares in railway companies.

By his will, dated Dec. 11, 1895, a testator declared “that all the moneys liable to be invested under this my will may be invested in such securities as my trustees in their absolute discretion shall think fit. And I authorise my trustees to continue or leave any moneys invested at my death in or upon the same securities.”

Held: on construction of the will the word “securities” was used in its popular and wide sense and meant “investments,” and so included ordinary stock and shares in railway companies.

Ogle v. Knipe (1), L.R. 8 Eq. 434, considered.

Per VAUGHAN WILLIAMS, L.J.: The meaning of a word is relative to the circumstances and occasion and date on which the word is used, and, evidence being admissible for the purpose of explaining the meaning of words used by the testator as distinguished from evidence of the testator’s intention, it is the duty of a judge to inform himself, not only by reference to dictionaries of good reputation, but also by evidence, of the meaning ordinarily given to any word among those who deal in the property to which it refers.

Notes. Considered: *Re Gent and Eason’s Contract*, [1905] 1 Ch. 386; *Re Hutchinson, Crispin v. Hadden*, [1918-19] All E.R. Rep. 1174; *Re Smithers, Watts v. Smithers*, [1939] 3 All E.R. 689; *Re Lilly’s Will Trusts, Public Trustee v. Johnstone*, [1948] 2 All E.R. 906. Referred to: *Re Johnson, Greenwood v. Greenwood* (1903), 89 L.T. 520; *Singer v. Williams*, [1921] 1 A.C. 41; *Re Neville, Neville v. First Garden City*, [1924] All E.R. Rep. 377; *Re United Law Clerks Society*, [1946] 2 All E.R. 674.

As to construction of “securities” in a will, see 34 HALSBURY’S LAWS (2nd Edn.) 259-260; and for cases see 44 DIGEST 705 et seq.

Cases referred to:

- (1) *Ogle v. Knipe* (1869), L.R. 8 Eq. 434; 38 L.J.Ch. 692; 20 L.T. 867; 17 W.R. 1090; 44 Digest 707, 5506.
- (2) *Shore v. Wilson* (1842), 9 Cl. & Fin. 355; 11 Sim. 615, n.; 4 State Tr.N.S. App. 1370; 5 Scott. N.R. 958; 7 Jur. 787, n.; 8 E.R. 450, H.L.; 17 Digest (Repl.) 266, 699.
- (3) *Richardson v. Watson* (1833), 4 B. & Ad. 787; 1 Nev. & M.K.B. 567; 2 L.J.K.B. 134; 110 E.R. 652; 44 Digest 612, 4396.
- (4) *Hicks v. Sallitt* (1854), 3 De G.M. & G. 782; 2 Eq. Rep. 818; 23 L.J.Ch. 571; 22 L.T.O.S. 322; 18 Jur. 915; 2 W.R. 173; 43 E.R. 307, L.C. & L.J.J.; 44 Digest 580, 4016.
- (5) *Abbott v. Middleton, Ricketts v. Carpenter* (1858), 7 H.L.Cas. 68; 28 L.J.Ch. 110; 33 L.T.O.S. 66; 5 Jur.N.S. 717; 11 E.R. 28, H.L.; 44 Digest 557, 3735.
- (6) *Gordon v. Gordon* (1871), L.R. 5 H.L. 254, H.L.; 44 Digest 542, 3592.

Also referred to in argument:

Re Johnson, Greenwood v. Greenwood and Robinson (1903), 89 L.T. 84; affirmed 89 L.T. 520, C.A.; 44 Digest 707, 5508.

Simmons v. London Joint Stock Bank, Little v. London Joint Stock Bank, [1891] 1 Ch. 270, 60 L.J.Ch. 313, 63 L.T. 789, 7 T.L.R. 109; 200 appeal sub nom. *London Joint Stock Bank v. Simmons*, [1892] A.C. 201; 61 L.J.Ch. 723; 66 L.T. 625; 56 J.P. 644; 41 W.R. 108; 8 T.L.R. 478; 36 Sol. Jo. 394, H.L.; 6 Digest (Repl.) 131, 969.

Re Chapman, Cooke v. Chapman, [1896] 2 Ch. 763; 65 L.J.Ch. 321, 76 L.T. 196; 45 W.R. 67; 12 T.L.R. 625; 40 Sol. Jo. 715, C.A.; 35 Digest 291, 441.

Biscoe v. Pack (1823), 1 Sim. & St. 500; 2 L.J.O.S.Ch. 17; 57 E.R. 198; 44 Digest 707, 5500.

Derogot v. Sanderson, Clark & Co., post; [1902] 1 Ch. 579; 71 L.J.Ch. 328; 86 L.T. 269; 50 W.R. 404; 18 T.L.R. 375; 46 Sol. Jo. 316, C.A.; 35 Digest 497, 2272.

Wilson v. Tucker (1714), 5 Bro. Parl. Cas. 193; 2 L.R. 622; and nom. *Tucker v. Wilson*, 1 P.Wms. 261, H.L.; 35 Digest 496, 2257.

Re Bedson's Trusts (1885), 28 Ch.D. 523; 54 L.J.Ch. 644; 52 L.T. 554; 33 W.R. 386, C.A.; 44 Digest 762, 6215.

Re Cadogan, Cadogan v. Palugi (1883), 25 Ch.D. 154; 53 L.J.Ch. 207; 49 L.T. 666; 32 W.R. 57; 44 Digest 721, 5704.

Re Beavan, Beavan v. Beavan (1885), 53 L.T. 245; 44 Digest 707, 5503.

Higgins v. Dawson, [1902] A.C. 1; 71 L.J.Ch. 132; 85 L.T. 763; 50 W.R. 237, H.L.; 44 Digest 549, 3672.

Hudleston v. Gouldsbury (1847), 10 Beav. 547; 9 L.T.O.S. 531; 11 Jur. 464; 50 E.R. 692; 44 Digest 709, 5523.

Harris v. Harris (1861), 29 Beav. 107; 7 Jur.N.S. 955; 9 W.R. 444; 54 E.R. 567; 43 Digest 757, 2004.

Parker v. Marchant (1842), 1 Y. & C. Ch. Cas. 290; 11 L.J.Ch. 223; 6 Jur. 292; 62 E.R. 893; on appeal, 1 Ph. 356; 2 Y. & C.Ch.Cas. 179; 12 L.J.Ch. 314; 7 Jur. 457; 44 Digest 694, 5352.

Appeal from a decision of FARWELL, J.

E. W. Rayner, of Liverpool, a general broker, by his will dated Dec. 11, 1895, gave to the trustees such a sum as, including the moneys subject to the settlement made on his marriage, should amount to £165,000 on certain trusts for his wife for life, and after her death for his children. And he gave the residue of his estate upon trust for certain persons mentioned. The will contained the following provisions:

"And I declare that my trustees may in their absolute discretion postpone the sale and conversion of my real and personal estate or any part thereof so long as they shall think fit. And that the rents, profits, and income to accrue from and after my decease of and from such part of my said estates as shall for the time remain unsold and unconverted shall, after payment thereof of all incidental expenses and outgoings, be paid and applied to the person or persons and in the manner to whom and in which the income of the proceeds of such sale and conversion would for the time being be payable or applicable under this my will if such sale and conversion had been actually made. And I declare that all moneys liable to be invested under this my will may be invested in such securities as my trustees in their absolute discretion shall think fit. And I authorise my trustees to continue or leave any moneys invested at my death in or upon the same securities."

The testator died on May 24, 1896, and on Oct. 31, 1896, the executors and trustees appropriated to the trust legacy above mentioned some ordinary stock of the Midland Rail. Co. which belonged to the testator at his death, and they proposed to purchase with money forming part of the trust legacy ordinary stock of the London and North Western Railway. Differences of opinion having arisen, a summons was taken out asking (inter alia) upon the construction of the will (1)

whether the trustees were authorised to appropriate out of the investments belonging to the testator at his death in part satisfaction of the trust legacy ordinary stock of the Midland Rail. Co.; and (ii) whether the trustees were authorised to purchase with moneys belonging to the trust legacy ordinary stock of the London and North Western Railway.

At the hearing of the summons affidavits were tendered to show that at the date of the death of the testator, who was a wealthy man, the greater part of his estate was invested in shares and other property which would not come within the description of securities in the sense of charges on property. The evidence of a stockbroker and a chartered accountant was also tendered to show that the stocks, shares, and debentures in which the testator had invested his money were prior to, and in 1895 and 1896 and had since been, usually, if not invariably, described and spoken of under the general name of "securities" by commercial men, brokers, accountants, and solicitors; and that the word among such persons included stocks, shares, scrip, and bonds to bearer, and was not confined to mortgages or charges upon property. The stockbroker deposed that the word was used in this comprehensive sense according to the regulations of the Liverpool Stock Exchange. FARWELL, J., refused to admit this evidence, and held that the word "securities" in the will must be construed as referring to "money secured on property," and that the answer to both the questions must be in the negative. The residuary legatees appealed.

Upjohn, K.C., and W. D. MacConkey for the residuary legatees.

Bramwell Davis, K.C., and Rotch for the trustees of the will.

Butcher, K.C., and Christopher James for the legatees.

Frederic Thompson and Loraine for other beneficiaries.

Cur. adv. vult.

Dec. 21, 1903. The following judgments were read.

VAUGHAN WILLIAMS, L.J.—The question the court has to decide in this case is: What is the meaning of the word "security" in this will? In my judgment, in this will the meaning of that word, or, rather, the word "securities," is determined, for reasons which I will presently discuss, by the context of the will, and it is unnecessary, therefore, to discuss generally what is the meaning of the word "security," either its common and ordinary meaning at the date of the will or what is the meaning of the words "strict and primary sense" in Proposition II in the treatise of WIGRAM, V.C., on EXTRINSIC EVIDENCE (3rd Edn.), for, in my judgment, it is apparent from the context of this will that the testator has not used the word "securities" in what FARWELL, J., holds to be this strict and primary sense, but in what may be called its popular sense, which, I may observe, is a sense in which I am of opinion, without the assistance of either dictionary or the evidence of the commercial or other witnesses, it is applied habitually by those who have to deal with property transferable by the assignment of indicia of property, be they commercial men or non-commercial men, lawyers or laymen, and a sense in which it has been used daily in the "Times" since the year 1886 and in divers Acts of Parliament.

The reasons why I have formed this conclusion as to the meaning of the word "securities" in this will are these. Take the passage in the will:

"and I authorise my trustees to continue or leave any moneys invested at my death in or upon the same securities."

I think that in this passage "the same securities" obviously means "the same investments," and I think that the effect of using the words "moneys invested" and the word "securities" to cover the same subject-matter is not to narrow down or limit the natural sense of the words "moneys invested," but to extend what FARWELL, J., considers to be the strict and primary meaning of the word "securities" so as to cover anything which according to the strict and primary meaning of the words "moneys invested" would be covered or connoted by those words, and, in my judgment, property in the shape of railway shares falls within the meaning both

of the words "moneys invested" and of the word "securities." The moneys invested are authorised to be left and continued *quæ investimentis in statu quo*.

I wish to add, although it is not necessary to do so for the decision of this case, having regard to the ground upon which the court has decided it, that, in my judgment, the meaning of a word is relative to the circumstances and occasion and date on which the word is used, and that if a judge is entitled to take into consideration at all the fact that at the date of the will "securities" is largely used in a sense other than a pledge for an advance of money, or in the particular sense of investments in property transferable by the assignment of intitles, such as "certificates," it is the duty of the judge to inform his mind, not only by reference to dictionaries of good reputation, but also to inform himself by evidence, of the meaning ordinarily given to such a word among those who deal in such property. A rule prohibiting a judge from so doing would be, in my judgment, a most serious limitation of the rule that evidence is admissible for the purpose of explaining the meaning of the words used by the testator, as distinguished from evidence of the testator's intention; and would be also a serious limitation of the rule that, for the purpose of explaining the meaning of the words used by the testator, evidence is admissible of the circumstances surrounding the testator at the time of making his will. I think that evidence is admissible to show that expressions used in the will had acquired an appropriate meaning, either generally or by local usage or amongst particular classes, and that where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence dehors the instrument itself.

"For both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party":

see the opinions of PARKE, B., and TINDAL, C.J., in *Shore v. William* (2) (9 Cl. & Fin. at pp. 555, 556), and the judgment of PARKE, B., in *Richardson v. Watson* (1) (4 B. & Ad. at p. 799).

I quite recognise that a decision that a word used in a technical sense in a legal instrument must be construed in its strict legal sense, which in relation to such a document is its primary sense, although not necessarily its archaic sense, or its popular sense at the date of the instrument; but I do not think that a decision like that in *Ogle v. Knipe* (1) controls the meaning of the word "securities" in a description of property disposed of by a testator. That case merely decides that in that will, at that date, the words "money and securities for money of every description" (very different words from the present) did not carry Bank of England stock and canal shares. The decision certainly did not impress a "technical meaning" on the word "securities" or limit for ever the meaning of the word "securities" to its narrow archaic meaning.

ROMER, L.J.—In the absence of any context or admissible evidence from which it can be gathered that the word "securities" has another meaning, I agree with FARWELL, J., that it must be taken in a will to have the meaning stated by him. And that the expressions "securities for money" and "investment of money upon securities," and even the expression "investment of money in securities," would accordingly, in the absence of anything sufficient to negative that view, be held to apply only to securities in the sense above stated. But the word is a flexible one, and I recognise that it is largely used in a wider or different sense, and in particular is widely used as a synonym for "investments." In the present case, after much hesitation and with the doubt I generally feel on the rare occasions when I come to a different conclusion from that arrived at by FARWELL, J., I think there is sufficient in the will in question to show that the testator has used the word "securities" in the sense of "investments." I arrive at this conclusion chiefly from the clause in the will

"And I authorise my trustees to continue or leave any moneys invested at my death in or upon the same securities."

In the whole, I think that the testator in the first part of this clause intended by the words "any moneys invested at my death" refer to all investments of his moneys existing at the date of his death, and that by the words "the same securities" he meant "the same investments." This being so, I agree in thinking that the appeal should be allowed, for the word "investments" would cover investments by the testator in shares.

STIRLING, L.J.—The question on this appeal is whether the word "securities" as used in the will, dated Dec. 11, 1895, of Edward William Rayner (who describes himself as of the city of Liverpool, in the county of Lancaster, general broker), includes stocks and shares of railway and other companies. FARWELL, J., has held that it does not, and his decision is in accordance with that of JAMES, V.C., in 1869 in *Ogle v. Kuipo* (1) on a will dated Mar. 16, 1841. Although there is not to be found in the English reports any subsequent decision on the point, I believe that this case has been repeatedly followed by judges of the Chancery Division. It is said, however, that the meaning of the word has changed since 1869, and that as ordinarily understood by mercantile men, both in 1895 and at the present time, it includes stocks and shares as well as mortgages on land and other property. As at present advised, I am not prepared to say that this contention is well founded, but I think it is unnecessary to decide the question, which is one of importance, on this occasion. Even assuming that in the primary meaning of the word it is limited to "money secured on property," still, as is laid down by LORD CRANWORTH in *Hicks v. Smith* (4) (3 De.M & G. at p. 794), another meaning may be given to it if there be pointed out

"either some inconsistency in different parts of the will, or a positive statement of such being the sense intended, or a reductio ad absurdum by not taking the word in a qualified sense."

In *Abbott v. Middleton* (5) the same learned judge says (7 H.L.Cas. at p. 89):

"Where by acting on one interpretation of the words we are driven to the conclusion, that the person using them is acting capriciously, without any intelligible motive, contrary to the ordinary mode in which men in general act in similar cases, there, if the language admits of two constructions, we may reasonably and properly adopt that which avoids these anomalies, even though the construction adopted is not the most obvious, or the most grammatically accurate."

This passage was quoted with approval by LORD CAIRNS in *Gordon v. Gordon* (6) (L.R. 5 H.L. at p. 284). The passage to be construed is this:

"I declare that all moneys liable to be invested under this my will may be invested in such securities as my trustees in their absolute discretion shall think fit. And I authorise my trustees to continue or leave any moneys invested at my death in or upon the same securities."

If in the second of these sentences the word "securities" is limited to money secured on property, the result would be that if the testator at the time of his death had standing in his own name two parcels of shares, one being an investment of his own, while the other was only security for an advance of money, the trustees would be at liberty to retain the latter, but not the former. I think that such a course would be capricious and without any intelligible motive on the part of the testator, who, it is to be remembered, was a business man. In my opinion, therefore, the word "securities" in both sentences ought to be held to mean "investments."

Solicitors: W. Wynne & Sons, for Evans, Lockett & Co., Liverpool; Van Sandau & Co., for Wright, Beckett & Co., Liverpool; H. Forshaw & Hawkins, Liverpool.

[Reported by W. C. BRIS, Esq., Barrister-at-Law.]

BEARD & LONDON GENERAL OMNIBUS CO.

[COURT OF APPEAL (A. L. Smith, Vaughan Williams and Romer, L.J.), July 10, 1900]

[Reported [1900] 2 Q.B. 530; 69 L.J.Q.B. 895; 83 L.T. 362; 48 W.R. 628; 10 T.L.R. 499]

Master and Servant. Liability of master for act of servant. Omnibus driven negligently by conductor. Need to prove negligent act within scope of servant's authority.

An omnibus, belonging to the defendant company, was left by its regular driver in charge of the conductor at the end of one of its journeys. The conductor, for the purpose, it was alleged, of turning the omnibus round in readiness to start on its return journey, drove it through an adjoining street, and in so doing negligently ran down and injured the plaintiff. The plaintiff brought an action for negligence against the owners of the omnibus, and at the trial gave no evidence as to the conductor's authority to drive.

Held: the de facto driver at the time of the accident was not the authorised omnibus driver, but was employed by the defendants as a conductor; there was no evidence to show that he had been given any special authority to drive or that he was acting within the scope of his employment; and, therefore, the action failed.

Notes. Distinguished: *Ricketts v. Tilling*, [1915] 1 K.B. 644. Referred to: *Whitchhead v. Reader*, [1901] 2 K.B. 48; *Marsh v. Moors*, [1949] 2 All E.R. 27; *L.C.C. v. Cattermoles (Garages), Ltd.*, [1953] 2 All E.R. 582.

As to liability of master to third part in tort, see 25 HALSBURY'S LAWS (3rd Edn.) 535 et seq.; and for cases see 34 DIGEST 138 et seq.

Case referred to:

(1) *Guilliam v. Twist*, [1895] 2 Q.B. 84; 64 L.J.Q.B. 474; 72 L.T. 579; 59 J.P. 484; 43 W.R. 566; 11 T.L.R. 415; 14 R. 461, C.A.; 34 Digest 142, 1117.

Appeal by the plaintiff from a decision of LAWRENCE, J., at the trial of the action with a jury.

The action was brought to recover damages for injury caused to the plaintiff by the negligent driving of an omnibus by a servant of the defendants. The defendant company sent out one of their omnibuses in charge of a licensed driver and a licensed conductor. At the end of one of its journeys the driver got off the box and left the omnibus in charge of the conductor. The conductor got on to the box and apparently for the purpose of turning the omnibus round, in readiness to start on its return journey, he drove down an adjoining street, and there drove so negligently that he ran down and injured the plaintiff.

At the trial before LAWRENCE, J., with a jury the plaintiff proved the above facts, but gave no evidence as to the authority of the conductor to drive the omnibus. LAWRENCE, J., held that no case had been made out, and directed judgment to be entered for the defendants. The plaintiff appealed.

Moses (Wallach with him) for the plaintiff.

Jelf, Q.C., and *Clavell Salter* for the defendants.

A. L. SMITH, L.J.—This is an appeal from a decision of my brother LAWRENCE giving judgment for the defendants. The plaintiff, while riding a bicycle, was run over by an omnibus belonging to the defendants. He then brought the present action against the defendant company for the negligence of the person who was driving the omnibus. I agree that if the plaintiff had simply given evidence that the defendants

omnibus had been negligently driven, there would have been *prima facie* evidence that the omnibus was being driven by the defendants' authorised servant. But that is not this case. The case was opened to the jury as one in which the omnibus was not being driven by the defendants' regular driver, but by the conductor. It seems to me that that negatived any presumption that the omnibus was being driven by the defendants' authorised agent, because the duties of the driver of an omnibus are totally different from those of the conductor. Suppose it were shown by the plaintiff that he had been injured by the omnibus when it was being driven by someone who was an entire stranger to the defendants. No case would then be made against the defendants. The plaintiff might go on to show that the stranger was driving under an emergency, and there were some special orders by the defendants under which he had their authority to drive. But there was no evidence of that sort in the present case. There was no evidence that the conductor had any authority from the defendants to drive the omnibus upon the occasion when the accident happened. I think LAWRENCE, J., came to a right conclusion that no case had been made out against the defendants, and that the appeal must be dismissed.

VAUGHAN WILLIAMS, L.J.—I think the case is just on the border line. I agree that on the evidence it was clear that the conductor was doing something outside his functions, but I do not think that one has the right to assume, without there being any evidence of what are the functions of a driver and of a conductor, that it is necessarily beyond the functions of the conductor of an omnibus to take charge of it during the temporary absence of the driver. The proprietors of this omnibus sent it out in charge of a driver and a conductor, and, though the driver and the conductor had different functions to perform, it is quite consistent with that state of things that it may be within the scope of the authority of one of them to perform temporarily the functions of the other in his absence. I have looked at the note of the evidence given for the plaintiff, and if it had been shown that one journey of the omnibus was at an end and another journey was about to commence, and that between these two moments the conductor had turned the omnibus round, I should have thought that there was a case to go to the jury, and that the onus was on the defendants to show that his doing this was outside his duty to take charge of the omnibus during the absence of the driver. But the omnibus was not merely being turned round. The plaintiff speaks of its coming down the hill at the rate of eight miles an hour. Upon this evidence it seems to me that the conductor was not merely performing a temporary duty during the absence of the driver, but that the driver may have done what he had no right to do and delegated his authority to the conductor. I think that it would be an unfortunate proposition to go forth that, whenever the conductor of an omnibus is found exercising a function that properly belongs to the driver, no case can be made against the proprietor of the omnibus, unless the plaintiff is in a position to call evidence to account for the temporary absence of the driver. It seems to me a safe view to take, whenever an omnibus is sent out in charge of a driver and a conductor, that it should be left to the jury to say whether the act done by the conductor which the plaintiff complains of was within the scope of the authority given him as conductor. It is all very well to say that everybody knows what authority is given to the driver and conductor of an omnibus, that the driver's duty is to drive, and the conductor's duty is to conduct, but one cannot deal with the case on one's own hypothesis as to their functions. For myself I cannot say whether between the journeys the conductor has any duty to perform as regards the horses. In the case we have to consider, the plaintiff gave evidence that the omnibus was being driven eight miles an hour down the hill and perhaps the onus was on the plaintiff to show that such an act was within the authority of the conductor, and perhaps the mere absence of the driver does not in itself afford any ground for letting the case go to the jury. When the driver is absent at any moment in the course of the employment of the omnibus for the conveyance of passengers, it is, in my opinion, the *prima facie* duty of the

conductor to take charge of the omnibus and, if what he does is apparently consistent with that duty, it would be for the defendants to prove that in fact what he was doing was outside his function. I wish to point out that in *Guillou v. Tait* (1) there was no finding at all with reference to anything done by the conductor, and that the driver was not absent. I have only been speaking of a case where the driver is absent, and, generally speaking, my opinion is that in such a case it is the *prima facie* duty of the conductor to take charge of the omnibus, and then it would be a question for the jury whether the conductor went beyond that duty. But on the facts of this particular case, I agree that judgment was rightly entered for the defendants and that the appeal should be dismissed.

ROMER, L.J.—I agree in thinking that the appeal must fail. If an omnibus belonging to the defendant company is being driven along a London street by a driver who appears to be authorised to do so, I think there is a presumption that he has been authorised by the company to drive. But of course that presumption may be removed. In the present case I think that the presumption was rebutted by the plaintiff's own evidence, because he showed that the *de facto* driver at the time of the accident was not the ordinary authorised omnibus driver but was employed by the defendants as a conductor. That evidence threw on the plaintiff the onus of showing some special authority by the company for the conductor to drive on that occasion. No such evidence was given. The facts established by the plaintiff do not show that any case of necessity had arisen. I therefore think that **LAWRENCE, J.**, was right in his decision.

Appeal dismissed.

Solicitors: *Osborn & Osborn; Hicks, Davis & Hunt.*

[*Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.*]

Re PUCKETT AND SMITH'S CONTRACT

[COURT OF APPEAL (Sir Richard Henn Collins, M.R., Stirling and Cozens-Hardy, L.JJ.), May 9, 10, 1902]

[Reported [1902] 2 Ch. 258; 71 L.J.Ch. 666; 87 L.T. 189; 50 W.R. 532]

Sale of Land—Contract—Enforcement—Misdescription of property—Latent defect—Sale for building—Culvert found to be running across land.

A purchaser contracted to buy land, the sale being subject to a condition that, the property "being open to inspection, the purchaser shall be deemed to buy with full knowledge of the actual quantities and condition thereof. If any error shall be found in the particulars the same shall not annul the sale, nor shall any compensation be allowed in respect thereof." The vendors, knowing that the purchaser was buying the land for building purposes, represented that it had "a valuable prospective building element," and that there were no restrictions as to the class of house to be erected. The purchaser inspected the property before he entered into the contract, but afterwards, before completion, discovered that a culvert for water ran across the land a short distance below the surface. There was no indication of this culvert on the plans shown to the purchaser, and the vendors were unaware of its existence.

Held: the above condition of sale did not apply as the existence of the culvert could not have been ascertained by any reasonable inspection and was such a

substantial drawback to the use of the land for building purposes as to constitute a material misdescription of the property, and, therefore, the purchaser was not bound to complete the contract.

Flight v. Booth (1) (1834), 1 Bing. N.C. 370, applied.

Re Brewer and Hankins' Contract (2) (1899), 80 L.T. 127, distinguished.

Notes. Distinguished: *Re Belcham and Gawley's Contract*, [1930] 1 Ch. 56. Applied: *Watson v. Burton*, [1956] 3 All E.R. 929. Referred to: *Shepherd v. Craft*, [1911] 1 Ch. 521; *Jennings v. Tarcner*, [1955] 2 All E.R. 769.

As to disclosure of material facts in sale of land, see 34 HALSURY'S LAWS (3rd Edn.) 210 et seq.; and for cases see 40 DIGEST (Repl.) 45 et seq.

Cases referred to:

(1) *Flight v. Booth* (1834), 1 Bing. N.C. 370; 1 Scott, 190; 4 L.J.C.P. 66; 131 E.R. 1160; 40 Digest (Repl.) 113, 870.

(2) *Re Brewer and Hankins' Contract* (1899), 80 L.T. 127, C.A.; 40 Digest (Repl.) 112, 865.

Also referred to in argument:

Oldfield (or Bowles) v. Round (1800), 5 Ves. 508; 31 E.R. 707, L.C.; 40 Digest (Repl.) 46, 281.

Lucas v. James (1849), 7 Hare, 410; 18 L.J.Ch. 329; 14 L.T.O.S. 308; 13 Jur. 912; 68 E.R. 170; 40 Digest (Repl.) 48, 296.

Kennedy v. Panama, etc. Mail Co. (1867), L.R. 2 Q.B. 580; 8 B. & S. 571; 36 L.J.Q.B. 260; 17 L.T. 62; 15 W.R. 1039; 35 Digest 118, 216.

Hart v. Windsor (1844), 12 M. & W. 68; 13 L.J.Ex. 129; 2 L.T.O.S. 440; 8 J.P. 233; 8 Jur. 150; 152 E.R. 1114; 31 Digest (Repl.) 133, 2716.

Jacobs v. Revell, [1900] 2 Ch. 858; 69 L.J.Ch. 879; 83 L.T. 629; 49 W.R. 109; 40 Digest (Repl.) 113, 872.

Ashburner v. Scwell, [1891] 3 Ch. 405; 60 L.J.Ch. 784; 65 L.T. 524; 40 W.R. 169; 7 T.L.R. 736; 40 Digest (Repl.) 95, 723.

Appeal from a decision of KEKEWICH, J., on a summons under the Vendor and Purchase Act, 1874 [repealed].

The trustees and executors of a will in July, 1899, put up for sale by auction a freehold property known as the Grange, West Molesey, but it was not sold. The property was described in the conditions of sale as possessing "an important frontage to Walton Road with a valuable prospective building element." Shortly after the attempted sale the eventual purchaser, who was a contractor, entered into negotiations with the vendor's agent with a view to purchase it, and on Aug. 5, 1899, the latter wrote to him as follows:

"In reply to your letter of yesterday, the old-fashioned residence of 13½ acres advertised for sale near Hampton Court suitable for development is known as the Grange, West Molesey, one mile from Hampton Court station. We enclose the small plan for your guidance. The price is £5,000, or we would submit an offer of not less than £4,500. There are no restrictions as to the class of houses to be erected, and it is admirably adapted for the erection of cottages, which are in great demand in the neighbourhood, being quite close to the works of three London water companies, where thousands of mechanics are permanently employed at high wages. We enclose an order to view."

The purchaser afterwards went over the property, and on Oct. 30, entered into a contract to purchase it. The contract was contained in a copy of the conditions of sale which had been printed for use at the auction, and the 6th condition provided:

"The property is believed and shall be taken to be correctly described, and, being open to inspection, the purchaser shall be deemed to buy with full knowledge of the actual quantities and condition thereof. If any error shall be found in the particulars, the same shall not annul the sale, nor shall any compensation be allowed in respect thereof."

Condition 7, which had been struck out, was as follows :

"The property is sold subject to such ditch, quail, or other estate, right of way, water, drainage, and other easements, restrictions, and liabilities as are mentioned in the particulars, or as may be ascertained to be charged thereon, or to affect the same, and to any subsisting liability under covenant or otherwise to repair fences or roads. The purchaser shall not be entitled to require the legal apportionment of any tithe rentcharge."

After he had entered into the contract, but before completion, the purchaser discovered that a culvert for the passage of water ran across the middle of the property a short distance from the surface. Neither the vendors nor the purchaser were aware of the existence of this culvert until it was discovered by the latter. In addition to the plan forwarded to the purchaser in the letter of Aug. 5, 1890, there was another attached to the conditions of sale. The former did not show any ditch or give any indication of any possible flow of water near the property. The other plan gave an indication of something which might be a ditch which left the property at a certain point and, at the time the purchaser inspected the property, appeared to be a dry ditch. The purchaser called on the vendors either to divert the culvert (which, it appeared, would cost £500) or to make compensation to him by an abatement of the purchase money, but the vendors, relying on the 6th condition, refused to do so, and took out this summons. *KEKEWICH, J.*, held that the purchaser's objections to the title and requisition had not been sufficiently answered, and that a good title had not been shown in accordance with the contract. The vendors appealed.

A. T. Murray for the vendors.

Buckmaster, K.C., and Davenport for the purchaser.

SIR RICHARD HENN COLLINS, M.R., stated the facts, and continued :—

The first point to be considered is, Did the parties contemplate and were they dealing on the basis that the land was reasonably capable of being developed for building purposes? I think it perfectly clear on the facts that both parties were dealing on that basis.

Then the next point is, Could the purchaser by reasonable inquiry and inspection have ascertained the existence of this culvert, which is a very serious drawback to the use of the property as a building property? The evidence on that seems to me really to be all one way. It is admitted the vendors themselves had not found it out, and knew nothing about it. The plans seem to me, when carefully examined, to give no fair indication of its existence at all. The first plan, the small one which was sent, does not suggest it at all, and does not show the ditch itself or any sort of indication of any possible flow of water near the property at that side. The plan that was attached to the conditions of sale undoubtedly does give an indication of what might be a ditch, or might be a road as far as I can see, but which at a certain point leaves the property, and is visible at a point further on which the purchaser did not see, and as to which he was not put on inquiry. At both places, the place where it enters and the place where it leaves the property, it was at the time the purchaser inspected invisible. It was covered somehow or other at both ends, so that he did not actually see them. It could not, as it seems to me on the evidence, by any reasonable care have been discovered by the purchaser when he inspected the property with the vendors' agent, and after carefully going over the property he did not discover the existence of this culvert. Unless that was the result of a want of ordinary care on his part, he is entitled to say that he could not by any reasonable inspection have found out the existence of this defect.

Is this culvert such a substantial defect as to alter within the authorities the nature of the thing which he intended to buy, and to oblige him to take (if he does take it) a thing essentially different from that which he agreed to take? On that I think the law is clear, and is well stated in *Flight v. Booth* (1), which has

been referred to by my brother STIRLING and has been adopted in the text-books, and will be found in FRY ON SPECIFIC PERFORMANCE (3rd Edn.) at p. 558. There had been there an actual description of the property, and it was suggested that the description in the contract did not accord with the actual facts ascertained. Here we have not got a specific description, but we have got on the facts and documents what is the equivalent to it—namely, that this property was sold for the purpose of being used as a building estate. Then the parties are in the same position as if that was written out at large in the contract. In giving the judgment of the court in *Flight v. Booth* (1), TINDAL, C.J., said (1 Bing. N.C. at p. 377):

“Where the misdescription, although not proceeding from fraud, is, in a material and substantial point, so far affecting the subject-matter of the contract that it may be reasonably supposed, that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts the purchaser may be considered as not having purchased the thing which was really the subject of the sale.”

In the present case the misdescription consists in the representation in the particulars that this property has a “valuable prospective building element,” coupled with the statement in the letter of Aug. 5, that this property was capable of development, and there were no restrictions as to the class of house to be built. That is the description of the land, but the fact is that under this land lies the covered culvert which may take the flood water from the ditch, which was dry at the time the purchaser saw it, and which, of course, may be a most substantial drawback to the value of a building estate. In fact, the evidence is that it would cost £500 to deal with this culvert in such a way as to make it possible to use the land for such building as was contemplated by both parties. Under these circumstances the learned judge has held that the purchaser is not bound to complete the purchase, and I think he was perfectly right. The appeal must be dismissed.

STIRLING, L.J.—I am of the same opinion. I think that condition 6, which is the condition which is relied upon by the vendors, does not avail them on the present occasion. I think it only applies to such matters as might be discovered by an inspection of the property itself with reasonable care, and does not impose upon an intending purchaser the duty of going on adjoining properties, or even of walking along neighbouring roads from which the property might be visible. That being so, it seems to me that the question which remains is not really a question of title at all, but is whether the case falls within the rule which is laid down by TINDAL, C.J., in *Flight v. Booth* (1). In my opinion, seeing that the property was plainly sold to the present purchaser for the purpose of building upon it, the case does fall within that rule. The decision in *Re Brewer and Hankins' Contract* (2), which came before myself and afterwards before the Court of Appeal, was based in both courts on the facts of that particular case, and the case did not fall within the rule in *Flight v. Booth* (1). There is one material difference between that case and the present, which is that in *Re Brewer and Hankins' Contract* (2) it is quite clear the property was not offered for building purposes. I think, therefore, the appeal must be dismissed.

COZENS-HARDY, L.J.—I agree.

Solicitors: *T. Durant; Hare & Co., for March, Clayton & Pearson, Manchester.*

[*Reported by W. C. Biss, Esq., Barrister-at-Law.*]

BROWNE v. BRANDT

[KING'S BENCH DIVISION (Lord Alverstone, C.J., Darling and Channell, JJ.),
March 5, 6, 1902]

[Reported [1902] 1 K.B. 696; 71 L.J.K.B. 361; 86 L.T. 625; 20 W.R. 681.
18 T.L.R. 399; 46 Sol. Jo. 389]

*Inn—Duty of innkeeper to accommodate travellers—Refusal of accommodation
when all bedrooms occupied—Liability.*

An innkeeper is under no common law duty to provide shelter and accommodation for travellers wishing to spend the night at his inn when all the rooms ordinarily used as bedrooms for guests are occupied.

Notes. Considered: *Constantine v. Imperial Hotels, Ltd.*, [1944] 2 All E.R. 171. *R. v. Higgins*, [1947] 2 All E.R. 619. Referred to: *Wickworth v. Barker*, [1931] All E.R. Rep. 847.

As to an innkeeper's liability to receive and entertain guests, see 21 HALLIDAY'S LAWS (3rd Edn.) 445 et seq., and for cases see 29 DIGEST 5 et seq.

Cases referred to in argument:

R. v. Ivens (1835), 7 C. & P. 213; 29 Digest 7, 76.

Fell v. Knight (1841), 8 M. & W. 269; 10 L.J.Ex. 277; 5 Jur. 554; 151 E.R. 1039; 29 Digest 6, 60.

Appeal from the decision of Reigate County Court.

On April 9, 1901, the appellant was travelling in a motor car from Crawley to London. The car broke down in the neighbourhood of Horley. The appellant and a friend who was travelling with him pushed the car to Horley, where they came to an inn called the Chequers, of which the respondent was the landlord. They arrived there about two o'clock in the morning. Having roused the respondent, the appellant demanded a bed or beds for himself and his friend, who were both wet through. The respondent declined to admit them to the inn, saying that the house was full. The appellant then asked for some refreshment, when, after some demur, the respondent admitted him and his friend into the inn and provided the refreshment required. The appellant again asked for beds or a bed, and was again refused on the ground that the house was full. The appellant then said that as the bedrooms were all occupied he and his friend would be content to remain for the night in the coffee-room or in a sitting-room which was unoccupied. This the respondent refused to permit, saying that he never allowed anyone to stay up all night in the coffee-room or sitting-rooms. The appellant and his friend then left the inn, and, failing to find shelter elsewhere, they procured a brougham and drove back to Crawley.

The appellant sued the respondent for damages sustained by reason of the respondent having refused to give him shelter in his inn. At the hearing before the learned county court judge the latter found as facts that the Chequers was on the night of April 9 full as regarded proper sleeping accommodation; that there was no unoccupied bedroom; that there were, however, at least two other rooms available for the shelter and accommodation of the appellant and his friend, and that the shelter and accommodation was refused. On these facts he held that the Chequers was on that night full when the appellant demanded shelter and accommodation, and that the respondent was therefore not bound to give shelter and accommodation to the appellant on that night. He

A gave judgment for the respondent, but, in case his judgment might on appeal be held wrong, he assessed the appellant's damages at five guineas.

Thornton Lawes for the appellant.

English Harrison, K.C., and *R. Burleigh Muir*, for the respondent.

B **LORD ALVERSTONE, C.J.**—In this case the appellant, his motor car having broken down, arrived at the respondent's inn after midnight, and was, after some discussion, let in for refreshment, but was not allowed to remain. He thereupon brought an action in the county court contending that the respondent had broken his common law duty as an innkeeper to provide accommodation for travellers, and that the action could be maintained if the respondent had a room of any kind, or at any rate a coffee-room or sitting-room, where he could have remained for the night. The county court judge found that the respondent's house was full as regarded proper sleeping accommodation: that there was no empty bedroom; that there were two rooms available for the accommodation of the appellant, and that the accommodation was refused. I do think that the question whether the appellant demanded to take the one sitting-room which was empty was submitted to the county court judge, but I do not wish to decide this case upon any narrow ground, and I will therefore assume in favour of the appellant that there was some place in the house where possibly the respondent might have permitted the appellant to stay for the night. I think it would be straining the common law liability of an innkeeper if we were to hold that the appellant has a good cause of action. The true view of the common law rule, in my opinion, E is that an innkeeper may not pick and choose his guests; he must give accommodation to people who come as travellers to his inn and are in a position to pay. I cannot think that the authorities to which we have been referred mean that, where an innkeeper provides a certain number of bedrooms and sitting-rooms for the accommodation of guests, he is under a legal obligation to receive and shelter as many people as the rooms will hold without overcrowding. I do not think that F a person who comes to an inn at night has a legal right to demand to be allowed to pass the night in a sitting-room; if the bedrooms are all full, I think the landlord is under no legal obligation to receive and shelter him. He must act reasonably and not captiously or unreasonably refuse to receive guests when he has proper accommodation for them. Here the county court judge has found in effect that the landlord did not act unreasonably. For these reasons I am G of opinion that his judgment must be affirmed.

H **DARLING, J.**—I am of the same opinion. No doubt an innkeeper is bound to provide accommodation for travellers, but it is not his absolute duty to do so at all risks and at all costs. He is bound to provide accommodation only so long as his house is not full; when it is full he has no duty in that respect. The question, then, is, When is an inn to be said to be full? I do not think the old cases can help one very much on this point, because one knew that in olden times people were in the habit of sleeping very many in one room and several in one bed. People who were quite unknown to one another would sleep in the same room, as is done in common lodging-houses at the present time. Therefore, if we got a definition of "full" in one of the old cases of the fourteenth or fifteenth centuries, I should I not be surprised to find that what was called "full" then we should now call "indecent overcrowding." It is the habit now of people to occupy separate bedrooms, and it seems to me that, having regard to modern habits, "full" must at present mean "full" in the sense in which a decently conducted inn would be considered full—that is, the house must be considered full when all the bedrooms were occupied, if what the person wanted was to pass the night. There might have been some difficulty here if the appellant had said: "I will take your sitting-room; I do not want to go to bed; I wish to sit up all night." But that difficulty does not arise in the facts of the case. The county court judge has come to the conclusion

that the house was full, having regard to modern habits. He referred to the *CANTERBURY TALES* of CHAUCER and the state of inns in this country when the pilgrims to Canterbury left the Tabard (*PROLOGUE TO CANTERBURY TALES*, vv. 19-20). And pointed out the respondent might have filed an affidavit in LADDISON'S *SENTIMENTAL JOURNAL* to show that a room was not considered then to be full which certainly would be considered too full at the present day.

CHANNELL, J.—I agree.

Appeal dismissed.

Solicitors: *George Terrell, Terrell & Varley; Cooper, Turner & Lunn, for Morrison & Nightingale, Reigate.*

[Reported by J. A. STRAHAN, Esq., Barrister-at-law.]

FARQUHARSON BROTHERS & CO. v. KING & CO.

[HOUSE OF LORDS (The Earl of Halsbury, L.C., Lord Macnaghten, Lord Shand, Lord Robertson and Lord Lindley), June 13, 16, 17, 1902]

[Reported [1902] A.C. 325; 71 L.J.K.B. 667; 86 L.T. 810; 51 W.R. 94; 18 T.L.R. 665; 46 Sol. Jo. 584]

Agent—Tort by agent—Fraudulent sale of principal's goods—Innocent purchaser—Right of principal to recover value.

The appellants were timber merchants, and kept large quantities of timber warehoused in their name at the docks. The dock company were authorised to accept and act upon delivery orders signed by C., the appellants' manager, who had authority to sell timber in ordinary quantities to regular customers. C. from time to time fraudulently sold to the respondents timber belonging to the appellants under an assumed name. The respondents bought the timber in good faith without any suspicion of fraud. They were not customers of the appellants, and did not know them in any way in the transaction. In an action for detinue brought by the appellants against the respondents,

Held: as the respondents had never heard of the appellants or of C., they had not acted on the faith of C. being vested by the appellants with authority to sell the timber, and, therefore, they acquired no better title to the timber than that of C., who had stolen it, and they were liable for its value to the appellants.

Notes. Considered: *Weiner v. Gill*, *Weiner v. Smith*, [1904-7] All E.R. Rep. 773. Distinguished: *Commonwealth Trust v. Akotey*, [1925] All E.R. Rep. 270. Considered: *Jones v. Waring and Gillow, Ltd.*, [1926] All E.R. Rep. 36. Applied: *Jerome v. Bentley & Co.*, [1952] 2 All E.R. 114. Referred to: *Herdman v. Wheeler*, [1902] 1 K.B. 361; *Rimmer v. Webster*, [1902] 2 Ch. 163; *Truman v. Attenborough* (1910), 103 L.T. 218; *Macmillan v. London Joint Stock Bank*, [1917] 2 K.B. 439; *Bradford v. Price* (1923), 92 L.J.K.B. 871; *Slingsby v. District Bank, Ltd.*, [1931] All E.R. Rep. 143; *Mercantile Bank of India, Ltd. v. Central Bank of India, Ltd.*, [1938] 1 All E.R. 52; *Transrail and Delagoa Bay Investment Co. v. Atkinson*, [1944] 1 All E.R. 529; *Central Newbury Car Auctions, Ltd. v. Unity Finance, Ltd.*, [1956] 3 All E.R. 905.

As to a principal's liability for money, goods, etc., entrusted to an agent, see 1 HALSBURY'S LAWS (3rd Edn.) 211 et seq.; and for cases see 1 DIGEST (Repl.) 429 et seq.

Cases referred to :

- (1) *Henderson & Co. v. Williams*, [1895] 1 Q.B. 521; 64 L.J.Q.B. 308; 72 L.T. 98; 43 W.R. 274; 11 T.L.R. 148; 14 R. 375, C.A.; 1 Digest (Repl.) 431, 872.
- (2) *Lickbarrow v. Mason* (1787), 2 Term Rep. 63; 100 E.R. 35; on appeal, sub nom. *Mason v. Lickbarrow* (1790), 1 Hy. Bl. 357, Ex. Ch.; sub nom. *Lickbarrow v. Mason* (1793), 4 Bro. Parl. Cas. 57; 6 East, 22, n., H.L.; 39 Digest 614, 2115.
- (3) *Bank of Ireland v. Evans' Charities Trustees* (1855), 5 H.L.Cas. 389; 25 L.T.O.S. 272; 3 W.R. 573; 3 C.L.R. 1066; 10 E.R. 950, H.L.; 13 Digest (Repl.) 198, 181.
- (4) *Scholfield v. Earl Lonsborough*, [1896] A.C. 514; 65 L.J.Q.B. 593; 75 L.T. 254; 45 W.R. 124; 12 T.L.R. 604; 40 Sol. Jo. 700, H.L.; 6 Digest (Repl.) 361, 2605.
- (5) *Brooklesby v. Temperance Building Society*, [1895] A.C. 173; 64 L.J.Ch. 433; 72 L.T. 477; 59 J.P. 676; 43 W.R. 606; 11 T.L.R. 297; 11 R. 159, H.L.; 1 Digest (Repl.) 368, 402.

Also referred to in argument :

- Johnson v. Crédit Lyonnais Co., Johnson v. Blumenthal* (1877), 3 C.P.D. 32; 47 L.J.Q.B. 241; 37 L.T. 657; 42 J.P. 548; 26 W.R. 195, C.A.; 1 Digest (Repl.) 385, 500.
- Dyer v. Pearson* (1824), 3 B. & C. 38; 4 Dow. & Ry.K.B. 648; 107 E.R. 648; 1 Digest (Repl.) 429, 852.
- Ramazzotti (Ramosotti) v. Bowring* (1859), 7 C.B.N.S. 851; 29 L.J.C.P. 30; 6 Jur.N.S. 172; 8 W.R. 114; 141 E.R. 1050; 1 Digest (Repl.) 431, 875.
- Pickering v. Bush* (1812), 15 East, 38; 104 E.R. 758; 1 Digest (Repl.) 359, 335.
- Meggy v. Imperial Discount Co., Ltd.* (1878), 3 Q.B.D. 711; 48 L.J.Q.B. 54; 38 L.T. 309; 42 J.P. 740; 26 W.R. 342, C.A.; 5 Digest (Repl.) 789, 6694.
- Cole v. North Western Bank* (1875), L.R. 10 C.P. 354; 44 L.J.C.P. 233; 32 L.T. 733, Ex. Ch.; 1 Digest (Repl.) 385, 501.
- Colonial Bank v. Whinney* (1886), 11 App. Cas. 426; 56 L.J.Ch. 43; 55 L.T. 362; 34 W.R. 705; 2 T.L.R. 747; 3 Morr. 207, H.L.; 5 Digest (Repl.) 809, 6839.
- Lamb v. Attenborough* (1862), 1 B. & S. 831; 31 L.J.Q.B. 41; 8 Jur.N.S. 280; 10 W.R. 211; 121 E.R. 922; 1 Digest (Repl.) 386, 510.
- Swan v. North British Australasian Co.* (1863), 2 H. & C. 175; 2 New Rep. 521; 32 L.J.Ex. 273; 10 Jur.N.S. 102; 11 W.R. 862; 159 E.R. 73, Ex. Ch.; 21 Digest (Repl.) 370, 1107.
- Babcock v. Lawson* (1880), 5 Q.B.D. 284; 49 L.J.Q.B. 408; 42 L.T. 289; 28 W.R. 591, C.A.; 39 Digest 535, 1460.
- Vickers v. Hertz* (1871), L.R. 2 Sc. & Div. 113; 1 Digest (Repl.) 383, 492.
- Perry-Herrick v. Attwood* (1857), 2 De G. & J. 21; 27 L.J.Ch. 121; 30 L.T.O.S. 267; 4 Jur.N.S. 101; 6 W.R. 204; 44 E.R. 895, L.C.; 25 Digest 228, 561.

Appeal from a decision of the Court of Appeal (SIR ARCHIBALD LEVIN SMITH, M.R., and VAUGHAN WILLIAMS, L.J., STIRLING, L.J., dissenting), reported [1901] 2 K.B. 697, reversing a decision of MATHEW, J., in an action tried before him with a jury in the Commercial Court.

The action was brought by the appellants against the respondents for the wrongful detention, or alternatively for the wrongful conversion, of forty-five different parcels of timber, the total value of which was agreed at the sum of £1,200.

The appellants were timber merchants, and the respondents packing-case manufacturers. The appellants were in the habit of warehousing large quantities

of timber imported by them in the Surrey Commercial Docks. They had in their employ a confidential clerk named Capon. On Jan. 25, 1895, the appellants sent to the secretary of the dock company a letter as follows:

"Dear Sir,—We have made arrangements whereby in future Mr. Capon will sign delivery orders on behalf of and in addition to the other members of the firm, and enclose our written authority for same.—Yours truly, Farquharson Brothers & Co."

Enclosed in the letter was the following authority:

"We hereby authorise you to accept all transfer or delivery orders which shall be signed on our behalf by Mr. H. J. Capon, whose signature is subjoined, the company acting also on our signature as heretofore. This authority is to remain in force until expressly revoked in writing by us.—Farquharson Brothers & Co.—Signature of person authorised, Henry J. Capon."

Capon had also a limited authority to sell timber on behalf of the appellants to certain recognised customers, as against each of whom they from time to time fixed a limit up to which they were willing to give them credit. After Capon had obtained this power to sign transfer or delivery orders, he in January, 1896, commenced a series of frauds as follows. He opened an account in the dock company's books in the name of Brown (who was a fictitious person). Into this account he from time to time transferred portions of the appellants' timber, concealing his fraud either by altering the entries in the appellants' stock books so as to make it appear that they had received less stock than they in fact had received or else by means of fictitious sales purporting to be to recognised customers, causing an apparent diminution of the stock. The total value of timber so transferred was £1,200 to £1,500 spread over a period from January, 1896, to November, 1900, and, the amounts being insignificant as compared with the size of the appellants' business, the frauds were not discovered until November, 1900. Upon the discovery of the frauds it was found that the whole of the timber had been sold to the respondents by Capon, with the exception of about £50 worth, in the following circumstances. Capon secured an address in Battersea under the assumed name of Brown, and from that address he entered into communication with the respondents, representing himself as a timber agent acting on behalf of Messrs. Bayley, a well-known firm of fire-escape and ladder makers, and eventually he sold to them the whole of the forty-five parcels of timber referred to in the appellants' claim at different times between January, 1896, and November, 1900.

It was admitted by the appellants' counsel that the purchases were so made by the respondents *bonâ fide* and without notice of any fraud. The respondents gave evidence that in purchasing as aforesaid they believed that there was such a person as Brown, who really was a timber agent at Battersea, and was acting in these transactions as agent for Messrs. Bayley, and that they had absolutely no knowledge or suspicion that he was Capon or in any way connected with the appellants. At the trial the judge left to the jury the question whether the appellants had so acted as to hold Capon out to the respondents as their agent to sell the timber to the respondents, all other questions of law or fact being reserved to the judge. The counsel for the respondents asked him also to leave to the jury the question whether the appellants had by their conduct enabled Capon to hold himself out as the true owner or as entitled to dispose of the goods, but the judge refused to leave that question to the jury. The jury answered the questions left to them in the negative. The judge gave judgment in favour of the appellants, which was reversed by the majority of the Court of Appeal.

Asquith, K.C., Danckwerts, K.C., and Whately for the appellants.

Lawson Walton, K.C., and Cababé for the respondents.

June 17, 1902. **THE EARL OF HALSBURY, L.C.**—I hesitate to speak all that is in my mind out of respect for the learned judges in the Court of Appeal,

A who have taken a different view. But so far as I can see this is a case in which no difficulty whatever arises. A servant has stolen his master's goods, and the question has to be decided whether the person who has purchased the goods innocently can set up a title to them as against the master from whom they have been stolen. That this timber was stolen there cannot be the smallest doubt, and I have very great difficulty in treating seriously the argument that it was not.

B What possible difference is there between this act of theft and the act of stealing a handkerchief from a person's pocket in the street? Because by a circuitous process the thief allows an innocent party to remove the goods from where they were stored by the owner the innocent party does not acquire a title. The thief, having no title, can give no title.

C That really disposes of the case, and I might well leave it there. But much argument has been used to establish the position that there was here an estoppel. I fail to see what estoppel has to do with the matter. By the innocent act of the dock company the timber has been taken away, but even as against the dock company there is no estoppel. All that the Surrey Commercial Dock Co. did they were expressly authorised to do by the appellants. There would, therefore, not be an estoppel as between them and the Dock Co., who acted in pursuance of the direct and real authority of the appellants. If it could be argued that the appellants represented that their clerk Capon was vested with disposing power, and anyone had acted on that belief to his prejudice, then estoppel would have arisen, and the person who had negligently allowed Capon to be so apparently vested would be estopped from denying that Capon had that authority. But what in the world has that to do with the question in this case? Capon was unknown to the respondents, as also were the appellants. The respondents dealt throughout with a person whom they believed to be Brown. No one would dream of saying that the respondents acted upon the faith of Capon being vested by the appellants with authority to sell, for they had never heard of the appellants nor of Capon. The clerk who has committed this fraud availed himself of his power of signing delivery orders to transfer into the name of Brown, which name he assumed, and in disposing of this stolen timber to the respondents he professed to act, not on behalf of the appellants, but on behalf of a third party named Bayley. I am bewildered at the absurdity of the suggestion that an estoppel arose in this case.

As to *Henderson & Co. v. Williams* (1), in which a judgment of my own has been relied upon by the respondents, I adhere to every word I said on that occasion; but that case has no relation to this, and the language I used on that occasion was the language of an American judge. What I said then was ([1895] 1 Q.B. at p. 529):

"When one of two innocent persons must suffer for the fraud of a third, he shall suffer, who, by his indiscretion, has enabled such third person to commit the fraud."

[No doubt anyone whose indiscretion had caused an innocent party to suffer ought, as was said in that case, to suffer. But where was the indiscretion here? No one outside the firm knew anything of the authority given to Capon. It is absurd to say that such an authority enabled the person invested therewith to give by his fraud or theft a good title to an innocent purchaser. I am a little surprised to find that two of the learned judges in the court below seem to be under the impression that what I said was that any person who enabled another by any means to commit a fraud must suffer. In a sense anyone who, for example, sold a pistol or dagger might be said to enable the purchaser to commit a murder. A strict analysis of the present case shows that such a case would be parallel to the present. Any notion of the respondents acting on a representation by the appellants is utterly absurd. The state of the law would have been perfectly clear even without the Sale of Goods Act, 1893, s. 21, by which, when an agent is invested with authority to sell, the owner is precluded from denying the purchaser's title. Here,

however, there was no authority to sell. The case is *hinc illud* it is simply that of goods stolen, and a buyer from a thief can acquire no better title than that of the thief who purported to sell the goods, which was *res mea*, and therefore the appellants are entitled to succeed, and I move your Lordships that the judgment of the Court of Appeal be reversed with costs.

LORD MACNAGHTEN.—After what has fallen from my noble and learned friend on the woolsack I am almost ashamed to trouble your Lordships with any observations of my own. But the case is peculiar in one point of view. I cannot remember any case in which the wealth of learning and argument was so far beyond the value of the poor and commonplace material on which it has been expended. And, besides, the question is not unimportant. The decision under appeal, if it could be supported, would have very far-reaching and, in my opinion, very pernicious consequences. **VAGHAN WILLIAMS, L.J.**, expresses an opinion to the effect that the case is difficult. The very learned judge who differs from him in the result agrees with him in this. Speaking for myself, in the view which I take of it, I must say that I cannot imagine a plainer or simpler case than this. Messrs. Farquharson, Brothers & Co. are timber merchants in a large way of business with a turnover exceeding £200,000 a year. They had a confidential clerk called Capon, whom they trusted implicitly. A short time ago they discovered that this man had been robbing them for years, stealing small lots of timber from time to time, passing the timber out of their names in the docks by means of a written authority which they had given to him, and disposing of it for his own benefit. They trace the stolen timber to the hands of Messrs. King & Co. They demand restitution or compensation; the demand is refused, and then this action is brought. What is the defence? Not that the goods were bought in market overt, though that would be no defence now, after the conviction of the thief; not that Messrs. Farquharson led them to believe that Capon had their authority to sell what they supposed that they bought. That defence is out of the question. They never imagined that they were dealing with Messrs. Farquharson or buying Messrs. Farquharson's goods. They never even dealt with Capon to their knowledge. They never dealt with him in his own name and in his proper person. They dealt with a phantom broker—an imaginary being created, animated, and worked by Capon for his own purposes under the plain and unpretentious name of Brown—and from this Brown, whom they never saw in the flesh and about whom they never made a single inquiry, they supposed that they bought this timber. Whether Capon, who has apparently been convicted of forgery, could have been convicted of larceny or not it seems to me absurd to suppose that by this juggle of Capon's—all sham and pretence so far as he was concerned—the property in the stolen goods passed to Messrs. King & Co. If it were permissible it would be interesting to inquire which of the two parties to this litigation were the more blameworthy in a moral point of view. The appellants trusted a man whom they had long known and believed to be honest. The respondents trusted a man whom they had never seen, whom a breath of suspicion and the most ordinary inquiry would have unmasked.

But we have nothing to do with this matter, though it seems to have entered into the consideration of the Court of Appeal. The real defence is a singular one. It must come to this: Respondents say to the appellants, "You, Messrs. Farquharson, have conducted your business in such an unbusinesslike way that you ought not to have your own goods back again. This misfortune, common to you and to us, is all your fault. By your blind and foolish confidence in Capon, and by the written authority which you gave to him, you 'enabled' him to commit this fraud upon us. And so **ASHURST, J.'s**, famous dictum in *Liechbarrow v. Mason* (2) comes in." This defence, in my opinion, has no foundation in principle or authority. To try the principle take a common case, a case which everybody understands. Nothing is better settled than this—that if a person buys a chattel

and it turns out that the chattel was found by the person who proposed to sell it, the true owner can recover his property unless there has been a sale in market overt. The right of the true owner is not prejudiced or affected by his carelessness in losing the chattel, however gross it may have been. If I lose a valuable dog, and find it afterwards in the possession of a gentleman who got it from somebody whom he believed to be the owner and paid for it accordingly, it is no answer for him to say that he never would have been cheated into buying the dog if I had chained it up, or put a collar on, or kept it under proper control. If a person leaves a watch or a precious jewel on a seat in the park or on a table at a café, and it gets into the hands of a person who supposes that he has bought it from the rightful possessor, it is no answer to the true owner to say that it was his own carelessness that enabled the finder to pass it off as his own.

If that be so, how can carelessness, however extreme, in the conduct of a man's own business preclude him from recovering his own property which has been stolen from him? Nor is the case without authority. In *Bank of Ireland v. Evans' Charities Trustees* (3) in this House the trustees, who were a corporate body, called upon the bank to replace stock which the bank had sold under a forged power of attorney bearing the genuine impression of their corporate seal. The defence was that the carelessness of the trustees in the custody of their seal enabled their clerk to impose on the bank and disentitled them from requiring the bank to replace the stock. The judges were consulted. Their unanimous opinion, which this House adopted, was delivered by PARKE, B. He thought that the negligence, if there was negligence, in the custody of the seal was only remotely connected with the transfer which the bank set up as good against the trustees. A somewhat similar contention was raised in the more recent case of *Scholfield v. Earl Lonsborough* (4). It was argued (and the argument found favour with some judges) that everybody who accepted a bill of exchange owes a duty which was defined as "the duty not to be negligent as to the form of the bill." That argument was rejected in this House; but in rejecting it both the EARL OF HALSBURY, L.C., and LORD WATSON made observations of much wider application. The rules of law applicable to this case are, in my opinion, well settled, and I would only venture to remind your Lordships of an observation may by LORD CAIRNS in this House to the effect that in cases of this sort, when your Lordships have to perform the disagreeable duty of determining which of two innocent parties is to suffer by the fraud of a third, all your Lordships have to do is to apply the settled and well-known rules of law and apply them rigorously.

LORD SHAND.—I have come to the conclusion, without difficulty, that the principle in *Brocklesbury v. Temperance Building Society* (5) does not apply in this case for the reasons fully stated by the Lord Chancellor, and because no representation of Capon's authority was made to the respondents. This was a case of fraudulent appropriation, and the title to the timber, therefore, could not pass to Capon or to anyone who purchased from him. On these grounds I concur in the judgment of the Lord Chancellor.

LORD ROBERTSON.—I concur. The facts of this case hopelessly shut out the respondents from the principles which they invoke. The respondents never heard of the appellants in connection with these purchases, never knew of Capon's existence, and, instead of dealing with Capon as agent of the appellants, dealt with Brown as the agent of Bayley; and the right which they expected to acquire was the right of Bayley and not the right of the appellants at all. The respondents rely on the fact that they paid their money in consequence of the dock company's registering a transfer in their favour executed by Capon in favour of Brown, in consequence of the general request of the appellants to the dock company to honour Capon's transfers. The place occupied, therefore, by this request to the dock company is merely that it was a *causa sine qua non* and not the *causa causans* of

the respondents, being involved. In my opinion the term "dispositive power" is wholly inapplicable to the authority conferred upon Capon. The name, in fact, is exactly the same as that of a servant having unrestricted access, for his master's purposes, to his master's goods, and meaning that access for the purpose of selling the goods. In this case the limited authority actually held by Capon can avail the respondents nothing.

LORD LINDLEY. *I concur.* The fact that the respondents bought the timber honestly did not confer on them a good title as against the real owners, who had done nothing which precluded them from denying, as against the respondents, Capon's right to sell it. What have the appellants done to mislead the respondents or to induce them to trust Capon? Absolutely nothing. There is nothing connecting the Surrey Commercial Dock Co. with the respondents in this transaction. The respondents were misled, not by what the appellants did, or by any authority they gave to the dock company, but by the fraud of Capon. It is true in one sense that the appellants enabled Capon to occasion this loss by placing him in the position which he occupied; but this is an instance of the unsoundness of the doctrine that where one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. This dictum has never, to my knowledge, been applied where nothing has been done by one of the innocent parties which has, in fact, misled the other. I agree that the appeal ought to be allowed.

Appeal allowed.

Solicitors: *Ward, Perks & McKay; Anning & Co.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

MEDIANA (OWNERS) v. COMET (OWNERS). THE MEDIANA

[HOUSE OF LORDS (the Earl of Halsbury, L.C., Lord Macnaghten, Lord Morris, Lord Shand, Lord James of Hereford and Lord Brampton), February 12, 13, 1900]

[Reported [1900] A.C. 113; 69 L.J.P. 35; 82 L.T. 95; 48 W.R. 398; 16 T.L.R. 194; 44 Sol. Jo. 259; 9 Asp.M.L.C. 41]

Shipping—Collision—Damages—Measure—Detention of lightship for repair—Loss of use of lightship—Hire of substitute—No actual pecuniary loss proved.

Where a man is deprived of the use of his property by the wrongful act of another a claim for damages may be sustained, and damages in such a case are real and not merely nominal even though no actual pecuniary loss is proved.

The Mersey Docks and Harbour Board, being charged by statute with the duty of lighting the approaches to the Mersey, maintained four lightships in constant use, and two in reserve to take the places of the others, when they needed repair or in other emergencies. One of the lightships, the C., was damaged by collision with the M., a steamship belonging to the appellants, the collision being due to the negligence of those in charge of the M. The O., one of the reserve lightships, took the place of the C. while she was being repaired. The owners of the M. paid the cost of the repairs and all other out of pocket expenses, but the Board made a claim for the loss of the use of the

C. while she was under repair, or for the hire of the substitute. It was admitted that the O. would not have been employed if she had not been acting as substitute for the C.

Held: the Board were entitled to damages for the loss of use of the C. notwithstanding the fact that they could not prove any actual loss or expense.

Principle of *The Greta Holme* (1), [1897] A.C. 596, applied.

Damages—"Nominal" damages—*Distinction between nominal and small damages.*

Damages—*Special damage*—*Need to plead with particularity.*

Per the EARL OF HALSBURY, L.C.: Damages are not necessarily nominal because they are small in amount. The term "nominal damages" is a technical one which negatives any real damage, and means nothing more than that a legal right has been infringed in respect to which a man is entitled to judgment. But the term "nominal damages" does not mean small damages.

Where special damage is alleged you must show precisely the nature and extent of the injury sustained, and the person liable must have the opportunity of inquiring into the details before the case comes into court. In the case of general damage no such principle applies, and the jury have only to give a proper equivalent for the unlawful withdrawal of the particular subject-matter.

Notes. Applied: *The Bodlewell*, [1907] P. 286; *The Astrakhan*, [1910] P. 172. Distinguished: *Admiralty Comrs. v. Valeria (Owners)*, [1922] All E.R. Rep. 463. Considered: *Admiralty Comrs. v. Chekiang (Owners)*, *The Chekiang*, [1926] All E.R. Rep. 114; *Admiralty Comrs. v. Susguchanna (Owners)*, *The Susguchanna*, [1924] All E.R. Rep. 124; *The Edison*, [1933] All E.R. Rep. 144; *Sunley & Co. v. Cunard White Star, Ltd.*, [1940] 2 All E.R. 97; *Shearman v. Folland*, [1950] 1 All E.R. 976; *The Hebridean Coast*, [1960] 2 All E.R. 85. Referred to: *The Tugela* (1913), 30 T.L.R. 101; *The Kingsway*, [1918] P. 344; *The Molière* (1924), 41 T.L.R. 154; *The West Wales*, [1932] P. 165; *Owen and Smith (Trading as Nuagin Car Service) v. Reo Motors (Britain), Ltd.*, [1934] All E.R. Rep. 734; *The London Corp'n.*, [1935] All E.R. Rep. 393; *Carlton Publishing Co. v. Sutherland Publishing Co.*, [1938] 4 All E.R. 398; *Strand Electric and Engineering Co. v. Brisford Entertainments, Ltd.*, [1952] 1 All E.R. 796.

As to measure of damages in general, 11 HALSBURY'S LAWS (3rd Edn.) 233 et seq. and for cases see 17 DIGEST (Repl.) 74 et seq.

Cases referred to:

- (1) *No. 7 Steam Sand Pump Dredger (Owners) v. Greta Holme (Owners)*, *The Greta Holme*, [1897] A.C. 596; 66 L.J.P. 166; 77 L.T. 231; 13 T.L.R. 552; 8 Asp. M.L.C. 317, H.L.; 17 Digest (Repl.) 83, 56.
- (2) *The City of Peking v. Compagnie des Messageries Maritimes*, *The City of Peking* (1890), 15 App. Cas. 438; 59 L.J.P.C. 88; 63 L.T. 722; 39 W.R. 177; 6 Asp. M.L.C. 572, P.C.; 41 Digest 805, 6657.
- (3) *The Black Prince* (1862), Lush. 568; 1 Mar.L.C. 251; 167 E.R. 258; 41 Digest 804, 6650.

Also referred to in argument:

The Clarence (1850), 3 Wm. Rob. 283; 7 Notes of Cases, 579; 14 Jur. 557; 166 E.R. 968; sub nom. *The Catherine v. The Clarence*, 5 L.T. 121; 41 Digest 802, 6626.

The Munster, [1899] P. 129, n.

The Emerald, [1899] P. 130, n.; 80 L.T. 178, n.

Appeal from a decision of the Court of Appeal (A. L. SMITH and HENN COLLINS, L.JJ.), reported [1899] P. 127, reversing a decision of PHILLIMORE, J., sitting in the Admiralty Division.

The action was brought by the respondents to recover damages in respect of a collision which occurred on April 23, 1898, between the appellants' steamship

Mediana and the respondents' lightship *Comet*, which was then employed upon the Crosby station, off the river Mersey. The respondents, the Mersey Dock and Harbour Board, the owners of the *Comet* and the *Orion* hereinafter mentioned, were a public body charged by Act of Parliament with the duty of lighting the approaches to the river Mersey, and kept six lightships, four of which were always in use on four stations, a fifth was kept to replace the lightships at such times as they were being overhauled, and the sixth was kept in the river Mersey in readiness to take the place of any lightship which might be damaged by collision or other accident. During the preceding twenty-five years there had been twenty-three cases of damage by collision with lightships, in eleven of which it was necessary to replace the lightship by the one kept in readiness in the river Mersey, and during the same period there had been four cases in which it was necessary to withdraw one of the lightships in consequence of damage not occasioned by collision. The expense of maintaining the sixth lightship, including interest on capital invested in her, was stated by the marine surveyor to the respondents to amount to about £1,000 a year. The *Orion*, the sixth lightship, took the place of the *Comet* after she had been damaged by collision, and it was admitted that during the seventy-four days on which she took the place of the *Comet* she was not required for any other purpose. The appellants admitted their liability, subject to a reference to the district registrar assisted by merchants. On Dec. 3, 1898, the appellants agreed with the respondents as to all the items of their claim except loss of the use of the lightship *Comet*, or hire of the services of the lightship *Orion* on the station from April 23, 1898, to July 6, 1898, seventy-four days at £1 4s., £310 16s. The appellants agreed that the amount claimed in respect of this item was correct, if such claim was recoverable. The admitted items of claim covered all the actual out of pocket expenses to which the respondents were put by reason of the substitution of the *Orion* for the *Comet*, and the only question in dispute was whether the respondents were entitled to be paid for the loss of the use of the *Comet* during the seventy-four days during which she was under repair, or were entitled to hire of the *Orion* which took her place.

It was contended on behalf of the appellants that inasmuch as the work of the *Comet* was performed by the *Orion*, another of the respondents' lightships, which would not have been otherwise employed, the respondents sustained no loss or damage in respect of their not being able to use the *Comet*, and that they were not entitled to any hire for the use of the *Orion* as they expended no extra money and sustained no loss or damage through not having the use of her owing to the collision, and that it was immaterial whether she was merely laid up at anchor in the river Mersey, as it was stated she generally was, or placed on an anchorage as a lightship, and, further, that if the claim was admitted, the respondents would actually, through the happening of the collision, obtain a profit which they would not otherwise have received, and that they could not legally do so.

It was contended on behalf of the respondents that they were entitled to compensation for the loss of the use of the *Comet* whether or not they could in fact show any actual loss or expense, and, further, that, inasmuch as they had spent moneys in providing a spare lightship to replace others damaged by collision, they were entitled to remuneration for the use of the *Orion* when she was replacing the *Comet*. The reference was heard before the district registrar on Dec. 8, 1898, and by his report, dated Dec. 12, 1898, he allowed the claim for loss of use of the lightship *Comet* and hire of the lightship *Orion*. The appellants carried in notice of objection to the registrar's report, and PHILLIMORE, J., allowed the objection, but his decision was reversed.

J. Walton, Q.C., and Horridge for the appellants.

Carter, Q.C., B. Aspinall, Q.C., and Maurice Hill for the respondents.

THE EARL OF HALSBURY, L.C.—This case, I agree, is really governed by the principles laid down by this House in *The Greth Halse* (1), in which it was

A pointed out that the respondents were deprived by the negligence of the appellants of the use of their dredger, and were entitled to the damages awarded. Lord Watson pointed out in that case that the result of the withdrawal of the dredger from its ordinary work was the accumulation of a considerable amount of silt which in itself was an injury sounding in damages. That decision has a much wider application than has been assigned to it by the appellants' counsel, and

B LORD HERSCHELL in terms stated the proposition, and I may say that I myself intended to lay it down, that where by a man's wrongful act something belonging to another was injured or taken away, a claim for damages may be sustained, and that the damages in such a case are not merely nominal. Damages are not necessarily nominal because they are small in amount. The term "nominal damages" is a technical one which negatives any real damage, and means nothing more than

C that a legal right has been infringed in respect to which a man is entitled to judgment. But the term "nominal damages" does not mean small damages. The whole region of inquiry into damages is one of extreme difficulty, and you cannot lay down any fixed principle to a jury as to the amount of compensation which ought to be given. Take the most familiar and ordinary case. How is anyone to measure pain and suffering caused by an accident in terms of moneys counted?

D By a manly mind pain and suffering, when passed, are soon forgotten, but the law recognises that as a topic upon which damages may be given.

In this particular case the broad proposition is that the respondents were deprived of their vessel. I purposely do not use the words the use of their vessel. For the wrongdoer has no right to inquire what or whether any use would have been made of the vessel of which the respondents were deprived. Suppose, for example,

E someone went into my house and took away a chair and retained it for some months, could anyone say that I as owner am entitled to no reparation on the ground that I have other chairs or that I was not in the habit of sitting upon that particular chair? The jury's task is often a difficult one in cases of that character, and an arbitrator or jury often has to take an artificial hypothesis; such as in the case to

F which I have referred what it would cost to hire such a chair. The broad principle applicable to this appeal is quite independent of the particular use which the respondents would make of the *Comet*. It is wholly different from a case of special damage, where you have to ascertain the specific loss of profit or other advantage which would otherwise have accrued. Where special damage is alleged you must show precisely the nature and extent of the injury sustained, and the person liable

G must have an opportunity of inquiring into the details before the case comes into court. In the case, however, of general damage no such principle applies, and the jury have only to give a proper equivalent for the unlawful withdrawal of the particular subject-matter. That broad principle comprehends this and many other cases, and the jury may assess damages which are not nominal damages though the amount may be trifling. It appears to me, therefore, that what the learned

H Lords in *The Grcla Holme* (1) intended to point out—and LORD HERSCHELL gives expression to it in plain terms—was that the unlawful keeping back of what belongs to another person is a ground for real and not nominal damages. I put aside the question of trespass, involving high-handed procedure or insolent behaviour, and other cases which have been held to entitle to aggravated and punitive damages. The principle of assessing damages must be the same in all forms of the unlawful

I detention of another man's property. That seems to me so plain that I have been puzzled to learn that in the Admiralty Court the loss of the use of this vessel has been treated as something for which no money damage can be allowed. I am glad that such a principle has not been affirmed in your Lordships' House, as it seems to me inconsistent and unreasonable.

The only difficulty I have had is in connection with the decision in the Privy Council in *The City of Peking* (2). But I have, I think, discovered a clue to the real grounds of the judgment in that case. It is to be observed, in the first place, that there is a difficulty in understanding the decision of the Judicial Committee

without the consent of those persons who had to cause the damages. Their remedy, so far as quoted, is not a model of obscurity. The principle of the decision in *The City of Peking* (2) appears to be that you could not be paid for the detention of the vessel when allowance was already made for the use of the substituted one, because you would be paid twice over. If that is the real principle of the decision it is not inconsistent with but it is on the same line as the judgment of the Court of Appeal in the present case. Whether the question was raised as to the exclusive use of the vessel I am not able to say. Taken as to my mind, this case affords no difficulty in arriving at the conclusion that the judgment ought to be affirmed, and I move your Lordships accordingly.

LORD MACNAGHTEN.—I concur. I took part in the hearing of *The City of Peking* (2), but I cannot pretend to remember very accurately whether this question was or was not directly raised. My impression, however, distinctly is that the present question was not involved in that case. In that case the parties admitted that the substituted service was provided at the expense of the wrongdoers, and that there had been no loss of profit whatever. They claimed an extravagant sum for demurrage on the authority of *The Black Prince* (3), but their Lordships had no hesitation in rejecting that claim, because that would have been paying them twice over. I observe that *The City of Peking* (2) was not cited in the Court of Appeal.

LORD MORRIS.—I am of the same opinion. I think that this case entirely comes within the principle in *The Greta Holme* (1), which overruled the principles of previous cases as regards the mode of assessing damages.

LORD SHAND.—I entirely concur with the motion of the Lord Chancellor. It was established that the *Orion* was kept expressly for the purpose of meeting such a contingency as happened. It appears that no fewer than eleven cases have occurred during the last twenty-five years in which a substitute has been called for to replace lightships damaged by collision on the Mersey. If the Mersey Commissioners had hired a ship for the purpose of doing the duty for which this sixth vessel was kept, there could be no answer to the claim for the cost of hire. It seems to me, therefore, if there be no answer in that case neither can there be any to this.

LORD JAMES OF HEREFORD.—I entirely concur. I think that there is a distinction between the case at the bar and the one determined by the Privy Council arising from the fact that in this case there has been expense incurred in providing the very remedy supplied in order to get rid of the effect of the act of the wrongdoer, while in *The City of Peking* (2) there was no expense incurred in order to remedy the injury.

LORD BRAMPTON.—I am of the same opinion. I desire to say one word with regard to the *Orion*, which was the substituted vessel built and maintained at great expense so that the respondents might have the means ready to obviate the inconvenience or danger which might arise from such a misfortune as befell the *Camat*. As between themselves and the wrongdoer, they were under no obligation whatever to use the *Orion*. They might have hired a vessel, in which case the liability for the hire would have been clear. Why should the appellants claim a right to have the services of the *Orion* gratuitously? They might as well claim the services of the skilled workmen employed by the respondents who happened at the moment to be idle. That cannot be the law. In my opinion the services of the *Orion* in this case ought to be paid for in the shape of damages.

Appeal dismissed.

Solicitors: *T. Cooper & Co.*, for Hill, Dickinson, Dickinson & Hill, Liverpool; *Roscliffes, Roscliff & Co.*, for A. T. Squarey, Liverpool.

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

DUNN AND OTHERS v. BUCKNALL BROTHERS
DUNN AND OTHERS v. DONALD CURRIE & CO. AND OTHERS

COURT OF APPEAL (Sir Richard Henn Collins, M.R., Stirling and Cozens-Hardy, L.JJ.), July 29, 30, August 7, 1902]

Reported [1902] 2 K.B. 614; 71 L.J.K.B. 963; 87 L.T. 497; 51 W.R. 100; 18 T.L.R. 807; 9 Asp.M.L.C. 336; 8 Com. Cas. 33]

C *Shipping—Bill of lading—Carriage of goods—Late delivery of cargo due to seizure of ship for carrying goods destined for an alien enemy—Exception of liability for loss or damage occasioned by restraint of princes.*

D A shipowner who carries goods destined for an alien enemy without the knowledge or consent of shippers of other goods in the same ship is *prima facie* liable to them in damages for late delivery occasioned by the seizure and detention of the ship by reason of enemy goods being on board, and he is not excused by an exception in the bill of lading of loss or damage occasioned by the restraint of princes.

Shipping—Carriage by sea—Cargo—Late delivery—Damages—Measure—Loss of market.

E There is no absolute rule of law that damages for loss of market cannot be recovered for delay in the carriage of goods by sea. Whenever the circumstances admit of calculations as to the time of arrival and the probable fluctuations of the market being made with the same degree of reasonable certainty in the case of carriage by sea as in that of carriage by land, damages for late delivery should be calculated according to the same principles in both cases.

F *The Parana* (1) (1877), 2 P.D. 118, considered and explained.

Notes. Except for unavoidable delays it is now the rule rather than the exception that damages for delay can be recovered.

G Considered: *Ardennes (Cargo Owners) v. Ardennes (Owners)*, [1950] 2 All E.R. 517. Referred to: *Monte Video Gas and Dry Dock Co. v. Clan Line Steamers* (1921), 37 T.L.R. 866; *Jensen v. Hollis Brothers & Co.*, [1936] 1 All E.R. 140; *Monarch Steamship Co. v. A/B Karlshamns Oljefabriker*, [1949] 1 All E.R. 1.

H As to exception of restraints of princes and rulers, see 35 HALSBURY'S LAWS (3rd Edn.) 290 et seq.; and for cases see 41 DIGEST 409 et seq. As to measure of damages for delay on voyage, see 35 HALSBURY'S LAWS (3rd Edn.) 475, 476; and for cases see 41 DIGEST 490 et seq.

Cases referred to:

(1) *The Parana* (1877), 2 P.D. 118; 36 L.T. 388; 25 W.R. 596; 3 Asp.M.L.C. 399, C.A.; 41 Digest 492, 3207.

(2) *The Mercurius* (1808), Edw. 53; 165 E.R. 1030; 37 Digest 632, 820.

I (3) *Wilson, Sons & Co. v. Xantho (Cargo Owners)*, *The Xantho* (1887), 12 App. Cas. 503; 56 L.J.P. 116; 57 L.T. 701; 36 W.R. 353; 3 T.L.R. 766; 6 Asp.M.L.C. 207, H.L.; 41 Digest 414, 2573.

(4) *Steinman & Co. v. Angier Line*, [1891] 1 Q.B. 619; 60 L.J.Q.B. 425; 64 L.T. 613; 39 W.R. 392; 7 T.L.R. 398; 7 Asp.M.L.C. 46, C.A.; 41 Digest 421, 2639.

(5) *Brass v. Maitland* (1856), 6 E. & B. 470; 26 L.J.Q.B. 49; 27 L.T.O.S. 249; 2 Jur.N.S. 710; 4 W.R. 647; 119 E.R. 940; 41 Digest 314, 1750.

Also referred to in argument :

Hapa v. Gulliford (1879), 4 C.P.D. 1-2; 48 L.J.Q.B. 372; 40 L.T. 356; 27 W.R. 541; 4 Asp.M.L.C. 128, C.A.; 41 Digest 430, 2699.

The Minna (1807), cited in Edw. at p. 55; 165 L.R. 1031; 37 Digest 632, 523.

British Columbia Saw-Mill Co. v. Nettle-leaf (1868), L.R. 3 C.P. 499; 37 L.J.C.P. 235; 18 L.T. 604; 16 W.R. 1046; 3 Mar.L.C. 65; 41 Digest 556, 3820.

The Notting Hill (1884), 9 P.D. 405; 53 L.J.P. 56; 51 L.T. 66; 32 W.R. 764; 5 Asp.M.L.C. 241, C.A.; 41 Digest 492, 3208.

Victorian Railways Commr. v. Coultas (1888), 13 App. Cas. 222; 57 L.J.P.C. 63; 58 L.T. 390; 52 J.P. 500; 37 W.R. 129; 4 T.L.R. 286, P.C.; 17 Digest (Repl.) 122, 333.

Rodocanachi v. Milbarn (1886), 18 Q.B.D. 67; 56 L.J.Q.B. 202; 56 L.T. 594; 35 W.R. 241; 3 T.L.R. 115; 6 Asp.M.L.C. 100, C.A.; 41 Digest 555, 3816.

Hadley v. Baxendale (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 18 Jur. 358; 2 W.R. 302; 2 C.L.R. 517; 156 E.R. 145; 17 Digest (Repl.) 91, 99.

Hammond & Co. v. Bussey (1887), 20 Q.B.D. 79; 57 L.J.Q.B. 58; 4 T.L.R. 95; C.A.; 17 Digest (Repl.) 137, 411.

Appeal by the defendants from a decision of MATHEW, J., at the trial of the action as a commercial cause, without a jury.

The plaintiffs brought this action to recover damages from the defendants for delay in the delivery of goods shipped at New York on the *Mashona* for carriage to Algoa Bay. The goods were shipped by the plaintiffs under bills of lading, which contained an exception of liability for loss or damage occasioned by restraint of princes. The *Mashona* sailed from New York on Nov. 5, 1899, shortly after war had broken out between Great Britain and the South African Republic. The vessel arrived at Algoa Bay on Dec. 5, 1899. On her arrival at Algoa Bay she was arrested by H.M.S. *Partridge*, when it was found that she was carrying goods consigned to residents in the South African Republic. These goods consisted chiefly of bread-stuffs, and were said to be intended for the enemy. The vessel was then taken to Table Bay by order of the naval authorities, and a suit was instituted in the Prize Court at Cape Town for the confiscation of the goods and the condemnation of the vessel, as aiding or attempting to aid trading operations with the enemy. The vessel and cargo were detained at Table Bay, pending the proceedings in the Prize Court, from Dec. 5, 1899, until the end of March, 1900. By the judgment of the Prize Court the goods consigned to the residents in the South African Republic were condemned, but the vessel was released. The owners of the vessel were ordered to pay the costs of the captors, save those of bringing the vessel round from Algoa Bay. The Prize Court held that

"there was reasonable and probable cause for seizing the ship; that there was certainly carelessness in taking the cargo on board at New York; and that though the intention was perhaps not to have landed them without the consent of the proper authorities, still the ship had the goods on board."

In consequence of these proceedings there was a delay of several months in the delivery of the plaintiffs' goods, and the plaintiffs brought this action alleging that the delay was caused by the negligence of the defendants.

The action was tried before MATHEW, J., without a jury as a commercial cause. The learned judge found as a fact that the defendants' agents knew the true character of the goods which were subsequently condemned, and that they were guilty of negligence and breach of duty to the plaintiffs in permitting them to be shipped on the same vessel as the plaintiffs' goods, and he accordingly gave judgment for the plaintiffs. The learned judge further held that the plaintiffs were entitled to damages based on the difference between the market value at the time when the goods ought to have been delivered in due course and their market value at the time when they were in fact delivered. He found as a fact that it was known to the defendants what the object of the plaintiffs' shipment was—namely, the

A supply of the British troops—and that the goods would sell at a much higher price if delivered in due course than at a later time when a large importation of similar goods would force prices down. The defendants appealed.

Carver, K.C., and Lewis Nood for the defendants Bucknall Brothers.

Sir E. Clarke, K.C., Scrutton, K.C., and F. D. Mackinnon for the defendants Donald Currie & Co.

B *Asquith, K.C., Bray, K.C., and F. W. Hollams* for the plaintiffs.

Cur. adv. vult.

Aug. 7, 1902. **SIR RICHARD HENN COLLINS, M.R.**, read the judgment of the court in which he stated the facts and proceeded: The defendants deny liability altogether and dispute the measure of damages. Their contention on the first C point is that at the time of shipment they had reasonable grounds for supposing that by arrangements existing at South African ports ships containing cargo consigned to the enemy would be allowed to proceed on giving a bond in £10,000 for the discharge of such goods into the hands of the British authorities at their ultimate port of destination within British territory, and that their intention in proceeding D to Algoa Bay was to report the facts to the British authorities there and act as directed by them—an intention which was defeated by the intervention of the *Partridge* before they had time to carry it out; and they relied on *The Mercurius* (2) in support of this contention.

We are of opinion that, if such was their real intention, it affords no defence to this action. The court have found that there was carelessness at New York, and that there was reasonable and probable cause for seizing the ship. Even if the find- E ing of the court were not conclusive on this point, in our opinion the course they took in carrying enemies' goods without the knowledge and consent of the other shippers was a breach of duty towards them, and was in effect to court detention even if they had a well-founded hope of being able to give such explanations to the authorities as would avoid the condemnation of the ship. They took the risk of escaping detention without consulting the plaintiffs on the matter. They are *prima* F facie liable to the plaintiffs for late delivery, and can only excuse themselves by the exception. But it is quite clear that they cannot rely upon an exception to excuse themselves from the consequences of a peril which their own negligence contributed to bring about. The principle is thus stated by CARVER in his valuable work on CARRIAGE OF GOODS BY SEA (3rd Edn.), s. 16:

G "A shipowner will not be exonerated from losses arising from any of these excepted causes when there has been any neglect on his part to take all reasonable steps to avoid them."

See also s. 77 of the same work, citing *Wilson, Sons & Co. v. Xantho* (Cargo Owners), *The Xantho* (3) and BOWEN, L.J., in *Steinman & Co. v. Angier Line* (4). The converse case of the owner's right against the shippers is given by LORD TENTERDEN in his treatise on SHIPPING (ABBOTT ON THE LAW RELATING TO MERCHANT SHIPS AND SEAMEN), chap. 7, as an instance of an unquestionable liability—and is H quoted by LORD CAMPBELL, C.J., in *Brass v. Mailland* (5) (6 E. & B. at p. 484);

"The merchant must lade no prohibited or uncustomed goods by which the ship may be subjected to detention or forfeiture";

I and the liability of the shipowner under the express contract of the bill of lading is at least as clear as that implied as resting on the merchant.

Here, as pointed out by MATHEW, J., there can be no doubt as to the conduct of the shipowners. They had taken advice and caused a clause to be introduced into the bills of lading delivered to the shippers of goods for the Transvaal, pointing to the possibility of detention and excusing themselves from liability. Indeed, counsel for the defendants Bucknall Brothers contended that, inasmuch as their conduct was deliberate, and with a view to carry such cargo to its destina-

tion only if the British authorities sanctioned it, the case came within *The Mercantile* (2) and the shipowners were exonerated. It is hardly worth a passing contention that a liability for the consequences of an act done negligently would be exonerated if it were shown that the act was done maliciously. The question whether the conduct of the owners has been such as to justify the condemnation of the ship is quite independent of their responsibility to the shipper for detentions brought about by their act, negligent or deliberate. If negligence in not taking all proper precautions to avoid the excepted perils defence them from relying on the exemption, how can they better their position by showing that they deliberately encountered it, even though they had hopes more or less sanguine of avoiding serious detention? They clearly had no right to speculate on possible immunity at the risk of the plaintiffs without consulting them.

In our opinion, therefore, on the undisputed facts in this case their liability is clearly established, and the only remaining question is whether the learned judge was wrong in his direction to the referees as to the measure of damages. On this part of the case *The Parana* (1) was strongly relied upon by the defendants in establishing that the plaintiffs could be entitled to nothing more than interest on the value of goods when they ought in ordinary course to have been landed down to the date of actual delivery, and they contended broadly that damages could not be recovered for loss of market on a voyage by sea. But we do not understand *The Parana* (1) as establishing any such general proposition. There can be no absolute peremptory rule taking voyages by sea out of the principles which regulate the measure of damages on breach of other contracts. It is only because the possible length of voyages and the consequent uncertainty as to the times of arrival may in many cases eliminate the supposition of any reasonable expectation as to the state of the market at the time of arrival that, as a general rule, damages for loss of market by late delivery are not recoverable from the carrier by sea. It is certainly not a rule of law; it is only an inference of fact that from the circumstances of the case no reasonable assumption as to the state of the market at the time of arrival could have been a factor in the contract between the parties. But, as the means of sea transit improve, voyages of three and four weeks' duration may be, and are now, accomplished with almost absolute certainty, and the state of the market at the reasonably calculated date of arrival may well be a vital factor present to the minds of both parties at the time of making the contract. Whenever the circumstances admit of calculations as to the time of arrival and the probable fluctuations of the market being made with the same degree of reasonable certainty in the case of a sea, as of a land, transit, there can be no reason why damages for late delivery should not be calculated according to the same principles in both cases.

This, indeed, if it were not self-evident, would seem to follow from the illustrations given by MELLISH, L.J., himself in delivering the judgment of the Court of Appeal in *The Parana* (1). After giving other instances, he says (2 P.D. at p. 121):

"Or if it is known to both parties that the goods will sell at a better price if they arrive at one time than if they arrive at a later time, that may be a ground for giving damages for their arriving too late and selling for a lower sum. But there is in this case no evidence of anything of that kind."

Here the learned judge has found as a fact

"that it was known to the defendants what the object of the plaintiff's shipment was—namely, the supply of the British troops—and that the goods would sell at a much higher price if delivered in due course than at a later time when a large importation of similar goods would force prices down."

The defendants, indeed, suggested that evidence was wanting to support these findings, but on the admitted facts it seems to us a case of *res ipsa loquitur* as to the inference which both parties must have drawn as to the purpose of the shipment and the probable effect of delay in delivery. And, as is well known to practitioners,

A in the Commercial Court, cases are there conducted on the basis of mutual admissions which do not always appear in the formal record. We are of opinion, therefore, that the judgment of the learned judge was right on all points, and that, consequently, this appeal must be dismissed.

Appeal dismissed.

B Solicitors: Parker, Garrett & Holman; W. A. Crump & Son; Hollams, Son, Coward & Hawksley.

[Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.]

PICKAVANCE v. PICKAVANCE

D [PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Francis Jeune, P., and Barnes, J.), December, 4, 10, 1900]

[Reported [1901] P. 60; 70 L.J.P. 14; 84 L.T. 62]

E *Husband and Wife—Summary proceedings—Summons—Withdrawal—Competency of fresh summons on same grounds—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict., c. 39), s. 4.*

Husband and Wife—Summary proceedings—Costs—Appeal—Technical objections not taken in court below.

F When a summons under the Summary Jurisdiction (Married Women) Act, 1895, had been withdrawn it was **held** that the complaint in respect of which it had been issued was put an end to and no fresh summons could be granted on the same cause of complaint.

G The omission to take an objection, though of a technical character, on the hearing of a summons under the Summary Jurisdiction (Married Women) Act, 1895, **held** not to operate as a waiver of the ground of objection, but if the objection is raised by the appellant for the first time on the hearing of the appeal, and was then allowed, the respondent would be entitled to the costs of the appeal.

Notes. The Summary Jurisdiction (Married Women) Act, 1895, s. 4, has been replaced by the Matrimonial Proceedings (Magistrates' Courts) Act, 1960, s. 1.

H Considered: *Stokes v. Stokes*, [1911] P. 195. Distinguished: *Davis v. Morton*, [1911-13] All E.R. Rep. 369. Considered: *Hopkins v. Hopkins*, [1914] P. 282. Distinguished: *R. v. Seddon, Ex parte Hall* (1916), 85 L.J.K.B. 806; *Molesworth v. Molesworth*, [1947] 2 All E.R. 842. Explained and Distinguished: *Land v. Land*, [1949] 2 All E.R. 218. Referred to: *Blackledge v. Blackledge* (1912), 82 L.J.P. 13.

I As to procedure for grant of matrimonial relief in a magistrates' court, see 12 HALSBURY'S LAWS (3rd Edn.) 493 et seq.; and for cases see 27 Digest (Repl.) 711 et seq. For the Matrimonial Proceedings (Magistrates' Courts) Act, 1960, see 40 HALSBURY'S STATUTES (2nd Edn.) 394.

Cases referred to in argument:

R. v. Fletcher (1871), L.R. 1 C.C.R. 320; 40 L.J.M.C. 123; 24 L.T. 742; 35 J.P. 789; 19 W.R. 781; 12 Cox, C.C. 77, C.C.R.; 3 Digest (Repl.) 445, 361.

Ellis v. Ellis, [1896] P. 251; 65 L.J.P. 124; 75 L.T. 390; 60 J.P. 823; 45 W.R. 144; 12 T.L.R. 514, D.C.; 27 Digest (Repl.) 711, 6779.

Medway v. Medway, [1900] P. 141; 69 L.J.P. 56; 82 L.T. 627; 64 J.P. 120; 48 W.R. 622, D.C.; 27 Digest (Repl.) 697, 6669.

Appeal by the husband, George Pritchard, from an order of the justices of the peace at St. Helen's, in the county of Lancashire, dated Nov. 3, 1900, who, having found that the husband had been guilty of persistent cruelty to his wife, Eliza Pritchard, whereby she had been compelled to leave and live separate and apart from him, adjudged that the wife should no longer be bound to live with her husband, and that she should be paid an allowance of 15s. a week by the husband.

In the notice of appeal, the grounds alleged were: (i) the complaint was out of time, since it had not been made within six months from the time when the subject-matter of the complaint arose, as required by the Summary Jurisdiction Act, 1847, s. 11, as referred to in s. 8 of the Summary Jurisdiction (Married Women) Act, 1895; (ii) the allowance of 15s. a week was excessive; (iii) there was not sufficient information or evidence to justify the order. Before the order appealed from had been made, the wife had sworn two informations against her husband, on June 20, 1899, and on Sept. 25, 1899, in which she had alleged that he had been guilty of persistent cruelty towards her, by reason of which she had been compelled to leave him, and to live separate and apart from him. On the hearing of the first summons the justices had suggested that an effort should be made to effect a reconciliation, and it was accordingly dismissed. The second summons was withdrawn without having been heard.

Pritchard for the husband.

Bateson for the wife.

Cur. adv. vult.

Dec. 10, 1900. **SIR FRANCIS JEUNE, P.**—We have taken time to consider our judgment because it seemed to involve the principle whether the withdrawal of a summons amounted to a withdrawal of the complaint on which it was based, so that it could no longer be proceeded on. There is no direct authority on the point, but we are clearly of opinion that the withdrawal of the summons did put an end to the complaint, and that no fresh summons could be founded on it. Therefore the summons was out of time.

It must be remembered that a summons cannot be withdrawn without the consent of the justices or the magistrate: a complainant cannot put an end to criminal proceedings without the leave of the court. The effect of this is that the complaint on which the summons was granted necessarily falls to the ground. The court, having once permitted the withdrawal, cannot revive the cause of complaint by issuing a fresh summons on the same ground. As to costs, the husband has succeeded here on the point of the summons being out of time, which he did not take in the court below. Under the circumstances the wife is entitled to her costs on the appeal.

BARNES, J., agreed.

Solicitors: *W. Norton Ellen*, for *A. E. Tickle*, St. Helen's; *Charles Russell & Co.*, for *H. L. Riley*, St. Helen's.

[*Reported by J. A. SLATER, Esq., Barrister-at-Law.*]

THOMPSON v. THOMPSON

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Francis Jeune, P.), June 11, 1901]

[Reported 85 L.T. 172; 17 T.L.R. 572]

Divorce—Cruelty—Husband convicted of unlawful carnal knowledge of girl under 16—Shock to wife—Criminal Law Amendment Act, 1885 (48 & 49 Vict., c. 69), s. 5 (1).

If the conduct of a husband is such as to cause a breakdown of the health of his wife by reason of the disgrace and shock arising out of his conviction of the offence of unlawful carnal knowledge of a girl under sixteen, the court will hold this to constitute legal cruelty on the part of the husband, and will grant a decree nisi to the wife, adultery having been also proved.

Notes. Followed: *Bosworthwick v. Bosworthwick* (1901), 88 L.T. 121. Considered: *Boyd v. Boyd*, [1938] 4 All E.R. 181; *Woollard v. Woollard*, [1954] 3 All E.R. 351; *Cooper v. Cooper*, [1954] 3 All E.R. 415; *Ivens v. Ivens*, [1954] 3 All E.R. 446. Referred to: *Buchler v. Buchler* (1946), 175 L.T. 214; *Wright v. Wright*, [1960] 1 All E.R. 678.

As to cruelty as a ground for divorce, see 12 HALSBURY'S LAWS (3rd Edn.) 269 et seq.; and for cases see 27 DIGEST (Repl.) 293 et seq.

Petition by the wife, Sarah Elizabeth Katherine Thompson, for the dissolution of her marriage with her husband, the Rev. James Henry Thompson, on the ground of his cruelty and adultery.

The marriage took place on Aug. 14, 1879. The husband was at that time an officer in the army, but he took orders and entered the Church in 1889. At the end of 1893, the husband became curate at Beaulieu, in Hampshire. He then began to indulge in familiarities with various young girls, and took two of them into his service in spite of the remonstrances of his wife. Eventually he was arrested and convicted under s. 5 (1) of the Criminal Law Amendment Act, 1885 (now s. 6 (1) of the Sexual Offences Act, 1956; 36 HALSBURY'S STATUTES (2nd Edn.) 219], and was sentenced at the Winchester Assizes, on Nov. 22, 1900, to twelve months' hard labour. The result of his disgraceful course of conduct had been to utterly shatter the health of the wife, who was now a mere shadow of her former self.

Priestley, for the wife, called evidence to show the way in which her health had been affected by the conduct of the husband, he being a clergyman, and by the shock and disgrace of the criminal proceedings taken against him. He submitted that, since it had been shown that the husband had debauched his servants in his own house, and subjected his wife to the indignity of discovering that he had rendered himself amenable to the criminal law, there was abundant evidence of cruelty. These circumstances were solely responsible for the present state of the health of the wife.

The husband did not appear and was not represented.

SIR FRANCIS JEUNE, P., held the cruelty to be established, and granted a decree nisi.

Solicitors: *P. J. Nicholls*, for *Hallett & Martin*, Southampton.

[Reported by J. A. SLATER, Esq., Barrister-at-Law.]

FULLERS, LTD. v. SQUIRE

[KING'S BENCH DIVISION (Lord Alington, C.J., and LAWRENCE, J.J., May 13, 1901)]

[Reported (1901) 2 K.B. 209, 70 L.J.K.B. 649; 85 L.T. 240; 65 J.P. 600; 49 W.R. 683; 45 Sol. Jo. 539]

Factory—Premises used for adapting articles for sale—Packing sweetmeats after shop hours—Factory and Workshop Act, 1878 (41 & 42 Vict., c. 16), s. 93.

Premises were used for the greater part of the day as a shop for the retail sale of sweetmeats and as tea rooms, but for a number of hours at night after ordinary shop hours they were used for the packing of sweetmeats into the boxes in which they were sold.

Held: there was evidence to justify a finding that the premises were a workshop within the meaning of s. 93 of the Factory and Workshop Act, 1878, since the work being carried on at night was "adapting articles for sale."

Notes. The Factory and Workshop Act, 1878, s. 93, has been replaced by s. 175 of the Factories Act, 1961.

Considered: *Hoare v. Robert Green, Ltd.*, [1904-7] All E.R. Rep. 858; *Patterson v. Hunt* (1909), 101 L.T. 571; *Stoke-on-Trent Revenue Officer v. Stoke-on-Trent Assessment Committee and Potteries Electric Traction Co., etc.* (1930), 143 L.T. 650; *Cockram v. Tropical Reservation Co.*, [1951] 2 All E.R. 520. Distinguished: *Wilson Bros., Ltd. v. Edwards (Valuation Officer), Hudson's Bay Co. v. Thompson*, [1958] 3 All E.R. 243. Referred to: *Simmonds Accessories (Western), Ltd. v. Assessment Committee*, [1944] 1 All E.R. 264; *Falstuck Marketing Company, Ltd. v. Morgan (Valuation Officer)*, [1958] 1 All E.R. 646; *Hudson's Bay Co. v. Thompson (Valuation Officer)*, [1959] 3 All E.R. 150.

As to the general meaning of "factory," see 17 HALSBURY'S LAWS (3rd Edn.) 11 et seq.; and for cases see 24 DIGEST (Repl.) 1021 et seq. For the Factories Act, 1961, s. 175, see 41 HALSBURY'S STATUTES (2nd Edn.) 402.

Case Stated by a metropolitan magistrate.

The respondent, Rose Elizabeth Squire, an inspector of factories and workshops, preferred an information against the appellants, Fullers, Ltd., under s. 13 and s. 83 of the Factory and Workshop Act, 1878, that on Dec. 19, 1900, they being then the occupiers of certain premises, the same being a workshop within the meaning of the Factory and Workshop Acts, 1878 to 1895, at 206, Regent Street, within the metropolitan police district, unlawfully employed one Ada Simmonds after the legal period of employment, contrary to the said statutes. The appellants were a firm of wholesale and retail manufacturers of bonbons, sweetmeats and confectionery, carrying on a wholesale business at a factory at Hammersmith, and having, among other retail places of business, a retail shop at 206, Regent Street. At 206, Regent Street, the appellants carried on their business on the ground, first and top floors. On the top floor artificial flowers were sewn on to the wicker hampers hereinafter mentioned. This floor was separate and distinct from the ground and first floors, and was separately managed and regulated by the appellants according to the provisions of the Factory and Workshop Acts, 1878 to 1895. The ground and first floors were used for the sale of bonbons, sweetmeats, wicker hampers packed and decorated as hereinafter set out, cardboard boxes, and confectionery, and also as tea rooms and in the manner hereinafter described. Ada Simmonds was, on Dec. 19 and 20, 1900, in the employment of the appellants, and was employed by them at their premises at Hammersmith from 8 a.m. till noon on Dec. 19, and afterwards on the ground and first floors at 206, Regent Street (with certain intervals) from 1 p.m. on Dec. 19 to 3 a.m. on Dec. 20. For the purposes of such last-mentioned employment, Ada Simmonds was furnished by the appellants with an assortment of bonbons and sweetmeats of various shapes, sizes and colours, also with cardboard

A boxes, ornamental wicker hampers, ribbons of a variety of sizes and colours, and fancy lace-paper necessary for her work as hereinafter described. From 1 p.m. on Dec. 19 until 3 a.m. on Dec. 20, Ada Simmonds was chiefly engaged in packing and arranging in layers in the cardboard boxes and ornamental hampers an assortment of bonbons and sweetmeats of different colours, shapes and sizes in fancy patterns, placing sheets of the lace-paper between each layer of sweetmeats or bonbons, tying up the boxes and hampers when so filled with the fancy ribbons, and in arranging them with bows on the outside of such boxes and hampers with a view to rendering them more attractive to purchasers than they would be if not so tastefully sorted, arranged, packed and bound up; and the magistrate found as a fact that they were so rendered more attractive by the work so expended on them, and that such work required the exercise of skill and taste on the part of Ada Simmonds. The hampers when so filled, arranged and dealt with were intended to be, and were, sold to customers as a whole, and at a certain fixed price for the whole, but such price was the same as that charged to customers for such ornamental hampers when empty, plus the price of the sweets, no special or separate charge being added in respect of the packing.

D It was contended on behalf of the appellants that the employment of Ada Simmonds by them was not manual labour exercised by way of trade or for purposes of gain in or incidental to any of the purposes set out in s. 93 of the Factory and Workshop Act, 1878.

The magistrate convicted the appellants, who now appealed.

E By s. 93 of the Factory and Workshop Act, 1878, the expression "workshop" means (inter alia)

F "Any premises, room, or place not being a factory within the meaning of this Act, in which premises, room, or place, or within the close or curtilage or precincts of which premises, any manual labour is exercised by way of trade or for purposes of gain in or incidental to the following purposes or any of them; that is to say, (a) in or incidental to the making of any article or of part of any article, or (b) in or incidental to the altering, repairing, ornamenting, or finishing of any article, or (c) in or incidental to the adapting for sale of any article, and to which or over which premises, room, or place the employer of the persons working therein has the right of access or control."

Joseph Walton, K.C. (Given with him), for the appellants.

H. Sutton, for the respondent.

G LORD ALVERSTONE, C.J.—This case is very near the line. The magistrate thought that the operations carried on came within s. 93 of the Factory and Workshop Act, 1878. The facts appear to be that the place at which this work of packing sweetmeats was being carried on was, at any rate for a great part of the day, an ordinary shop—that is to say, sweetmeats were sold on the ground floor and tea was sold on the first floor—but that, up to a very late hour of the night, the premises were being used for the carrying on of this particular operation. It must have been continued for several hours after the ordinary shop had closed. I do not wish to express any opinion on the point raised on behalf of the appellants, namely, that if in an ordinary shop during shop hours packing takes place the matter will of necessity come within s. 93 of the Act of 1878. All we have to consider here is I whether there was evidence on which the magistrate could come to the conclusion that he did. I have no doubt that there was. There were boxes of sweetmeats, and they were adapted for sale by the operation that was carried on, namely, that of placing them in layers, laying lace-paper in between the layers, and afterwards ornamenting the boxes. If this operation had taken place in a room in a separate building in which sweets were bought wholesale, I should have entertained no doubt on the point. But I think that the magistrate was entitled to hold on the evidence before him that, having regard to the fact that the operation was carried on for several hours after shop hours, it was not incidental to the shop business,

but nothing more than carrying on the work which was to adapt the articles for sale. It is impossible to say that there was no evidence on which the magistrate would come to the conclusion he has arrived at. The appeal must be dismissed.

LAWRANCE, J.—I agree.

Appeal dismissed.

Solicitors : *Beaumont & Son* ; Solicitor to the Treasury.

[*Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.*]

Re MOORE. PRIOR v. MOORE

[CHANCERY DIVISION (Joyce, J.), February 12, March 14, 1901]

[Reported [1901] 1 Ch. 936; 70 L.J.Ch. 358; 84 L.T. 501; 49 W.R. 484;
17 T.L.R. 356]

Will—Gift—Uncertainty—Repair of tomb—Until 21 years from death of last survivor of all persons living at testatrix's death.

A testatrix bequeathed a sum of Consols to trustees upon trust to apply the interest in maintaining and keeping in a proper state of repair a tomb "for the longest period allowed by law—that is to say, until the period of twenty-one years from the death of the last survivor of all persons who shall be living at my death."

Held: the bequest was void for uncertainty, it being impossible to ascertain when the last survivor of all persons living at the testatrix's death died.

Notes. Approved: *Re Villar, Public Trustee v. Villar*, [1928] All E.R. Rep. 535. Referred to: *Re Vaux, Nicholson v. Vaux*, [1938] 2 All E.R. 177; *Re Leverhulme, Cooper v. Leverhulme* (No. 2), [1943] 2 All E.R. 274.

As to the period allowed for the suspension of vesting for the rule against perpetuities, see 29 HALSBURY'S LAWS (3rd Edn.) 281 et seq., and for cases see 37 DIGEST 55 et seq.

Cases referred to in argument:

Thellusson v. Woodford (1805), 11 Ves. 112; 1 Bos. & P.N.R. 357; 32 E.R. 1030. H.L.; 37 Digest 63, 67.

Pirbright v. Salwey, [1896] W.N. 86; 8 Digest (Repl.) 353, 327.

Re Dean, Cooper-Dean v. Sterens (1889), 41 Ch.D. 552; 58 L.J.Ch. 693; 60 L.T. 813; 5 T.L.R. 404; 8 Digest (Repl.) 357, 362.

Pownall v. Graham (1863), 33 Beav. 242; 9 Jur.N.S. 318; 11 W.R. 60; 55 E.R. 360; 37 Digest 63, 66.

Pettingall v. Pettingall (1842), 11 L.J.Ch. 176; 8 Digest (Repl.) 357, 361.

Cadell v. Palmer (1833), 1 Cl. & Fin. 372; 10 Bing. 140; 7 Bl.N.S. 202; 3 Moo. & S. 571; 6 E.R. 956, H.L.; 37 Digest 65, 74.

Originating Summons to determine the validity of a bequest.

Martha Mary Moore by her will, dated Sept. 27, 1897, bequeathed the sum of £500 New Consols (free of duty) to trustees upon trust to apply the dividends to maintain and keep in a state of proper repair, condition, and protection, the grave or tomb of her late brother, G. M. Morgan, deceased, near that of the late Mrs.

A Livingstone in the burial ground Shupunga (otherwise Chupanzai, Zambesi, in Africa. "For the longest period allowed by law—that is to say, until the period of twenty-one years from the death of the last survivor of all persons who shall be living at my death," and, subject to the above-mentioned bequest the testatrix declared that the aforesaid sum of £500 should form part of her residuary personal estate and be held upon the trusts thereof. The testatrix died on Jan. 3, 1898, and her will was proved on Feb. 22, 1898. The trustees of the will took out an originating summons to determine whether the above bequest was valid and effectual.

Younger, K.C., and *H. Fellowes* for the defendant residuary legatee.

Hughes, K.C., and *S. Dickinson* for the trustees.

W. F. Hamilton, K.C., and *Methold* for another defendant.

C **JOYCE, J.**—The gift is void for uncertainty. It will be impossible to tell when the last life drops, and, therefore, also impossible to tell when the period of twenty-one years begins. That being so, I need not go into the question whether the gift is void for perpetuity. The gift is void for uncertainty, and I so hold.

Solicitors: *Tamplin, Taylor & Joseph; Foster & Wadham; Johnson & Master.*

D [Reported by P. S. OSWALD, Esq., Barrister-at-Law.]

E

WHITTON v. WHITTON

F [PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Francis Jeune, P.), July 24, 1901]
[Reported [1901] P. 348; 71 L.J.P. 10; 85 L.T. 646]

Variation of Settlement—Children—Protection of interests.

Variation of Settlement—Marriage settlement—Power to wife to appoint after death of husband in favour of second husband and children of second marriage—Dissolution of marriage on wife's petition—Extinguishment of husband's interest.

G

On the dissolution of a marriage the court has power to vary a marriage settlement and will consider the effect of the whole order about to be made. Nothing should be done disadvantageous to the children though there may be cases in which infant children may be deprived of part of their interests.

H

A marriage settlement gave the wife power to appoint, after the death of her husband, in favour of a second husband and the children of a second marriage. The marriage was dissolved on the petition of the wife, and she applied to the court for a variation of the settlement by extinguishing the interest of the husband as though he were dead.

I

Held: an order would be made extinguishing the whole of the husband's interest, and power would be given to the wife to appoint a portion of the settled fund for the benefit of a second husband and the children of a second marriage; the wife by obtaining such extinguishment, had accelerated the interests of the children of the first marriage, and was, therefore, entitled to a quid pro quo.

Notes. The Matrimonial Causes Act, 1859, s. 5, has been repealed; see now the Matrimonial Causes Act, 1950, s. 25, 29 HALSBURY'S STATUTES (2nd Edn.) 412.

Considered: *Blood v. Blood*, [1902] P. 190. Applied: *Hodgson Roberts v. Hodgson Roberts and Whitaker*, [1906] P. 142. Considered: *Re Poole's Settlement Trusts, Poole v. Poole*, 1959] 2 All E.R. 340. Referred to: *Webster v.*

Webster and Williamson, [1936] All E.R. Rep. 502; *Cobdenough v. Cobdenough and Fisher*, [1933] All E.R. Rep. 167; *Nasrwan v. Nasrwan*, *Tager v. Tager and White*, [1934] All E.R. Rep. 523; *Wadhwa v. Wadhwa*, [1938] 1 All E.R. 296; *Garforth Blas v. Garforth Blas*, [1951] 1 All E.R. 308; *Parcell v. Parcell*, [1961] 1 All E.R. 369.

As to variation of settlements after divorce, see 12 Halsbury's Laws (3rd Edn.) 451-460, and for cases see 27 Digest (Repl.) 641 et seq.

Case referred to :

(1) *Pollard v. Pollard*, [1894] P. 172; 63 L.J.P.104; 70 L.T. 815; 6 R. 504, 27 Digest (Repl.) 655, 6164.

Also referred to in argument :

Leigh v. Leigh and Cottenham (1900), unreported.

Forsyth v. Forsyth, [1891] P. 363; 61 L.J.P. 13; 65 L.T. 556; 27 Digest (Repl.) 643, 6062.

Hartopp v. Hartopp and Alhurst, [1899] P. 65; 68 L.J.P. 33; 80 L.T. 297; 15 T.L.R. 168; 27 Digest (Repl.) 651, 6134.

Crisp v. Crisp (1872), L.R. 2 P. & D. 426; 42 L.J.P. & M. 13; 27 L.T. 428; 21 W.R. 79; 27 Digest (Repl.) 643, 6061.

Noel v. Noel (1885), 10 P.D. 179; 54 L.J.P. 73; 33 W.R. 552; 27 Digest (Repl.) 654, 6160.

Petition for the variation of a settlement.

According to the report of the registrar the petitioner had obtained a decree absolute, dated Nov. 19, 1900, dissolving her marriage with the respondent on the ground of his adultery and cruelty, and she had been granted the custody of the two children of the marriage, aged respectively five and three years.

By a settlement, dated Dec. 29, 1893, made on the marriage of the petitioner with the respondent a sum of £10,000, the property of the petitioner, was settled upon trust for her for life for her separate use, without power of anticipation, and, after her death, for the respondent for life, or until forfeiture or re-marriage, with remainder in trust for the children or remoter issue of the petitioner and respondent, as they should jointly or as the survivor should appoint, and in default of any child of the marriage acquiring a vested interest, in trust for the appointees of the petitioner; and, in default of any appointment, and if the petitioner should survive the respondent, in trust absolutely for her separate use; and if the respondent should survive the petitioner, in trust for the petitioner's next of kin. There was in addition a further covenant by the petitioner to settle any after-acquired property above the value of £200. It was further provided that if the petitioner should survive her husband and marry again (subject to certain conditions and limitations) she should have power to appoint the income of a sum not exceeding £5,000 out of the settled fund to her second husband, and the capital and income thereof to the children of such second marriage. The respondent brought two policies of insurance into settlement, of the value of £300 and £200, but these had lapsed owing to his failure to keep up the payment of the premiums. The petitioner was entitled in reversion, and would ultimately become possessed of property amounting in value to nearly £30,000, the whole of which would come into settlement under the covenant to bring in all after-acquired property above £200. The registrar reported that all the interests of the respondent in the settlement should be extinguished as though he were dead.

By s. 5 of the Matrimonial Causes Act, 1859, the court had power to vary a marriage settlement "either for the benefit of the children of the marriage or of their respective parents."

Priestley for the wife.

The husband in person.

Symmons for the guardian ad litem of the children.

Barnard for the trustees of the settlement.

A SIR FRANCIS JEUNE, P.—I can accede to the present application. I have
permission to do so, for none of the cases which have been cited has ever thrown
any doubt upon the point. *Pollard v. Pollard* (1) certainly does not do so. But in
cases of this kind the interests of the children must be considered, and nothing
must be done which would be on the whole to their disadvantage. All the authorities
show this. The rule is founded not so much upon the words of the Act of Parliament
B as on the established practice of the court, that the children, being innocent parties,
ought not to have their interests injuriously affected by the misconduct of either
of their parents. At the same time, however, the court ought in every case to
consider what would be the effect of the whole order it is about to make, and not
merely the effect of any particular portion of it. I am favourably impressed by
the argument which has been urged on behalf of the petitioner, that if this appli-
C cation is granted a very substantial benefit will be conferred upon the children by
the acceleration of their interests, owing to the interests of the respondent being
extinguished, seeing that he might live to a very great age. There is nothing unfair
in asking them to concede, as a set-off against that, that their mother be allowed to
appoint £5,000 among the children of a future marriage. This is a desirable thing to
be done if the court has power to allow it. It would be hard that a wife, who is freed
D from the marriage tie by the misconduct of her husband, should not be allowed to
appoint anything at all in favour of a second husband, or of the children of a second
marriage; and if such an arrangement can be made without substantial injury to
the children of the first marriage I think it is both proper and desirable to permit
it. I make an order, therefore, that all the interests of the husband in the settle-
ment be extinguished, as though he were dead. That will give the wife the power
E to make the appointment I have mentioned, because, the husband's interests being
extinguished, his power to act or have a voice in that proceeding is at an end as a
matter of course. At all events, in case there should be any doubt, it will be made a
part of the order. I think the question of costs may be dealt with as in *Pollard v.*
Pollard (1), which is all that is asked for here.

F Solicitors : *Fraser & Christian ; George Watson ; Iliffe, Henley & Sweet.*

[Reported by J. A. SLATER, ESQ., Barrister-at-Law.]

Re SETON-SMITH. BURNAND v. WAITE

[CHANCERY DIVISION (Buckley, J.), March 12, 1902]

[Reported [1902] 1 Ch. 717; 71 L.J.Ch. 386; 86 L.T. 322; 50 W.R. 456]

Will—"Furniture and other personal effects"—*Effects whether or not used with business—Exclusion of tenant's fixtures.*

A testator, who carried on the R. Hotel as a yearly tenant and resided on the premises, bequeathed "all the furniture and other personal effects belonging to me and which at the date of my death are at the R. Hotel" to W.

Held: all the furniture and personal effects at R. Hotel, whether used in connection with the business or not, passed to W., but not the tenant's fixtures.

Notes. As to the construction in wills of particular descriptions, see 34 HALL BURY'S LAWS (2nd Edn.) 245 et seq., and for cases see 44 DIGEST 711-714.

Cases referred to:

- (1) *Finney v. Grace* (1878), 10 Ch.D. 13; 48 L.J.Ch. 247; 27 W.R. 117; 44 Digest 712, 5571.
- (2) *Pratt v. Jackson* (1725), 2 P. Wms. 302; reversed (1726), 1 Bro. Parl. Cas. 222; 1 E.R. 528.
- (3) *Le Farrant v. Spencer* (1748), 1 Ves. Sen. 97; 24 L.J.Ch. 526, n.; 27 E.R. 915, L.C.; 44 Digest 711, 5559.
- (4) *Manning v. Purcell* (1855), 7 De G.M. & G. 55; 3 Eq. Rep. 387; 24 L.J.Ch. 522; 24 L.T.O.S. 317; 3 W.R. 273; 44 E.R. 21, L.J.J.; 44 Digest 711, 5560.

Also referred to in argument:

Cole v. Fitzgerald (1827), 3 Russ. 301; 38 E.R. 588, L.C.; 44 Digest 712, 5584.

Swinfen v. Swinfen (No. 4) (1860), 29 Beav. 207; 4 L.T. 194; 7 Jur.N.S. 89; 9 W.R. 175; 54 E.R. 606; 44 Digest 714, 5620.

Northey v. Paxton (1888), 60 L.T. 30; 44 Digest 713, 5589.

Originating Summons to determine what passed under a specific legacy.

Harold Seton-Smith carried on business as proprietor of the Roebuck Hotel in Berkshire. No lease of the premises had ever been granted to him, and he held as a yearly tenant. Miss Gertrude Waite lived in the house, and assisted him in the management of the business. By his will, dated May 10, 1901, the testator appointed two trustees and executors, and he bequeathed "all the furniture and other personal effects belonging to me and which at the date of my death are at the Roebuck Hotel aforesaid to Gertrude Waite who is now residing at the said hotel"; and he bequeathed all the residue of his personal estate to his trustees upon certain trusts as therein mentioned. The personal effects in the hotel belonging to the testator consisted of: (a) Trade or tenant's fixtures and trade implements; (b) furniture and personal effects independent of the business; (c) linen, plate, glass, china, etc., used in connection with the business. Doubts arose as to what articles passed under the specific legacy, and the trustees took out an originating summons to determine the question.

G. Lawrence for the trustees.

Cann for Miss Waite.

Christopher James for persons interested in the residue.

BUCKLEY, J. (after stating the facts, continued):—It is contended that under the bequest of "all the furniture and other personal effects belonging to me and which at the time of my death are at the Roebuck Hotel" Miss G. A. Waite is entitled to tenant's fixtures which were in the hotel. I do not think she is. It is true that they belonged to the testator in a certain sense; but is it probable that

intended by the bequest which I have read to give Miss Waite the right to take down the roller blinds and such things? If a testator, being entitled to a leasehold house containing tenant's fixtures, bequeaths the house to A. and all furniture and household effects to B., can it be said that B. may take away the tenant's fixtures? There is no doubt he cannot, but that A. is entitled to them. The same applies here. I find authority in *Finney v. Grice* (1) where SIR GEORGE JESSEL, M.R., takes the same example as I have taken. There a testator bequeathed to his wife all his

"household furniture, plate, linen, and china articles and things except stock-in-trade, money, securities for money, books of account, and manuscripts, and also all my household consumable stores that may be within my dwelling-house at the time of my decease, for her own absolute use and benefit";

and he devised and bequeathed his residuary real and personal estate, including leaseholds, in trust for sale. SIR GEORGE JESSEL held that tenant's fixtures in a leasehold house occupied by the testator did not pass to the widow. So here I do not think the tenant's fixtures passed to Miss Waite.

Passing to the next point, at the testator's death there was a considerable quantity of furniture in the hotel, some of which was used by the testator himself, some by Miss Waite, and some was used for the general purposes of the hotel by visitors. There was also the ordinary apparatus of a hotel, china, glass, plate, and such things. It is argued on behalf of the residuary legatee that the whole of this furniture and other articles did not pass to Miss Waite, but only such as belonged to the testator in the particular sense that he personally used them, and it is said that such articles as were required for the trade or business of the hotel did not pass to her. But I think that view is wrong. I am of opinion that all the articles, whether used for the purposes of the hotel business or not, passed to her. The cases which were cited in support of the opposite contention seem to me to be distinguishable. In *Pratt v. Jackson* (2) a man named Jackson had a house in which he lived in London, and he had also a house in Gosport which was used as a hospital for invalid seamen, and was provided with beds, sheets, and other articles for the use of patients who were received there and taken care of. The question arose under articles executed by Jackson and his wife before marriage by which it was agreed that in consideration of a provision made for the wife by the intended husband the wife should have no claim out of his real or personal estate,

"provided this should not extend to what he, the said intended husband, should or might leave her by will, nor to all or any of the household goods, or utensils, or household stuff, etc., of him the said Nathaniel Jackson at the time of his death, all which she was to receive and enjoy."

The husband having died, the wife claimed the beds, sheets, and other things in the house at Gosport, and the question was whether she was entitled to them as household goods or utensils or household stuff within the intent of the marriage articles. It was held that they were not. The material word in that case was "household." Whose household was referred to? The answer was, the testator's. The beds and sheets in the house at Gosport were not his household goods or stuff in that sense. That case was followed in *Le Farrant v. Spencer* (3), where a bequest of "household furniture, linen, plate, and apparel whatsoever" was held not to include goods which the testator had for trade and merchandise as distinguished from his own domestic use. In *Manning v. Purcell* (4), the testator bequeathed to his wife "all my moneys, household furniture, plate, books, linen, wearing apparel, etc." He had a tavern as a house of business and also a private residence, both containing furniture, and he lived at the latter, but sometimes slept at the former. The decision of that case was grounded on the word "my," and it was held that the bequest did not include furniture used at the tavern, but that it meant furniture which was used in "my" household. I therefore hold that under the bequest of furniture and other personal effects in this will there passed to

Miss Walter all the furniture, linen, plate, glass, china, and other effects belonging to the testator which at the date of his decease were at the Hotelman House, whether they were used for the trade or business of the hotel or not, but not including tenant's fixtures.

Solicitors : *Morris & Bristow* ; *Gribble & Co.*, for *Hewett*, Reading.

[*Reported by A. L. MORRIS, Esq., Barrister-at-Law.*]

Re RICHARDS. UGLOW v. RICHARDS

[CHANCERY DIVISION (Farwell, J.), November 13, 1901]

[Reported [1902] 1 Ch. 76; 71 L.J.Ch. 66; 85 L.T. 452; 50 W.R. 90; 46 Sol. Jo. 50]

Power of Appointment—General power—Gift in will of income to widow for life—Power for the widow “ . . . to use such portion of the estate as expedient.”

A bequest of the income of an estate to the testator's wife for life contained a direction that if the income should not be sufficient, it should be lawful for the widow to use such portion of the testator's real and personal estate as she might deem expedient. On the wife's decease what remained of the capital was to be divided among certain residuary legatees.

Held: the declaration in the will conferred on her a general power of appointment over the corpus during her life.

Re Pedrotti's Will (1) (1859), 27 Beav. 583, distinguished.

Notes. Applied: *Re Ryder, Burton v. Kearsley*, [1914-15] All E.R. Rep. 144. Considered: *Re Shaker's Estate, Bromley v. Reed*, [1937] 3 All E.R. 25.

As to construction of powers, see 30 HALSBURY'S LAWS (3rd Edn.) 214-219, and for cases see 37 DIGEST 389 et seq.

Case referred to :

(1) *Re Pedrotti's Will* (1859), 27 Beav. 583; 29 L.J.Ch. 92; 1 L.T. 390; 6 Jur.N.S. 187; 54 E.R. 231; 37 Digest 395, 81.

Summons.

A testator had devised and bequeathed his real and personal estate to trustees upon trust to realise and invest and to pay the income to his widow for life, and afterwards for division among certain residuary legatees as therein mentioned. And he directed that in case the income should not be sufficient it should be lawful for the widow to use such portion of the real and personal estate as she might deem expedient. This summons was taken out to ascertain whether this power was to be construed as a general power of appointment or was to be restricted to such amount only as was sufficient for her maintenance.

Cartmell for the trustees.

Cozens-Hardy for the residuary legatees.

Jenkins, K.C., and *Ashton Cross* for the widow.

FARWELL, J.—The only question which has occasioned me any doubt or difficulty is whether I am bound by the decision in *Re Pedrotti's Will* (1) or not. But,

on consideration, I find I can distinguish that case in a material point. This is a gift of a general power of appointment. The testator says :

"In case the income shall not be sufficient it shall be lawful for my said wife to use such portion of my real and personal estate as she shall deem expedient."

The words in *Re Pedrotti's Will* (1) were that she should be "at liberty to resort to the principal"—it does not say for what. No limit is given here except the sufficiency or the insufficiency of her income. The guide in *Re Pedrotti's Will* (1) was whether it was sufficient or insufficient for her wants, and the court adjudged that that meant what was sufficient for her maintenance suitably for her station in life and gave that amount accordingly. It was held impliedly, although it was not so stated in the judgment, that the property was not given to her at all, and also that the gift was not a power of appointment which could be exercised by her executing a document with reference to the power if she had had any.

There is a distinction between that case and this. The words "not sufficient" are ambiguous. They may mean "sufficient for wants" or "sufficient for desires." *Re Pedrotti's Will* (1) contained no such words, and the court held that sufficient meant for her maintenance in her station in life. The guide here is "such portion . . . as she may deem expedient," not "as is sufficient to make up her income to an amount suitable for her station in life." The property is left to her. What is in terms framed as a contingency "in case the income shall not be sufficient" is really only introductory to the words that if she shall deem it expedient to add to the income, then there is to be a general power to take out of corpus. There are cases in which it has been held, where there is a charge of debts on real estate in case the personal estate shall be insufficient, that the charge exists without going into the question whether it is insufficient or not. Perhaps those cases are not very near the present case. I think the words used are not words of contingency, but are used in connection with words which appear to depend on the will of the widow, and not on the happening of actual events not indicated by the testator.

On the true construction of the will, therefore, there is a general power of appointment in the widow, and I should have had no doubt about the matter but for *Re Pedrotti's Will* (1), which is, however, satisfactorily distinguished. I hold, therefore, that she has a general power of appointment over the corpus during her life.

Solicitors : *Robins, Billing & Co.*, for *Marrack & Co.*, Truro; *Kingsford, Dorman & Co.*, for *Carlyon*, Truro.

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

Re MAYHEW. SPENCER v. CUTBUSH

CHANCERY DIVISION (Farwell, J.), March 5, 1901]

[Reported [1901] 1 Ch. 677; 70 L.J.Ch. 428; 84 L.T. 761; 49 W.R. 390;
45 Sol. Jo. 326]

Power of Appointment—Will—Execution of special power—Admissibility of evidence.

A testator gave to his daughter H. a power of appointment over certain property among "all and every or such one and more of my grandchildren," and to his daughter B. a power of appointment "among my grandchildren or others . . . in like manner as I have directed and declared with respect to my daughter H. as if the same were again repeated as to my daughter B." B. by her will appointed, devised, and bequeathed all her real estate and the residue of her personal estate among four grandchildren of the testator, without referring to the power of appointment.

Held: (i) the words "or others" did not confer a general power of appointment upon B.; (ii) the word "appoint" standing in conjunction with "devise and bequeath" was a sufficient reference to the special power of appointment; (iii) evidence was admissible to show that there was no other power to which it could have reference.

Notes. Applied: *Kent v. Kent*, [1902] P. 108. Distinguished: *Re Weston's Settlement*, *Neeves v. Weston*, [1904-07] All E.R. Rep. 174. Followed: *Re Latta's Settlement*, *Public Trustee v. Latta*, [1949] 1 All E.R. 665. Referred to: *Re Marten*, *Shaw v. Marten* (1901), 71 L.J.Ch. 203; *Re Waterhouse*, *Waterhouse v. Ryley* (1907), 98 L.T. 30; *Re Barker's Settlement*, *Knocker v. Vernon Jones*, [1918-19] All E.R. Rep. 384; *Re Holford's Settlement*, *Lloyds Bank v. Holford*, [1944] 2 All E.R. 462; *Re Knight*, *Re Wynn*, *Midland Bank Executor and Trustee Co. v. Parker*, [1957] 2 All E.R. 252.

As to the exercise by will of special powers, see 30 HALSBURY'S LAWS (3rd Edn.), 255-262, and for cases, see 37 DIGEST, 446-460.

Cases referred to:

- (1) *Re Teape's Trusts* (1873), L.R. 16 Eq. 442; 43 L.J.Ch. 87; 28 L.T. 799; 21 W.R. 780; 37 Digest 451, 541.
- (2) *Re Swinburne*, *Swinburne v. Pitt* (1884), 27 Ch.D. 696; 54 L.J.Ch. 229; 33 W.R. 394; 37 Digest 453, 550.
- (3) *Re Richardson's Trusts* (1886), 17 L.R.Ir. 436; 37 Digest 432, *o*.

Also referred to in argument:

- Re Milner*, *Bray v. Milner*, [1899] 1 Ch. 563; sub nom. *Re Milner*, *Milner v. Bray*, 68 L.J.Ch. 255; 80 L.T. 151; 47 W.R. 369; 37 Digest 453, 551.
- Re Williams*, *Foulkes v. Williams* (1889), 42 Ch.D. 93; 58 L.J.Ch. 451; 61 L.T. 58, C.A.; 37 Digest 437, 427.
- Re Mills*, *Mills v. Mills* (1886), 34 Ch.D. 186; 56 L.J.Ch. 118; 55 L.T. 665; 35 W.R. 133; 37 Digest 447, 506.
- Re Huddleston*, *Brano v. Eyston*, [1894] 3 Ch. 595; 64 L.J.Ch. 157; 43 W.R. 139; 8 R. 462; 37 Digest 447, 504.

Originating Summons to determine whether a power of appointment was general or special.

A testator by his will, dated Mar. 27, 1858, gave to trustees therein mentioned certain leasehold property upon trust to pay twelve-seventeenths of the income arising therefrom to his daughter Matilda, and gave her a power of appointment "among every or any such one or more" of her children, and in case Matilda should die without attaining a vested interest, he directed the property to be held upon trust for "all and every or such one or more" of his, the testator's, grandchildren as Matilda should appoint. The testator then gave to his trustees divers

leasehold hereditaments and stocks and shares (subject as therein mentioned) upon trust to pay one moiety or half part of the clear yearly income thereof to his daughter Maria for her life for her separate use and after her death to any husband with whom she might intermarry (if he should survive her) with the like restrictions and limitations over as he (the testator) had declared with respect to his daughter Matilda and her husband, and subject thereto

"Upon trust as to one equal undivided moiety or half part of the said several last-mentioned leasehold hereditaments, stocks, and shares upon trust for the children of my said daughter Maria and in default of children for my grandchildren or others as my said daughter Maria shall by will appoint in like manner as I have directed and declared with respect to my daughter Matilda as if the same were here again repeated as to my daughter Maria . . ."

The will also contained a gift of one-third of the residue to Maria for life, and subject thereto in default of children

"for the testator's grandchildren in like manner as the testator had thereinbefore directed and declared in respect to the share of his estate thereinbefore specially given"

to Maria.

The testator died on Nov. 30, 1859. The executors and trustees appointed by the will had since died, and the plaintiff and defendant Frederick Mayhew Cutbush were the present trustees. Maria Mayhew died on Sept. 18, 1900. By her will she, after certain bequests, purported to make an appointment of her share under the testator's will in the following terms :

"I appoint, devise, and bequeath all my real estate and the residue of my personal estate to my trustees upon trust to sell or convert the same into money and to pay and divide the proceeds after paying my debts and funeral and testamentary expenses equally between the four children of my deceased sister Jane Cutbush."

The question now arose whether the gift in the will of the testator in trust "for my grandchildren or others as my said daughter Maria shall by will appoint" conferred a general power of appointment, or whether it was controlled by the reference to the trusts which had been declared in respect of Matilda's share, so as to confer a special power only, and, if the latter was the case, whether the words in the will of Maria exercised the special power. An originating summons was taken out by Arthur N. Spencer, one of the trustees of the testator's will, that the court might determine (inter alia) (i) whether the powers of appointment given by the testator to Maria Mayhew were general or special powers: and (ii) whether Maria Mayhew had exercised those powers by her will.

Coote for the trustees of the will.

Butcher, K.C., and *Gatey* for the defendant F. M. Cutbush.

Julius Green and *Hay* for other parties interested.

FARWELL, J.—I come to the conclusion on this branch of the summons that this is a special power. The words "or others" do not seem sufficient to oust the real intention shown by the whole will to incorporate the provision which the testator had made for Matilda into the other provisions made by the will.

The question was then argued whether the words of Maria's will were an exercise of the special power.

FARWELL, J.—This case is very near the line, but, on the whole, I come to the conclusion that there has been an appointment. The words of the will are :

"I devise, bequeath, and appoint all my real estate and the residue of my personal estate to my trustees upon trust . . . for the four children of my sister Jane Cutbush."

The testatrix, Maria Mayhew, had under her father's will a limited power of appointment among his grandchildren. I start, therefore, with this, that there is here a gift to objects of the power. The mere fact that there is in the will also a direction for payment of debts out of the fund which is subject to the power of appointment is not enough by itself to exclude the exercise of the power. It is said that in a case like this it is not admissible to look at the fact that there is no other power to which the words of the will could be applicable, but I think it is clear both on authority and principle that it is admissible. When a will contains a devise of real estate, I have to look at the facts to see whether there is or is not real estate for the devise to act on. Similarly when the testatrix appoints personally I am at liberty to inquire whether there is personality. I start, then, with this, that I have it in evidence that there is here a special power of appointment, and no other. Next, I find the word "appoint" in the will together with the words "devise and bequeath." "Appoint" is a word of art and refers to powers only. I do not deny that it may have a wider sense; and I do not say that if other words were not there the word "appoint" alone would carry all property over which there was a power of appointment. But here I have all three words, and I do say that the word "appoint" used in such a collocation necessarily refers to the power, and I read it as if it imported into the will a reference to the special power. That is the true view in a will such as this, containing all three words. I felt some difficulty at one time as to whether the words here might be answered by a general power, and the reference in the will to "my personal estate" might seem at first sight to point to this view. But the words in the cases cited to me—especially in *Re Teape's Trusts* (1) and *Re Swinburne, Swinburne v. Pitt* (2)—might equally well have been answered by the existence of a general power, but in both those cases it was held that there was a sufficient reference to execute a special power. Here the words "devise and bequeath" are in themselves quite enough to satisfy a general power. That is provided by s. 27 of the Wills Act, 1837, and I cannot see that I do any violence to the words of the will by holding that "appoint" refers to the special power. The only ground which I feel for hesitation was caused by an expression of CHATTERTON, V.C., in *Re Richardson's Trusts* (3), but it is, I think, obvious that that was not a decision. What was actually decided in that case was that the mere use of the word "appoint," where there was no evidence that there was no general power to which it could refer, was not enough to exercise a special power, but the Vice-Chancellor says (17 L.R.Ir. at p. 442):

"The argument on the one side turns only on the use of the word 'appoint,' that on the other on the insufficiency of this without more to indicate the intention, and also on the description of the subject of the gift as 'all my real and personal estate and effects of every kind.' Property which was not that of the testatrix, but over which she had a special power of appointment, cannot, without the aid of a strong context, be held to be described by these words. No such context exists here except merely the word 'appoint'; and even if the testatrix had no general power of appointment, I think I should go beyond any decided cases, and beyond the principle on which those cases proceed, if I were to hold that this was sufficient."

The Vice-Chancellor was there intending to deal with the will which he had before him; but if his words are applied to the will before me now, I do not agree with him. There is here, in my opinion, sufficient context to show that the words which the testatrix uses are meant to apply to and to exercise a special power.

Solicitors: *H. E. Griffith; Paterson, Candler & Sykes*, for Ellis, Maidstone.

[Reported by G. RENDALL, Esq., Barrister-at-Law.]

GATTWARD v. KNEE

PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Francis Jeune, P.), December 10, 1901]

[Reported [1902] P. 99; 71 L.J.P. 34; 86 L.T. 119; 18 T.L.R. 163; 46 Sol. Jo. 123]

Will—Soldier's will—"Actual military service"—Order for mobilisation given—Wills Act, 1837 (7 Will. 4 & 1 Vict., c. 26), s. 11.

By s. 11 of the Wills Act, 1837, it is provided: "Provided always, and be it further enacted that any soldier being in actual military service . . . may dispose of his personal estate as he might have done before the making of this Act." A soldier is in "actual military service" within the section as soon as the order for mobilisation has been given.

Per SIR FRANCIS JEUNE, P.: "Mere warning for service is not enough."

Notes. Followed: *May v. May*, [1902] P. 103 n. Considered: *Re Booth, Booth v. Booth*, [1926] All E.R. Rep. 594. Referred: *In the Estate of Stanley*, [1916-17] All E.R. Rep. 352; *Godman v. Godman*, [1920] P. 261. Applied: *Re Wingham*, [1948] 2 All E.R. 908.

As to privileged wills by members of the Royal Forces, see 16 HALSBURY'S LAWS (3rd Edn.) 176 et seq.; and for cases, see 39 DIGEST 332 et seq. For the Wills Act, 1837, see 26 HALSBURY'S STATUTES (2nd Edn.) 1326.

Case referred to:

(1) *In the Goods of Hiscock*, ante p. 63; [1901] P. 78; 70 L.J.P. 22; 84 L.T. 61; 17 T.L.R. 110; 39 Digest 334, 202.

Action by the plaintiff, William Gattward, who claimed that the letters of administration to the estate of the deceased William Knee, which had been granted to the defendant, Mark Thomas Lewellyn Knee, father of the deceased, on July 31, 1901, should be revoked and that a letter written by the deceased in September, 1899, should be admitted to probate as a soldier's will and that letters of administration with the will annexed should be granted to him.

The deceased was a private in the 2nd Battalion of the King's Royal Rifles, and was stationed in India in the early part of September, 1899, a month before the outbreak of the Boer War. Prior to his departure with his regiment for South Africa he wrote the following letter to the plaintiff:

"1479 Pte. W. Knee, D Company, 2nd K.R.R., Natal, South Africa (for Transvaal Company).—Dear Bill.—Just a few lines to you hoping that you are not dead yet, as I have received no answer to the last letter that I sent you. I do not know weather you are waiting for me to come home or not but there is no nowing when I will arrive as we are just off to South Africa again for the Boer War if war is declared at all. It is hard lines seven years and four months' service and got to go there; but it cannot be helped. I am sending a box of things to you which I want you to look after for me till I come home for there are some things which I got out here, I think a lot of them, I will shew them to you when I come; they are a lot of curios and there is some things for you there, but if you have a letter to say that I am killed, then the lot is for you; and also I have about £13 in the bank and £18 deferred pay which will come £31. You will receive the lot if I am killed in action for I shall make out my will in your favour so you can keep this letter in case you want it for anything, but let us hope that I arrive home safe again. I am looking forward to a grand time with you and the missus—yes, for we will have one when I come home. Please excuse black lead as I want to catch the mail, everyone is using or waiting for the ink. Hoping you are enjoying good health as I am at

present. Please write my address as in this letter.—I remain, from your old
 chumby, hoping to see you at the end of the war, W. Kinn. Take the note of the
 top of the box."

The deceased died of enteric fever at Ladysmith on Feb. 9, 1900. From information supplied by the War Office it appeared that the 2nd Battalion of the King's Royal Rifles had been warned for service on Sept. 7, 1899, and had been ordered to mobilise for service in South Africa on Sept. 9. At the time of the warning and the order for mobilisation the battalion was stationed at Fort William, Calcutta, and sailed for South Africa on the 18th of the same month.

Richards, K.C., and *Soper* for the plaintiff.

Barnard for the defendant.

SIR FRANCIS JEUNE, P.—I am clearly of opinion that the letter of the deceased is a testamentary document, and the fact that he had intimated his intention of drawing up a more formal document later on does not at all affect the letter itself. I also think that it is a soldier's will. I am of opinion that mobilisation may be taken as a fair test as to whether a soldier is or is not what is called in Roman law in expeditione. Mere warning for service is not enough. But in this case the order for mobilisation followed the warning for service within two days. I think I am justified in finding that the letter in the present case was written between Sept. 9 and Sept. 18—i.e., after the order for mobilisation and before the departure for South Africa. No doubt I am going a step further than I did in *Hiscock's Case* (11); but yet I think, for the reasons that I have stated, that the deceased was in expeditione at the time when the letter was written, and that, therefore, the letter itself is a valid soldier's will.

Solicitors: *Eugene Goddard; Bentley*.

[Reported by J. A. SLATER, ESQ., Barrister-at-Law.]

GENTEL v. RAPPS

[King's Bench Division (Lord Alverstone, C.J., Darling and Channell, JJ.), November 18, 1901]

[Reported [1902] 1 K.B. 160; 71 L.J.K.B. 105; 85 L.T. 683; 66 J.P. 117; 50 W.R. 216; 18 T.L.R. 72; 46 Sol. Jo. 69; 20 Cox, C.C. 104]

Local Authority—Byelaw—Repugnancy to general law—Byelaw creating new offence.

A byelaw is not repugnant to the general law merely because it creates a new offence and says that something is unlawful which no other law says is unlawful. It is only when it makes unlawful something which the general law by express enactment or necessary implication makes lawful, that a byelaw is rendered repugnant.

Local Authority—Byelaw—Tramway—Byelaw prohibiting use of obscene or offensive language in car—Validity—Tramways Act, 1870 (33 & 34 Vict., c. 78, s. 46).

A tramway company, in pursuance of the Tramways Act, 1870, made a byelaw as follows: "No person shall swear or use obscene or offensive language whilst in or upon any carriage . . ."

Held: the byelaw was valid.

Notes. Considered: *Brabham v. Wookey* (1901), 18 T.L.R. 99; *Powell v. May*, 1916] 1 All E.R. 441. Referred to: *Moorman v. Tordoff* (1908), 98 L.T. 416.

As to the validity of byelaws and regulations made by corporations, see 9 HALSBURY'S LAWS (3rd Edn.) 42 et seq.; and for cases see 13 DIGEST (Repl.) 238 et seq. For the Tramways Act, 1870, see 25 HALSBURY'S STATUTES (2nd Edn.) 1289.

Cases referred to :

- (1) *Strickland v. Hayes*, [1896] 1 Q.B. 290; 65 L.J.M.C. 55; 74 L.T. 137; 60 J.P. 164; 44 W.R. 398; 12 T.L.R. 199; 40 Sol. Jo. 316; 18 Cox, C.C. 244, D.C.; 38 Digest (Repl.) 178, 103.
- (2) *Barnett v. Berry*, [1896] 1 Q.B. 641; 65 L.J.M.C. 118; 74 L.T. 494; 60 J.P. 375; 44 W.R. 512; 12 T.L.R. 362; 40 Sol. Jo. 459; 18 Cox, C.C. 325; on appeal, 60 J.P. 550, C.A.; 25 Digest 435, 326.
- (3) *Mantle v. Jordan*, [1897] 1 Q.B. 248; 66 L.J.Q.B. 248; 66 L.J.Q.B. 224; 75 L.T. 552; 61 J.P. 119; 13 T.L.R. 121; 18 Cox, C.C. 467, D.C.; 38 Digest (Repl.) 171, 64.
- (4) *Low v. Volp*, [1896] 1 Q.B. 256; 65 L.J.M.C. 43; 74 L.T. 143; 60 J.P. 232; 44 W.R. 442; 12 T.L.R. 206; 18 Cox, C.C. 253, D.C.; 43 Digest 350, 91.
- (5) *Hanks v. Bridgman*, [1896] 1 Q.B. 253; 65 L.J.M.C. 41; 74 L.T. 26; 60 J.P. 312; 44 W.R. 285; 12 T.L.R. 193; 40 Sol. Jo. 277; 18 Cox, C.C. 224, D.C.; 43 Digest 350, 93.
- (6) *Thomas v. Sutters*, [1900] 1 Ch. 10; 69 L.J.Ch. 27; 81 L.T. 469; 48 W.R. 133; 16 T.L.R. 7; 44 Sol. Jo. 24; 19 Cox, C.C. 418; 63 J.P. Jo. 724, C.A.; 25 Digest 435, 327.
- (7) *Kruse v. Johnson*, [1898] 2 Q.B. 91; 67 L.J.Q.B. 782; 79 L.T. 647; 62 J.P. 469; 46 W.R. 630; 14 T.L.R. 416; 42 Sol. Jo. 509; 19 Cox, C.C. 103, D.C.; 13 Digest (Repl.) 239, 639.
- (8) *Wanstead Local Board of Health v. Wooster* (1873), 38 J.P. 21; 2 Digest (Repl.) 336, 255.

Also referred to in argument :

- White v. Morley*, [1899] 2 Q.B. 34; 68 L.J.Q.B. 702; 80 L.T. 761; 63 J.P. 550; 47 W.R. 583; 15 T.L.R. 360; 43 Sol. Jo. 511; 19 Cox, C.C. 345; 13 Digest (Repl.) 241, 661.

Case Stated upon an information preferred by the appellant against the respondent for that he, being in or upon a carriage using a tramway, unlawfully used obscene or offensive language, contrary to the byelaw No. 6 made in pursuance of s. 46 of the Tramways Act, 1870.

By the Tramways Act, 1870, s. 46 :

"Subject to the provisions of the special Act authorising any tramway, and this Act, The local authority of any district in which the same is laid down may from time to time make regulations as to the following matters : The rate of speed to be observed in travelling upon the tramways; the distances at which carriages using the tramways shall be allowed to follow one after the other; the stopping of carriages using the tramway; the traffic on the road in which the tramway is laid. The promoters of any tramway and their lessees may from time to time make regulations,—For preventing the commission of any nuisance in or upon any carriage, or against any premises belonging to them; For regulating the travelling in or upon any carriage belonging to them, and for better enforcing the observance of all or any of such regulations, it shall be lawful for such local authority and promoters respectively to make byelaws for all or any of the aforesaid purposes, and from time to time repeal or alter such byelaws and make new byelaws, provided that such byelaws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect. Notice of the making of any byelaws under the provision of this Act shall be published by the local authority of the promoters making the same by advertisement. . . ."

The byelaws were duly made, allowed, and published in 1877; and were proved A
and put in evidence before the justices. No. 6 was as follows:

"No person shall swear or use obscene or offensive language whilst in or upon
any carriage, or commit any nuisance in or upon or against any carriage, or
wilfully interfere with the comfort of any passenger."

It was proved by a conductor of the tramway company that at 9.45 a.m. on July 30, B
1900, when his tramcar was near Ashton Gate, in Bristol, the respondent got on the
carriage, and when he was asked for his fare that he said to the conductor, "You
are a blackleg lot of b—s here; you ought to be clucked off the cars." The
uttering of these words was not disputed. The conductor also proved that there
were two other passengers on the car on the front seat who did not hear the words
and who made no complaint. A dispute had arisen between the tramway company C
and some of their servants, and the words objected to had reference to the dispute.
The justices found that the words were obscene and were actually "offensive
language," considering to whom they were spoken.

It was contended on behalf of the respondent that the byelaw under which the
respondent was summoned was ultra vires on the following grounds: (i) That it went D
beyond the provisions which gave power to the promoters to make byelaws, as
that power was simply to prevent the commission of any "nuisance" upon a car-
riage; (ii) that the word "nuisance" had a technical meaning, and would not
include swearing or the use of obscene or offensive language; (iii) that the byelaw
was unreasonable because it prohibited using obscene and offensive words, which
words were not necessarily when uttered a criminal offence, and could not be made E
crimes except by the express words in a statute; (iv) that the Act of 1870 contained
a proviso that the byelaws were not to be repugnant to the laws of that part of the
United Kingdom where they were to have effect, whereas this byelaw was repugnant
to the provisions of the Town Police Clauses Act, 1847 (which apply to the city
and county of Bristol) and the hereinbefore mentioned local or personal Act, inas-
much as the words "to the obstruction, annoyance, or danger of the residents and
passengers," and "to the annoyance of the inhabitants and passengers" were F
omitted from the byelaw; (v) that the evidence had gone so far as to prove that no
person had been annoyed or complained, and that the only person who heard the
words was the conductor to whom they were specially addressed; (vi) that the
byelaw created new offences, viz., "swearing or using offensive language" which
when committed would not be mala in se, and could only be prohibited by Act of G
Parliament, such as the Profane Oaths Act, 1745, and that the penalty under that
statute was limited, and could not be extended by any byelaw; (vii) that the byelaw
containing such a vague term as "offensive language" which might if valid render
merely slanderous words punishable on summary conviction, and must be ultra
vires, and *Strickland v. Hayes* (1) was cited.

It was contended, on behalf of the appellant, (i) That the offence of swearing H
or using obscene language could be made the subject of a byelaw when committed
on a tramcar, and *Burnett v. Berry* (2) was cited to show that what might not in
itself be malum in se (e.g., betting) might be prohibited by a byelaw in connection
with persons resorting to a public place, and that a tramcar was a place to which
the public resorted as passengers, and as such they were not to be subjected to
anything offensive or likely to become a nuisance, and, moreover, as passengers they I
were not allowed to use offensive words or to be a nuisance to others; (ii) that
tramway carriages were like railway stations and railway carriages and to be
specially regarded as to superior privileges in the shape of byelaws and regulations
that would not apply to the open streets, and that the passengers paid for their
seats and were to be specially protected from what might not be an actual nuisance
in a public street where persons were free to go away or turn aside, but which
would be an annoyance from a fellow passenger; (iii) that *Mantle v. Jordan* (3) had
modified *Strickland v. Hayes* (1) and a more liberal interpretation should now be

given: (iv) that the byelaw was good and within the powers conferred by statute, inasmuch as the company or promoters had thereby power to prevent their servants and their passengers from being annoyed by such nuisance as a person becoming a passenger for the purpose of saying offensive words, as in this very case; and to prevent a person from committing a nuisance which might deter other persons from becoming passengers in their carriages and from molesting or interfering with their officials in the discharge of their duties: *Lower v. Volp* (4) and *Hanus v. Bridgman* (5); (v) that the conductor did not cease to be a person and one of the public, and that he was himself necessarily a passenger, and that the words were especially offensive and annoying to him; (vi) that the byelaw was within the power which the company had as promoters for "regulating the travelling in or upon any carriage belonging to them."

In reply for the respondent it was contended that the company could only make byelaws as to passengers, for the prevention of any "nuisance," a term well understood to mean annoyance to the public generally, and not to special individuals, and *Thomas v. Sutters* (6) and *Kruse v. Johnson* (7) were cited.

The justices came to the conclusion that they were bound by the decision in *Strickland v. Hayes* (1) and as no such words as "to the annoyance of passengers" were embodied in the byelaw, it should be considered to be ultra vires. They consequently dismissed the information.

Macmorran, K.C. (*H. H. Gregory* with him) for the appellant.
Schiller for the respondent.

LORD ALVERSTONE, C.J.—I have no doubt that the magistrates should have held the byelaw valid, and that the principle upon which they have decided is not sound. If *Strickland v. Hayes* (1) is to be held as deciding more than that a byelaw cannot make an offence which has been created by statute into a different offence, then that case is not law. I think if the effect of the decision is that when the legislature gives a public authority or company authority to make byelaws for the prevention of nuisances, they can in no case make a byelaw defining a particular act, which can be a nuisance, to be a nuisance, and which would not otherwise be a nuisance, it cannot now be supported. I think *LINDLEY, L.J.*, in dealing with this matter, meant that a byelaw, provided that it is not repugnant to the law, may deal with a matter with which the law has not already dealt, when he said:

"Looking at that section, I cannot find that it was intended to give power to make byelaws creating any new criminal offence. Of course byelaws must do more than merely reiterate the provisions of Acts of Parliament, otherwise they would be nugatory; but it is important to see that they are strictly within the authority under which they are made."

I think *Kruse v. Johnson* (7) and the betting cases recognise the right of the local authority which makes the byelaw to define and describe what shall be a nuisance under particular circumstances, and it is enough if the circumstances render annoyance certain or even probable, as where a byelaw provided that no pig should be kept within 100 yards of a house in a populous place: *Wanstead Local Board of Health v. Wooster* (8). Here the legislature has given the tramway company, subject to the approval of the Board of Trade, the power of making byelaws for preventing the commission of any nuisance in or upon any carriage belonging to them. I think it is quite within the authority of the byelaw making body to say that particular things done in a tram, although not nuisances elsewhere, shall be forbidden as nuisances, such as smoking, music, or obscene language. In doing so, the tramway company are acting within their powers, and I cannot see that in holding so we are straining what is laid down in *Strickland v. Hayes* (1), so as to say that as there are no such words as are in the Towns Police Clauses Act, 1847, viz., to the annoyance of the passengers, there was no nuisance. In my opinion that Act was not dealing with the power to make special regulations as are

made by the byelaw in this case, but was dealing with offences in the streets. I think the case must go back to the magistrates to convict.

DARLING, J.—I am of the same opinion. As to *Atchlam v. Hayes* (1), after the decisions that have been given since, and particularly *Kruse v. Johnson* (7), I do not think that it can be regarded as an undoubted authority. The Tramways Act, 1870, gives power to the promoters of any tramway to make regulations for the preventing the commission of any nuisance in or upon any carriage belonging to them, and for regulating the travelling in or upon any carriage belonging to them. Under that power they made a byelaw which provides that no person shall speak or use obscene or offensive language while in or upon any carriage. It is said that that byelaw is ultra vires. I do not think so. The tramway authorities could prohibit nuisances on their tramcars, and the byelaw enumerates certain things which amount to nuisances. If the things called nuisances can be reasonably considered, when regard is had to the place where they are committed, then I think the byelaw is good. It must go further than the statute in that it enumerates the things that are nuisances. In my opinion the byelaw is sensible and reasonable, although the words "to the annoyance of passengers" are omitted. It would be intolerable if passengers, besides being annoyed by language as was used in the present case, should have to be further annoyed by having to come into court and repeat such language. For the reasons I have stated I think this byelaw is a good one.

CHANNELL, J.—I am of the same opinion. I think that the recent cases, such as, for instance, *Kruse v. Johnson* (7), have settled that where an authority has power to make byelaws to prevent nuisances they can declare particular things to be nuisances in particular places if those things are of a character which may possibly be a nuisance. That is because it is for the authority to say under their power of making byelaws whether it is a nuisance in the place to which the byelaw applies—e.g., in a tram. The cases clearly establish that it is not necessary to add the words "so as to be in fact a nuisance." That is not necessary where you are specifying in the byelaw the particular place. If, however, the byelaw applied to a large area not uniform in character, so that what might be a nuisance in one part of the area might not be so in another part of it, it might be advisable to insert the words. A byelaw is not repugnant to the general law merely because it creates a new offence and says that something is unlawful which no other law says is unlawful. It is only when it makes unlawful something which the general law by express enactment or necessary implication makes lawful. I say by "necessary implication," because where the legislature has declared that travelling without a ticket with intent to defraud is an offence, a byelaw which left out the words "with intent to defraud" was held to be invalid, as repugnant to the general law. Again, a byelaw is repugnant to the general law if it declares to be lawful what is declared by the general law to be unlawful. In my opinion the byelaw here was not repugnant to the general law either express or implied.

Appeal allowed.

Solicitors: *Thos. White & Sons* for Stanley, *Wasbrough & Doggett*, Bristol; *Harc & Co.* for *E. G. Watson*, Bristol.

[Reported by *W. DE B. HERBERT, Esq., Barrister-at-Law.*]

ROBERTS v. CHARING CROSS, EUSTON AND HAMPSTEAD RAIL. CO.

[CHANCERY DIVISION (Farwell, J.), January 20, 21, 1903]

[Reported 87 L.T. 732, 19 T.L.R. 160]

Pleading—Striking out—Statement of claim—Need to prove action “frivolous and vexatious”—R.S.C., Ord. 25, rr. 2, 4.

R.S.C., Ord. 25, r. 4, which gives the court or a judge power to strike out a pleading where no reasonable cause of action is disclosed, only applies where the action is “frivolous and vexatious.” It must be worse than demurrable. The court will not strike out pleadings where there is something to argue.

Negligence—Statutory powers—Exercise—Carrying out of works by night—Right of plaintiff to injunction—Right to compensation under Lands Clauses Consolidation Act, 1845 (8 & 9 Vict., c. 18), s. 68.

The defendants, a railway company, were authorised by statute to carry out certain works in connection with their undertaking, and were in the habit of carrying on work on the site of a proposed station by night as well as by day. The plaintiff, who occupied a house close to this site, brought an action to restrain the defendants from working at night, alleging that such work rendered his house uninhabitable, and was a vexatious and unreasonable abuse by the defendants of their statutory powers.

Held: on the assumption that working at night was unreasonable, a good cause of action was disclosed, and the fact that compensation could be obtained under s. 68 of the Lands Clauses Consolidation Act, 1845, did not exclude the regulating and restraining jurisdiction of the court.

Notes. Applied: *Howard-Flanders v. Maldon Corpn.*, [1926] All E.R. Rep. 110. Referred to: *Re Brighton (Everton Place Area) Housing Order 1937*, *E. Robins & Son, Ltd.’s Application*, [1938] 4 All E.R. 447; *East Suffolk Rivers Catchment Board v. Kent*, [1940] 4 All E.R. 527.

As to striking out of pleadings, see 30 HALSBURY’S LAWS (3rd Edn.) 37, and as to exercise of statutory powers, see *ibid.*, vol. 30, 685 et seq. and *ibid.*, vol 31, 470 et seq. For cases see 42 DIGEST 721 et seq. For the Lands Clauses Consolidation Act, 1845, see 3 HALSBURY’S STATUTES (2nd Edn.) 890.

Cases referred to:

- (1) *Southwark and Vauxhall Water Co. v. Wandsworth Board of Works*, [1898] 2 Ch. 603; 67 L.J.Ch. 657; 79 L.T. 132; 62 J.P. 756; 47 W.R. 107; 14 T.L.R. 576, C.A.; 26 Digest (Repl.) 554, 2240.
- (2) *East Fremantle Corpn. v. Annois*, p. 73 ante; [1902] A.C. 213; 71 L.J.P.C. 39; 85 L.T. 732; 67 J.P. 103; 18 T.L.R. 199, P.C.; 26 Digest (Repl.) 524, 2010.
- (3) *Sutton v. Clarke* (1815), 6 Taunt. 29; 1 Marsh. 429; 128 E.R. 943; 38 Digest (Repl.) 13, 49.
- (4) *Galloway v. London Corpn.* (1864), 2 De G.J. & Sm. 213; 4 New Rep. 77; 10 L.T. 439; 28 J.P. 452; 10 Jur.N.S. 552; 12 W.R. 891; 46 E.R. 356, L.J.J.; on appeal (1866), L.R. 1 H.L. 34; sub nom. *Galloway v. London Corpn. and Metropolitan Rail. Co.*, *London Corpn. v. Galloway*, 35 L.J.Ch. 477; 14 L.T. 865; 30 J.P. 580; 12 Jur.N.S. 747, H.L.; 42 Digest 722, 1415.
- (5) *Coats v. Clarence Rail. Co.* (1830), 1 Russ. & M. 181; 8 L.J.O.S.Ch. 72; 39 E.R. 70, L.C.; 11 Digest (Repl.) 147, 259.

Also referred to in argument:

London, Brighton and South Coast Rail. Co. v. Truman (1885), 11 App. Cas. 45; 55 L.J.Ch. 354; 54 L.T. 250; 50 J.P. 388; 34 W.R. 657, H.L.; 11 Digest (Repl.) 121, 134.

- London & Great Northern Rail. Co. (1854)*, 10 Q.B. 611, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.
- 20 L.J.Q.B. 293; 17 L.T.O.S. 39; 15 Jur. 652; 117 E.R. 1026; 38 Digest (Repl.) 24, 120.
- Mersey Dock and Harbour Board v. Gibbs, Mersey Dock and Harbour Board v. Penhallow* (1866), L.R. 1 H.L. 93; 11 H.L.Cas. 686; 35 L.J.Ex. 225; 14 L.T. 677; 30 J.P. 467; 12 Jur.N.S. 571; 14 W.R. 872; 2 Mar.L.C. 353; 11 E.R. 1500, H.L.; 42 Digest 746, 1707.
- Leader v. Moron* (1773), 2 Wm. Bl. 924; 3 Wils. 461; 96 E.R. 546; 38 Digest (Repl.) 12, 42.
- Boulton v. Crowther* (1824), 2 B. & C. 703, 2 L.J.O.S.K.B. 139; 107 E.R. 544; sub nom. *Bolton v. Crowther*, 4 Dow. & Ry.K.B. 195; 38 Digest (Repl.) 19, 83.
- Ricket v. Metropolitan Rail. Co. (Directors, etc.)* (1867), L.R. 2 H.L. 175; 36 L.J.Q.B. 205; 16 L.T. 542; 31 J.P. 484; 15 W.R. 937, H.L.; 11 Digest (Repl.) 150, 281.
- Biscoe v. Great Eastern Rail. Co.* (1873), L.R. 16 Eq. 636; 21 W.R. 902; 38 Digest (Repl.) 22, 98.
- Metropolitan Asylum District v. Hill* (1881), 6 App. Cas. 193; 50 L.J.Q.B. 353, 44 L.T. 653; 45 J.P. 664; 29 W.R. 617, H.L.; 38 Digest (Repl.) 36, 182.
- Birmingham Waterworks Co. v. London and North Western Rail. Co.* (1861), 4 L.T. 398.

Summons to strike out the plaintiff's statement of claim on the ground that it did not allege that in carrying out their works by night the defendants were "acting negligently in the exercise of or in excess of their statutory powers."

The defendants were a company incorporated by the Charing Cross, Euston, and Hampstead Railway Act, 1893, and authorised by that and subsequent Acts to carry out certain works in connection with their undertaking. The plaintiff resided at Haverstock Hill, in a house close to the site of Belsize Park station, one of the defendants' proposed stations. Three shafts were being sunk there by the defendants, and work had been and was being carried on by night and by day both in connection with the actual sinking of the shafts and the subsequent tunnelling. Such work would, it was alleged, continue during several years. It was admitted that the actual work was authorised by statute; but the plaintiff alleged by his statement of claim that the carrying on of the work by night was a vexatious and unreasonable abuse by the defendants of their statutory powers, and that by reason thereof the plaintiff's said house was rendered unfit for use as a dwelling-house, and he asked for an injunction to restrain the defendants from so doing. He also asked for damages.

On this summons it was contended by the defendants that no cause of action was shown by the statement of claim; that where no negligence or excess of statutory powers was alleged, the plaintiff's sole remedy was that provided by the Lands Clauses Consolidation Act, 1845, s. 68.

FARWELL, J., ruled as follows :

"The defendants have taken the wrong course. Order 25, r. 4, only applies when the action is 'Trivious and vexatious.' Demurrer has been done away with, and an action, in order that the procedure under this rule may be applicable, must be worse than demurrable. There must be nothing to argue. Here clearly there is something to argue. The only way this question can be raised before the trial of the action is by an application to the court to try a preliminary point of law under Ord. 25, r. 2."

By consent the summons was amended in order that the preliminary point of law might be argued. Counsel, on both sides, admitted, for the purposes of this application only, that it was unreasonable for the company to carry on their work by night.

By s. 68 of the Lands Clauses Consolidation Act, 1845 :

"If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction . . . and if the compensation claimed in such case shall exceed the sum of fifty pounds, such party may have the same settled either by arbitration or by the verdict of a jury as he shall think fit . . ."

J. Roskill for the defendants.

H. Johnston for the plaintiff.

FARWELL, J.—This came on as a summons under Order 25, r. 4, to strike out the statement of claim, on the ground that it disclosed no reasonable cause of action. It was obvious that this could not be done, because there was a question to argue. I, accordingly, at the request of counsel on both sides, allowed the summons to be treated as amended, so that the preliminary point of law might be decided. The exact question for decision has been written down by counsel, and is as follows :

"Assuming that the carrying out of works authorised by the defendant company's private Act by night is unreasonable and has rendered the plaintiff's house unfit for use as a dwelling-house, has the plaintiff any cause of action?"

I should have thought that the mere statement of the question in that form answered itself: for it is impossible for the court to impute to the legislature an intention to grant powers to be exercised in an unreasonable manner. Of course, however unreasonable it may appear, *a priori*, if the legislature has authorised it, then it ceases to be unreasonable. If the legislature had authorised work by night in terms, it would not lie in the mouth of anyone to contend in this court that it was unreasonable. Here, however, I am to assume, for the purposes of this application, that working by night is in fact unreasonable. Where an act which would otherwise give rise to a cause of action is authorised by Parliament, whether compensation is or is not given by the Act so authorising it, no action will lie against a person acting within the limits of the power created by Parliament. There may be questions of construction, which are affected to some extent by the consideration whether compensation is or is not given by the Act, but the same principle applies to all. If the Act of Parliament has authorised the particular thing to be done, then you cannot sue a man or a company for doing what is a lawful act. In my opinion this principle applies, whether the powers are given to public authorities acting for the public benefit or to railway companies or others acting for their own profit. To this principle there is, however, one qualification which is well settled, and indeed is admitted by the defendants, namely, that in carrying out works authorised by statute you must not act negligently. A company acting under statutory powers is treated as a private individual acting within his own rights. If a private individual acting within his own rights acts negligently, he is liable; although the act is perfectly lawful, if he does it negligently he is liable, and so it is with a company having these powers. But there is yet a further proposition which the defendants in this case deny, but which appears to me to be well settled. Not only must a company not be guilty of negligence, but it must also act reasonably. *Southwark and Vauxhall Water Co. v. Wandsworth District Board of Works* (1) settles this. *HEAR COLLINS, L.J.*, the present Master of the Rolls, says ([1898] 2 Ch. at p. 611) in a judgment which was read and approved by *CHITTY, L.J.* :

"So stated, it is merely an assertion of the proposition so frequently affirmed that, where statutory rights infringe upon what but for the statute would be the rights of other persons, they must be exercised reasonably, so as to do as little mischief as possible. The public are not compelled to suffer inconvenience which is not reasonably incident to the exercise of statutory powers."

Again, on the following page, the Master of the Rolls says :

"But it must be admitted that the defendants are bound to exercise their statutory powers with reasonable regard for the rights of other persons."

That is affirmed again, if it needs further affirmation, by LORD MACNAGHTEN in *Ford Fremantle Corpn. v. Annois* (2), who says (see ante, p. 76) :

"The law has been settled for the last 100 years. If persons in the position of the appellants, acting in the execution of a public trust and for the public benefit, do an act which they are authorised by law to do, and do it in a proper manner, though the act so done works a special injury to a particular individual, the individual injured cannot maintain an action. He is without a remedy unless a remedy is provided by statute. That was distinctly laid down by LORD KENYON and BULLER, J., and their view was approved by ABBOTT, C.J., and the Court of King's Bench. At the same time ABBOTT, C.J., observed that if in doing the act authorised the trustees acted arbitrarily, carelessly, or oppressively, the law, in his opinion, had provided a remedy. These words 'arbitrarily, carelessly, or oppressively' were taken from the judgment of GIBBS, C.J., in *Sutton v. Clarke* (3), decided in 1815. As applied to the circumstances of a particular case, they probably create no difficulty. When they are used generally and at large, it is not perhaps very easy to form a conception of their precise scope and exact meaning. In simpler language TURNER, L.J., observed in a somewhat similar case, *Galloway v. London Corpn.* (4), that such powers are at all times to be exercised bonâ fide and with judgment and discretion."

LORD MACNAGHTEN then refers to a remark of the Master of the Rolls in *Southern and Fenchurch Water Co. v. Wandsworth District Board of Works* (1), and goes on : "In a word, the only question is, Has the power been exceeded? Abuse is only one form of excess." This was regarded as a matter of principle. If the legislature has given powers and those powers are being used for the purpose of carrying out the work authorised and it is admitted that the mode in which they are being used is unreasonable, that is an abuse of the power so given and is therefore ultra vires. There is not only no authority conflicting with this proposition, but the exact point to my mind was decided by LYNDHURST, L.C., in *Coats v. Clarence Railway Co.* (5), which is one of the cases referred to by the Master of the Rolls. The headnote to that case is as follows (1 Russ. & M. 181) :

"A railway company in exercise of the powers conferred on them by an Act of Parliament, which gave compensation to persons whose property might sustain damage from their operations, were proceeding to erect an arch over a mill-race, for the purpose of sustaining an embankment on which the railway was to be constructed; and it appeared that injury would be done to the mill if the arch were of the proposed dimensions, but that the injury would be avoided if the arch were of certain larger dimensions; an injunction was granted to restrain the company from making over the mill-race an arch of less than certain specified dimensions."

The judgment is extremely short, but it appears from the argument, which is set out *ibid.* at p. 184, that the exact argument that has been addressed to me was there addressed to the Lord Chancellor :

"But, admitting that some injury might ensue, the court had no jurisdiction. The Act of Parliament had pointed out the only remedy to which the plaintiff was entitled; it had given him a right to compensation, and had fixed the mode in which the amount of compensation was to be ascertained. He might claim that compensation, but he could not call upon the court to prevent the company from exercising the powers which the Act of Parliament had conferred on them. The case would be different if the company were proposing to do what the Act

at Parliament did not authorise; but there was no suggestion to that effect. It was not even hinted that they were exceeding their powers. . . . On the other hand, it was argued on behalf of the plaintiff, that the right to compensation, given by the Act of Parliament, did not exclude the regulating and restraining jurisdiction of the court; and that nothing would be more pernicious than to hold that the large and ample powers conferred by such Acts of Parliament were not subject to any control. The company were not to be prevented from doing anything which was necessary to the due prosecution of their undertaking; but, on the other hand, they were not to prosecute it in such a manner as to do unnecessary injury to others. . . . The Lord Chancellor was of opinion that, in such a case, the court ought to interfere to protect the plaintiff; and he awarded an injunction, by which the company were restrained from making over the mill-race any arch of less dimensions than the arch recommended by the engineer's report."

If an authority is needed, it seems to me that this is an express authority. The company had a perfect right to make their arch over the mill-race for the purpose of their embankment, which was one of the things they were authorised to do. The argument there was, as it is here, that it was at the company's discretion to say how they would carry out the work. The present case is clearly within the authority, and I have no hesitation in declaring that the plaintiff has a perfectly good cause of action. The costs of this application are to be the plaintiff's in any event.

Solicitors: *H. A. Scott; Fowler, Perks & Co.*

[*Reported by H. C. GARSIA, Esq., Barrister-at-Law.*]

ATTORNEY-GENERAL v. MURRAY AND ANOTHER

[COURT OF APPEAL (Sir Richard Henn Collins, M.R., Mathew and Cozens-Hardy, L.JJ.), December 19, 1903]

[Reported [1904] 1 K.B. 165; 73 L.J.K.B. 66; 89 L.T. 710; 68 J.P. 89; 52 W.R. 258; 20 T.L.R. 137]

Estate Duty—Property passing on death—Property deemed to pass—Money received under policy of assurance—No insurable interest—Nature of payment made on death—"Interest"—Marriage settlement—Policy on life of husband settled by father of husband—Liability to duty on death of husband—Finance Act, 1894 (57 & 58 Vict., c. 30), s. 2 (1) (d).

In 1866 a father effected a policy of insurance on the life of his son, who was then aged eleven years, but the insurance was not to take effect until the son attained the age of twenty-one years when the payment of the annual premium was to cease. The father accepted that he had no insurable interest. The proceeds were expressed to be payable to the father. In 1884 the son married, and by the marriage settlement which was then made the father assigned the policy to the trustees on trust that they should invest the moneys to become payable under the policy and should pay the income to the son's wife, if she should survive the son, during her life. In 1898 the father died

and in 1901 the same died. The proceeds of the policy were subsequently paid to the trustees of the son's marriage settlement. The Crown claimed estate duty in connection with the death of the son in respect of the policy moneys under the Finance Act, 1894, s. 2 (1) (d).

Held: (i) the moneys were not a mere gratuity paid by the insurance company, notwithstanding that, as between the company and the father, the policy was void for want of an insurable interest.

Worthington v. Curtis (1) (1875), 1 Ch.D. 419, applied;

(ii) the policy of insurance was an "interest" within s. 2 (1) (d), but the son (on whose death the policy matured) had not purchased or provided it within s. 2 (1) (d), and, therefore, no estate duty was payable under that section.

Decision of RIDLEY, J., [1903] 2 K.B. 64, reversed.

Notes. Explained: *A.-G. v. Pearson*, [1924] All E.R. Rep. 359. Considered: *Westminster Bank v. I.R. Comrs.*, *Wrightson v. I.R. Comrs.*, [1905] 2 All E.R. 745. Referred to: *A.-G. v. Lethbridge*, [1905] 2 K.B. 323; *Re D'Arigdor-Goldsmid's Life Policy*, *D'Arigdor-Goldsmid v. I.R. Comrs.*, [1931] 2 All E.R. 543; *D'Arigdor-Goldsmid v. I.R. Comrs.*, [1953] 1 All E.R. 403; *Lawson's Life Assurance Policies*, *Westminster Bank, Ltd., v. I.R. Comrs.*, [1956] 1 All E.R. 627.

As to estate duty on interests provided by deed and, see 15 HALSBURY'S LAWS (3rd Edn.) 25 et seq., and cases there cited.

Cases referred to:

(1) *Worthington v. Curtis* (1875), 1 Ch.D. 419; 45 L.J.Ch. 259; 33 L.T. 828; 24 W.R. 228, C.A.; 29 Digest 882, 3058.

(2) *A.-G. v. Robinson*, [1901] 2 I.R. 67; 21 Digest 15, q.

Also referred to in argument:

Dalby v. India and London Life Assurance Co. (1854), 15 C.B. 966; 3 C.L.R. 61; 24 L.J.C.P. 2; 24 L.T.O.S. 182; 18 Jur. 1024; 3 W.R. 116; 139 E.R. 465, Ex. Ch.; 29 Digest 343, 2774.

Holman v. Johnson (1775), 1 Cowp. 341; 98 E.R. 1120; 12 Digest (Repl.) 913, 2404.

Allkins v. Jope (1877), 2 C.P.D. 375; 46 L.J.Q.B. 824; 36 L.T. 851; 3 Asp.M.L.C. 449; 29 Digest 305, 2527.

Gedye v. Royal Exchange Assurance Corp., post, p. 179; [1900] 2 Q.B. 214; 69 L.J.Q.B. 506; 82 L.T. 463; 16 T.L.R. 344; 9 Asp.M.L.C. 57; 5 Com. Cas. 229; 12 Digest (Repl.) 338, 2618.

Joy v. Campbell (1804), 1 Sch. & Lef. 328; 3 B.R.N.S. 110, n.; 5 Digest (Repl.) 857, *3368.

Lord Advocate v. Fleming, [1897] A.C. 145; 66 L.J.P.C. 41; 61 J.P. 602; 13 T.L.R. 216; sub nom. *Lord Advocate v. Robertson*, 76 L.T. 125; 45 W.R. 674, H.L.; 21 Digest (Repl.) 139, 791.

A.-G. v. Ellis, [1895] 2 Q.B. 466; 64 L.J.Q.B. 813; 73 L.T. 190, 350; 59 J.P. 774; 44 W.R. 13; 11 T.L.R. 566; 39 Sol. Jo. 709; 15 R. 584, D.C.; 21 Digest (Repl.) 34, 124.

A.-G. v. Dobree, [1900] 1 Q.B. 442; 69 L.J.Q.B. 223; 81 L.T. 607; 64 J.P. 24; 48 W.R. 413; 16 T.L.R. 80; 44 Sol. Jo. 163, D.C.; 21 Digest (Repl.) 42, 760.

A.-G. v. Lord Montagu, [1904] A.C. 316; 73 L.J.K.B. 707; 90 L.T. 726; 53 W.R. 115; 20 T.L.R. 523, H.L.; 21 Digest (Repl.) 59, 230.

A.-G. v. Earl of Selborne, [1902] 1 K.B. 388; 71 L.J.K.B. 289; 85 L.T. 714; 66 J.P. 132; 50 W.R. 210; 18 T.L.R. 111; 46 Sol. Jo. 103, C.A.; 21 Digest (Repl.) 158, 916.

Appeal by the defendants from an order of RIDLEY, J., on an information by the Attorney-General claiming estate duty.

On July 25, 1866, Henry William Peek (afterwards Sir H. W. Peek, Bart.) effected an insurance with the Commercial Union Assurance Co. on the life of his son, Cuthbert Edgar Peek, then aged eleven years. The policy was in the following form:—

"Whereas Henry William Peek, of Wimbledon House, Wimbledon, in the county of Surrey, Esquire, hereinafter called the assured, hath contracted with the Commercial Union Assurance Co. for an assurance of the sum of £10,000 on the life of his son, Cuthbert Edgar Peek, for the whole duration thereof, but to commence at the age of twenty-one years, and hath deposited a proposal and declaration dated the 25th day of July, 1863, and signed by himself as the basis of the contract for such assurance: and whereas the said assured hath paid the sum of £357 18s. 4d. as the premium for such assurance for one year from the 25th day of July, 1866, and hath agreed to pay the like sum on the 25th day of July in each year during the nine years that follow, the last payment to be made on the 25th day of July in the year 1875. Now these presents witness and declare that the capital stock and funds of the said company shall be subject and liable to pay to the assured or to his executors, administrators, or assigns the sum of £10,000 within one calendar month after proof shall have been furnished to the reasonable satisfaction of the directors for the time being of the company of the death of the said Cuthbert Edgar Peek if such event happen after he shall have attained the age of twenty-one years."

In the correspondence that took place before the completion of this policy Sir Henry Peek wrote to the company saying that he was effecting the assurance in his own name, but with a view of giving his son a paid-up policy for marriage settlement or otherwise if his son's conduct, after attaining his majority, should be quite satisfactory to him; and that he had no insurable interest in his son's life, and, therefore, deferred the policy coming into effect till after the age of twenty-one should be attained, and he agreed to the forfeiture of the premiums in the event of death meanwhile.

In January, 1876, Cuthbert Edgar Peek came of age. In 1884 Cuthbert Edgar Peek was married to Augusta Louisa Brodrick. By indenture dated Jan. 2, 1884, being the settlement of the property of the intended husband, and made between Cuthbert Edgar Peek of the first part, Augusta Louisa Brodrick of the second part, Sir Henry W. Peek of the third part, and the trustees (the defendants to the present information) of the fourth part, after reciting (inter alia) that Sir Henry W. Peek was entitled to the above-mentioned policy of insurance on the life of Cuthbert Edgar Peek, and that on the treaty for the intended marriage it had been agreed that Sir Henry W. Peek should assign the policy and the moneys assured by or to become payable thereunder to the trustees on the trusts thereafter declared concerning the same; it was witnessed that in pursuance of the agreement in that behalf, and in consideration of the intended marriage, Sir Henry W. Peek, with the approbation of Cuthbert Edgar Peek and Augusta Louisa Brodrick, assigned to the trustees the policy on the life of Cuthbert Edgar Peek and all moneys assured or to become payable by or under the same. And it was agreed and declared that the trustees should invest the moneys assured by or to become payable under the policy when the same might be received, and should pay the income after the death of Cuthbert Edgar Peek to Augusta Louisa Brodrick (if she should survive him) during the remainder of her life, and after her death should hold the moneys on certain other trusts which are not material to this case. In 1898 Sir Henry W. Peek died. In July, 1901, Sir Cuthbert E. Peek, who had succeeded to the title, died. The Commercial Union Assurance Co. paid to the present defendants, as trustees of the settlement, the sum of £14,196 17s. in respect of the policy above mentioned, and bonuses that had accrued. The defendants invested this sum and paid the income to Lady Peek, the widow of Sir Cuthbert E. Peek. The Crown claimed the payment

of estate duty from the defendants on £11,196 17s. under ss. 1 and 2 (1) (d) of the Finance Act, 1894. RIBLEY, J., held that the Crown was entitled to the estate duty claimed. The defendants appealed.

Danckwerts, K.C., and R. J. Parker for the defendants.

The Attorney-General (Sir R. B. Plimley, K.C.) and Vaughan Hawkins for the Crown.

Cur. adv. vult.

Dec. 19, 1903. **COZENS-HARDY, L.J.**, read the following judgment of the court. This is an appeal from a judgment of RIBLEY, J., who has held that estate duty is payable under s. 2 (1) (d), of the Finance Act, 1894, on the death of Sir Cuthbert Peck in respect of a policy for £10,000 on his life settled by his marriage settlement. The material words of the statute are these:

"Property passing on the death of the deceased shall be deemed to include the property following—that is to say: (a) Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

Three points were raised in support of the appeal. First, it is contended that no property passed on the death, because the policy was taken out by and in the name of Sir Henry Peck, the father of Sir Cuthbert, who had, as the office was informed at the time, no insurable interest in his son's life. The policy was, therefore, illegal and void, under the Life Assurance Act, 1774, and any money paid by the office after Sir Cuthbert's death was a mere gratuity. In our opinion, this contention cannot prevail. The statute made the contract of insurance void as between the office and Sir Henry, but no further. If the office, though not bound so to do, in fact paid the money, the payment must be treated as made in respect of the policy, and all the same consequences must follow as if the statute had not been passed. The judgment of the Court of Appeal in *Worthington v. Curtis* (1) really concludes this point. The words of MELLISH, L.J., are clear and direct (1 Ch.D. at p. 424):

"The statute is a defence for the insurance company only, if they choose to avail themselves of it. If they do not, the question who is entitled to the money must be determined as if the statute did not exist. The contract is only made void as between the company and the insurer."

The court could not have arrived at the decision in that case on any other view of the law. Secondly, it is contended that a policy of insurance is not an interest within sub-s. (1) (d). We have not been able to appreciate this argument. A policy is plainly property within the scope of s. 2, and we can see no ground for excluding it from sub-s. (1) (d). We are content to adopt the reasoning of PALLES, C.B., in *A.G. v. Robinson* (2), and we do not think any good object would be attained by attempting to further elaborate it. Thirdly, assuming that this particular policy is capable of being brought within sub-s. (1) (d), it is contended that it was not

"purchased or provided by the deceased either by himself alone or in concert or by arrangement with any other person."

It is clear that, apart from the statute of George III, the policy was the property of Sir Henry alone, and that Sir Cuthbert had no right to or interest in it. The marriage settlement is framed on this footing. Sir Henry "as settlor" assigns the policy to the trustees upon the usual trusts. He also brings into settlement stocks and securities of large amount as well as real estate. We can draw no distinction between the policy and this other property. Who "provided"

A this property? The answer must be the father and not the son. The son "provided" some other property of his own, including a policy on his own life in another office, which we only mention to show that it has not been overlooked, but he did not "provide" this property. We are not prepared to hold that on a marriage settlement everything brought into settlement on the husband's side by his father or other relatives can properly be said to be provided by the husband in concert or by arrangement with his father or other relatives. The Finance Act must, of course, be construed fairly, but it is for the Crown to establish that a particular case falls within the language used, and we think the attempt fails in the present case. It is, perhaps, worth noting that, if Sir Henry, instead of being father of Sir Cuthbert, had been his uncle or had stood in loco parentis, it is clear that succession duty would be payable under the settlement, as on a succession from him, it being a disposition by him as predecessor. That the policies should be "provided" by the son, so as to be liable to estate duty, and at the same time "disposed of" by the legal owner of the policy, so as to be liable to succession duty at a rate based on the relationship of the predecessor, would be a strange result. In our opinion estate duty is not payable in respect of this policy money, but succession duty at 1 per cent. will be payable on the death of Lady Peek, who is now entitled for life to the income arising from the investment of the policy money.

In the view which we take it is not necessary to consider the precise meaning of the words "in concert or by arrangement with any other person." Section 15 (3) indicates one class of cases to which the words might apply, and we conceive they might apply to a case where a husband settles a policy on his own life, and provision is made in the settlement for paying future premiums by the trustees out of the income of the trust property. This is by no means an unusual provision, and other examples might be given. An attempt was made to bring the case within sub-s. (1) (d) by referring to a letter written by Sir Henry to the office with the proposal, in which he said :

"I effect the insurance in my own name, but with a view to giving him a paid-up policy for marriage settlement or otherwise if after he shall have attained his majority his conduct is quite satisfactory to me."

But this expression of intention was of no moment. The intention was never carried into effect. It gave the son no right or interest in the policy. It cannot alter or enlarge the rights of the Crown, which must depend on the terms of the marriage settlement alone. The appeal must be allowed.

Appeal allowed.

Solicitors : *Solicitor of Inland Revenue ; Johnsons, Long & Co.*

[*Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.*]

BERRY v. GAUKROGER

[Court of Appeal (Vaughan Williams, Bowen and Collins-Hardy, L.J.J.), April 21, 22, May 5, 1903]

[Reported [1903] 2 Ch. 116; 72 L.J.Ch. 435; 88 L.T. 621; 51 W.R. 440; 19 T.L.R. 445; 47 Sol. Jo. 400]

Estate Duty—Incidence—Legacies payable on cesser of life interest—Finance Act, 1894 (57 & 58 Vict., c. 30), s. 8 (4).

A testator, who died in August, 1869, by his will devised and bequeathed all his residuary real and personal estate to trustees on trust to sell and convert the same and pay his funeral and testamentary expenses and debts, and to invest the residue, and out of the income to pay his wife an annuity during her life, and after her death to stand possessed of the trust funds on trust to pay thereout legacies amounting to £9,000, and then to divide the residue among specified persons. On the death of the widow in November, 1900, estate duty became payable on so much of the trust funds as represented proceeds of sale of real estate. On the question as to the incidence of that estate duty as between the pecuniary legatees and the residuary legatees,

Held: each of the pecuniary legatees and the residuary legatees took a portion of the property for which the executors were not accountable, and, accordingly, under the Finance Act, 1894, s. 8 (4), each became accountable for the estate duty on a rateable proportion of the total fund passing.

Notes. Applied: *Re Charlesworth's Trust, Tew v. Briggs*, [1912] 1 Ch. 319; *Re Hicklin, Public Trustee v. Hoare*, [1916-17] All E.R. Rep. 658. Explained: *Re Portman (No. 2)*, [1925] Ch. 294. Distinguished: *Re Drake, Drake v. Wilson*, [1925] All E.R. 664; *Re Loner, Public Trustee v. Victoria Hospital for Children*, [1929] 1 Ch. 731; *Re Fuchs Will Trusts, Westminster Bank, Ltd., v. Choe*, [1944] 1 All E.R. 338. Considered: *Re Cassel's Will Trusts, Public Trustee v. A.-G.*, [1946] 1 All E.R. 704; *Re Lander, Lander v. Lander*, [1951] Ch. 346; *Re McNeill (deceased), Royal Bank of Scotland v. Macpherson* [1957] 3 All E.R. 508. Referred to: *De Quetterville v. De Quetterville* (1905), 92 L.T. 758; *Re Spencer Cooper, Poë v. Spencer Cooper*, [1908] 1 Ch. 130; *Re Grant, Norrison v. United Kingdom Temperance and General Provident Institution* (1915), 59 Sol. Jo. 316; *Re Smyth, Edwards v. Smyth*, [1917] 2 Ch. 331; *Re Tattersall's Settlement, Public Trustee v. Tattersall*, [1918] 2 Ch. 243; *Re Northcliffe, Arncliffe v. Hudson*, [1928] All E.R. Rep. 310; *Re Kede Estates, Arding v. Sneyd*, [1952] 2 All E.R. 164.

As to apportionment of estate duty according to beneficial interests, see 15 HALSBURY'S LAWS (3rd Edn.) 137 et seq.; and for cases see 21 Digest (Repl.) 81 et seq. For the Finance Act, 1894, s. 8 (4), see 9 HALSBURY'S STATUTES (2nd Edn.) 366.

Cases referred to:

- (1) *Re Countess of Orford, Cartwright v. Duc del Balzo*, [1896] 1 Ch. 257; 65 L.J.Ch. 253; 44 W.R. 383; sub nom. *Re Earl of Orford, Newell v. Cartwright, Cartwright v. Duc del Balzo*, 73 L.T. 681; 21 Digest (Repl.) 85, 281.
- (2) *Robertson v. Broadbent* (1883), 8 App. Cas. 812; 53 L.J.Ch. 266; 50 L.T. 343; 32 W.R. 205, H.L.; 23 Digest (Repl.) 389, 4594.
- (3) *Bothamley v. Sherson* (1875), L.R. 20 Eq. 304; 44 L.J.Ch. 589; 33 L.T. 150; 23 W.R. 848; 23 Digest (Repl.) 390, 4608.
- (4) *Re Bourne, Martin v. Martin*, [1893] 1 Ch. 188; 62 L.J.Ch. 69; 67 L.T. 586; 41 W.R. 70; 37 Sol. Jo. 10; 3 R. 52; 21 Digest (Repl.) 67, 274.

Also referred to in argument:

Earl Cowley v. L.R. Comrs., [1899] A.C. 198; 68 L.J.Q.B. 435; 80 L.T. 361; 63 J.P. 436; 47 W.R. 525; 15 T.L.R. 270; 43 Sol. Jo. 348, H.L.; 21 Digest (Repl.) 11, 36.

Re Campbell, [1902] 1 K.B. 113; 71 L.J.K.B. 160; 85 L.T. 708; 18 T.L.R. 86, C.A.; 21 Digest (Repl.) 93, 435.

Re Webber, Gribble v. Webber, [1896] 1 Ch. 911; 65 L.J.Ch. 541; 74 L.T. 244; 41 W.R. 489; 12 T.L.R. 298; 40 Sol. Jo. 388; 21 Digest (Repl.) 67, 275.

Re Duke of St. Albans, Loder v. Duke of St. Albans, [1900] 2 Ch. 873; 69 L.J.Ch. 863; 49 W.R. 74; 44 Sol. Jo. 690; 21 Digest (Repl.) 93, 434.

Re Margon-Wilson, Wilson v. Margon-Wilson, [1900] 1 Ch. 565; 69 L.J.Ch. 310; 82 L.T. 171; 48 W.R. 338; 16 T.L.R. 256; 44 Sol. Jo. 312, C.A.; 21 Digest (Repl.) 95, 451.

Re Chisholm, Goddard v. Brodie, [1902] 1 Ch. 457; 71 L.J.Ch. 289; 86 L.T. 183; 21 Digest (Repl.) 90, 416.

Re Power, Power v. Howell (1898), 47 W.R. 183; 43 Sol. Jo. 63; 21 Digest (Repl.) 72, 310.

Wade v. Wade, [1898] 2 Ch. 276; 67 L.J.Ch. 527; 78 L.T. 808; 47 W.R. 43; 42 Sol. Jo. 592; 21 Digest (Repl.) 74, 329.

Re Gray, Gray v. Gray, [1896] 1 Ch. 620; 65 L.J.Ch. 462; 74 L.T. 275; 60 J.P. 314; 44 W.R. 406; 12 T.L.R. 270; 21 Digest (Repl.) 83, 380.

Re Shaw, Tucket v. Shaw, [1895] 1 Ch. 343; 64 L.J.Ch. 283; 71 L.T. 873; 43 W.R. 315; 13 R. 185; 21 Digest (Repl.) 85, 386.

Re Croft, Deana v. Croft, [1892] 1 Ch. 652; 61 L.J.Ch. 190; 66 L.T. 157; 40 W.R. 425; 8 T.L.R. 309; 36 Sol. Jo. 255; 21 Digest (Repl.) 191, 1123.

Re Saunders, Saunders v. Gore, [1898] 1 Ch. 17; 67 L.J.Ch. 55; 77 L.T. 450; 46 W.R. 180; 42 Sol. Jo. 65, C.A.; 21 Digest (Repl.) 162, 939.

Maure v. Dixon (1880), 15 Ch.D. 566; 49 L.J.Ch. 807; 29 W.R. 12; 43 Digest 824, 2679.

Appeal by residuary legatees from an order of BUCKLEY, J., dated Feb. 25, 1903.

The application in this matter was made by a summons in an administration action of *Berry v. Gaukroger*, commenced in 1874 by the defendant John Berry, the surviving trustee of the will of the testator John Berry, and also by the legatees named in orders dated Mar. 12, 1901, and July 18, 1901, that so much of a sum of £2,154 19s. 8d. New Consols in court to the credit of the action account of "Ruth Sugden annuity" as would raise £223 14s., being the amount of estate duty paid on Oct. 2, 1901, in respect of the several legacies directed to be paid by the order of Mar. 12, 1901, and the proceeds paid to the applicants in such proportions as they have respectively paid the same.

The testator died on Aug. 25, 1869, having by his will, made the same day, after bequeathing certain legacies, devised and bequeathed his residuary real and personal estate to trustees, on trust to sell the same, convert and pay his funeral and testamentary expenses and debts, and the legacies thereinbefore bequeathed, and to invest the residue, and out of the income to pay his wife an annuity of £500 a year, and to pay some other small annuities, and he directed that after his wife's death his trustees should stand possessed of the trust funds on trust to pay thereout certain legacies, amounting in the aggregate to £9,000, and then to divide the residue among certain persons named. An administration action was brought, and in the action a sum of Consols was carried over to the account of the widow's annuity. The widow died on Nov. 16, 1900. By an order dated Mar. 12, 1901, payment of the legacies was ordered, and inquiries were directed to ascertain the parties entitled to the residue. Under the Finance Act, 1894, s. 1, estate duty became payable on the widow's death on so much of the fund as represented proceeds of sale of real estate of John Berry, in that it was settled property in which the deceased (the widow) had an interest ceasing on her death. Having regard to the Finance Act, 1894, s. 21 (1), estate duty was not payable so far as the fund represented personal estate. The proportion of the fund representing real estate was ascertained or taken to be twelve-seventeenths of the total amount. The estate duty on twelve-seventeenths of the £9,000, being the amount required to pay the legacies, was £223 14s. That had been paid. The legacy duty had also been

paid. Payment had then been made to the legatee of the difference between their respective legacies and their respective proportions of the £223 14s. and of the legacy duty. The pecuniary legatee of the £9,000 had thus borne the £223 14s. and also the legacy duty on their legacies. BUCKLEY, J., held that the residuary legatees were obliged to bear the estate duty referable to the legacies.

J. Austen-Cartmell for the residuary legatees.

W. Baker for the pecuniary legatees.

Cur. adv. vult.

May 5, 1903. The following judgments were read.

VAUGHAN WILLIAMS, L.J. I agree with BUCKLEY, J., as to the question which we have to propose to ourselves—which is, whether the pecuniary legatees ought to bear the £223 14s., or whether that amount ought to be thrown on the annuity fund, or the portion of it representing the real estate, so that the residuary legatees and not the pecuniary legatees shall bear it. It is to be recalled that the property, in respect of which the question of the incidence of estate duty arises in this case, is property of which the deceased was not competent to dispose, and that in respect of such property the scheme of the Act is to tax, not the interest which ceased with the death, but the property out of which the interest was enjoyed. Section 8 of the Finance Act provides for the collection of estate duty, and sub-s. (4) of that section provides for cases in which property passes on the death of the deceased, and his executor is not accountable for the estate duty in respect of that property. That is admittedly the present case. In such a case it is provided that

"every person to whom any property so passes for any beneficial interest in possession, and also, to the extent of the property actually received or disposed of by him, every trustee, guardian, committee, or other person in whom any interest in the property so passing or the management thereof is at any time vested, and every person in whom the same is vested in possession, by alienation or other derivative title, shall be accountable for the estate duty on the property."

In my judgment, each of the pecuniary legatees, and also the residuary legatees, all took on the death of the testator a portion of the property for which his executor was not accountable, for a beneficial interest in possession, and as such became accountable for the duty, and, therefore, debtors to the Crown for the duty. In the present case I do not think it is necessary to decide whether each person taking a beneficial interest in possession became accountable for the duty on the whole £9,000, or only to the extent of his beneficial interest, but I am inclined to think only to the extent of his beneficial interest. By s. 9 (5), any

"person authorised or required to pay the estate duty in respect of any property shall, for the purpose of paying the duty or raising the amount of the duty when already paid, have power"

to raise the amount by sale or mortgage of the property. This sub-section applies to all property passing, whether "free property" of the testator or not. Section 9 (6) provides that

"a person having a limited interest in any property who pays the estate duty in respect of that property shall be entitled to the like charge as if the estate duty in respect of that property had been raised by means of a mortgage to him."

I agree with BUCKLEY, J., that sub-s. (6) would give this charge to any person accountable under s. 8 (4).

It was argued before BUCKLEY, J., that s. 14 (1) would enable a person accountable under s. 8 (4) to recover an amount equal to the proper rateable part of the estate duty from persons to whom property passes for any beneficial interest in

possession within the meaning of s. 8 (4), as being persons entitled to a charge on such property. I suppose the argument was meant to apply to a case in which the person authorised or required to pay the estate duty had paid that duty on the whole sum out of which the interests in possession passed on the death of the deceased. I doubt, however, whether, even in such a case, the persons taking the interest in possession would fall within the words "the person entitled to any sum charged on such property." I will assume the negative for the purpose of my judgment; but, notwithstanding my agreement in most of the premises arrived at by BUCKLEY, J., I cannot agree in his ultimate conclusion. It seems to me that the moment you find that under s. 8 (4) every person to whom property (other than free property of the testator) passes for a beneficial interest in possession (which includes these pecuniary legatees) is accountable for the duty, be it on the whole fund or his portion of the fund, and therefore pro tanto a debtor to the Crown, the court ought in the due course of administration to take the whole duty out of the fund, and to deduct that duty rateably from the legacy of each legatee and from the residue alike. If this were not so, the ultimate incidence of the estate duty on the fund passing would depend on the accident of which of the parties accountable was in fact called on to pay, or on the fact that no one was called on to pay, but that payment was left to be determined in due course of administration. It seems to me that the pecuniary legatees cannot relieve themselves of the burden of a rateable part of this duty unless they can show that, outside the Finance Act, there is something which entitles them to have, as against the residuary legatees, the amount of their legacies free of estate duty. In the first place, the whole scheme of the Finance Act, so far as it relates to property passing on the death of the deceased in respect of which his executor is not responsible for estate duty, is to tax the property itself so passing, and to make the estate duty a first charge. The decision of NORTH, J., in *Re Countess of Orford, Cartwright v. Duc del Balzo* (1), seems to me to be a distinct authority on the construction of the Finance Act, 1894, that in all cases where the duty becomes payable for which the executor is not made accountable by s. 6 (1) the duty must be paid ultimately by the persons beneficially entitled in proportion to their shares, and it follows that the duty cannot be thrown wholly on the residue. NORTH, J., although he thought s. 14 supported the conclusion he was arriving at, nevertheless arrived at his judgment independently of s. 14, and, I think, independently of the fact that in that case the funds were settled on trust to invest in land.

It was argued that the residuary legatees ought to bear the estate duty in this case by reason of the rule as between specific and residuary legatees laid down by LORD SELBORNE in *Robertson v. Broadbent* (2) and *Bothamley v. Sherson* (3), and it was said also that the estate duty was analogous to probate duty, and that the ultimate incidence of this estate duty ought to be determined as if it were probate duty, and *Re Bourne, Martin v. Martin* (4) and the judgment of STIRLING, J., were cited in support of this contention. But I do not think that the observations of STIRLING, J., are applicable to the present case, for it seems to me that estate duty in a case in which property passes on the death of the deceased, and his executor is not accountable for estate duty, is not analogous to probate duty, but rather to succession duty. Moreover, whatever may be the analogy, it seems to me that the scheme of the Finance Act in cases in which the "executor as such" is not accountable for estate duty, and in particular the terms of s. 8 (4), making the person to whom such property passes for a "beneficial interest in possession" accountable, exclude the analogy of probate duty, and also any rule which governs the incidence of charges and costs between specific legatees and the residuary legatees inter se.

ROMER, L.J.—I also think that the appeal must succeed. I agree that the onus is on the residuary legatees to show that under the Finance Act, 1894, a rateable part of the estate duty is cast on the pecuniary legacies payable out of the proceeds

of sale of the realty. If the Act contained no provision to that effect, then the residuary legatees, being only entitled to the residue of the proceeds, could not throw any part of the duty on the pecuniary legatees. On the other hand, if the Act does cast on the pecuniary legatees a proportionate part of the duty, there is nothing which would justify the court in holding that, as between the residuary and pecuniary legatees, the former must indemnify the latter against that proportionate part. I think that in cases like the present the Act does cast a rateable part of the duty on the pecuniary legatees. Section 8 (4) applies. In my opinion the pecuniary legacies are "property" which passed on the death of the annuitant to the legatees for a "beneficial interest in possession." And in this case the interest in possession is an absolute interest. In my view the word "property," which is used in different parts of this sub-section, does not in every part mean of necessity exactly the same property. I think the section has been expressly framed so as to make it plain. For example, the words "any property" do not mean of necessity the whole of the property which passes on the death within the meaning of the phrase that opens the sub-section. In the present case, I think that the pecuniary legacies come within the words "any property," and, that being so, I think that under s. 9 (1) the duty assessable as against these legacies became a first charge on the legacies as against the legatees. And, as above observed, I find nothing in the Act or the will which would justify the court in freeing the pecuniary legatees from this charge by making the residuary legatees indemnify them from it.

In this view it becomes unnecessary for me to consider the effect of s. 14 (1) of the Act. I may add that in my view, inasmuch as the pecuniary legatees became absolutely entitled to the legacies, they could under s. 8 (4) be made liable by the Crown to pay, not all the duty on the whole proceeds of the realty, but only the duty chargeable as against the pecuniary legacies. On the other hand, though it is not necessary for me to determine the point, I incline to the view that not only the trustees of the whole fund, but also the beneficiaries who became entitled to the residue, could at the instance of the Crown have been made to pay the whole duty on the fund. But in that event there would have been, under the general law applicable to such cases, a right of adjustment and recoupment as between the residuary and pecuniary legatees by treating the whole duty as rateably payable by the residuary and pecuniary legacies. And, moreover (though, as above stated, it is not necessary for me to determine the point), I may add that s. 9 (6) appears to me to allow the residuary legatees, paying the whole duty (they having only a limited interest in the fund regarded as a whole), to recoup themselves as to the part assessable against the pecuniary legatees by obtaining a charge which would rateably embrace the interest of the pecuniary legatees in the fund.

COZENS-HARDY, L.J.—In my opinion, the judgment of BUCKLEY, J., cannot be supported. It seems plain that the annuity fund was property passing on the death of the annuitant within the meaning of the Finance Act, and in so far as the annuity fund arose from the proceeds of sale of real property it was property in respect of which estate duty became payable, notwithstanding s. 21 (1). The estate duty has been paid by the trustees, and the question is simply whether the legatees of the £9,000 are bound to contribute their rateable proportion of the estate duty, or whether the whole must be borne by the persons entitled to the residue of the fund. Before BUCKLEY, J., the argument for the residuary legatees seems to have been rested mainly on s. 14 (1), the legacies being treated as charged on the fund belonging to the residuary legatees, and the legatees being, therefore, bound to repay. I doubt whether this contention was well founded, but it is not in my view necessary to decide this, for I prefer to base my judgment on s. 8 (4). I think that the legacies must be regarded as property which passed to the legatees for a beneficial interest in possession on the death of the annuitant. If so, the legatees were accountable to the Crown for the estate duty. It is true that the Crown, having the right to demand the duty from other persons—viz., the trustees—have

and prevailed against the legatees, but that, I think, can make no difference. It is an old and well-established principle of equity that when several persons are liable in respect of one and the same obligation the rights of the parties inter se are not affected by the circumstance that one of those persons has been called on to discharge and has discharged the obligation. This right of contribution must, I think, prevail here, and, although the money has been found out of the entire fund, it ought to be contributed rateably according to the beneficial interests in the fund, or, in other words, the legatees must bear their rateable proportion. This is, I think, exactly the sort of case contemplated by s. 14 (1). The only other question is whether there is anything in the language of the will sufficient to exempt the legatees from this liability to contribute. I can find nothing in the use of the word "legacy" to justify this conclusion. The charge created by the Finance Act, 1894, s. 9 (1), was, of course, not in contemplation by the testator, who died many years before the Finance Act. It is a fresh burden, and it must be borne rateably according to the beneficial interest of the parties in the fund.

Appeal allowed.

Solicitors: *James, Mellor & Coleman*, for *Learoyd & Co.*, Halifax; *Williamson, Hill & Co.*, for *England & Co.*, Halifax.

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

Re EARL HOWE'S SETTLED ESTATES. EARL HOWE v. KINGSCOTE

[COURT OF APPEAL (Sir Richard Henn Collins, M.R., Romer and Cozens-Hardy, L.JJ.), April 2, 1903]

[Reported [1903] 2 Ch. 69; 72 L.J.Ch. 461; 88 L.T. 438; 51 W.R. 468; 19 T.L.R. 386; 47 Sol. Jo. 434]

Estate Duty—Payment—Interest on duty—Settled fund—Duty being paid by instalments—Right of tenant for life to charge interest on capital of fund—Finance Act, 1894 (57 & 58 Vict., c. 30), s. 9 (5).

The Finance Act, 1894, s. 9 (5), does not empower a tenant for life to charge the capital of the settled property with interest payable on estate duty in respect of that property which is being paid by instalments.

Notes. Considered: *Re Egmont's Settled Estates, Lefroy v. Egmont*, [1912] 1 Ch. 251. Referred to: *Re Hall, Holland v. A.-G.*, [1941] 2 All E.R. 358.

As to powers to raise the amount of estate duty and interest, see 15 HALSBURY'S LAWS (3rd Edn.) 142 et seq., and for cases see 21 DIGEST (Repl.) 89, 90. For the Finance Act, 1894, s. 9 (5), see 9 HALSBURY'S STATUTES (2nd Edn.) 371.

Case referred to:

(1) *Re Fish, Lea v. Fish* (1897), 103 L.T.Jo. 267; 21 Digest (Repl.) 90, 417.

Appeal by the tenant for life from an order of BUCKLEY, J., dated Mar. 12, 1903, made on a summons issued by the fourth Earl Howe as tenant for life in possession of the family estates under an indenture of re-settlement dated May 31, 1883, asking whether he was entitled to raise by sale, mortgage, or charge of the estates (i) the instalment of the estate duty payable on the death of the third Earl Howe in respect of the settled estates due on Sept. 25, 1902; and (ii) the interest which became payable on that date in respect thereof on such instalment and on future instalments.

On the death on Sept. 25, 1900, of the third Earl Howe property settled by a deed of May 31, 1883, of which the third earl was tenant for life, devolved for an

settle for life in possession on the plaintiff, who was the next tenant for life in A remainder. The duty was assessed at £50,463 2s. 8d., and the plaintiff elected to pay it by eight annual instalments, the amount of each instalment being £6,270 7s. 9d. Under s. 6 (8) of the Finance Act, 1894, the first instalment was payable at a year from the death, viz., on Sept. 25, 1901, without interest. The second instalment was payable at the end of the second year, viz., on Sept. 25, 1902, with interest on the unpaid portion of the duty added to the instalment, the interest being £1,316 15s. 8d. BUCKLEY, J., held that the tenant for life was not entitled to charge the interest payable on the duty against the capital of the settled property. It was argued that the instalment of estate duty was not payable out of the capital.

R. J. Parker and G. R. Northcote for the tenant for life.

Ashworth James for the tenant for life in remainder.

Kenyon Parker for the trustees of the settlement.

SIR RICHARD HENN COLLINS, M.R.—This is an appeal from BUCKLEY, J., on a question arising under the Finance Act, 1894. Counsel for the tenant for life say in effect that they will be satisfied with nothing short of a declaration that under s. 9 (5) of the Act, the tenant for life has the right to charge the inheritance with interest on the sum payable as estate duty under the Act. I am certainly not prepared to go that length.

It appears to me that the reasons given by BUCKLEY, J., in his exhaustive judgment have settled the question, and that his decision is right. When one comes to read the sub-section, it appears to me that the contention on behalf of the tenant for life leaves out the most crucial part of it. No doubt the Finance Act, 1894, does allow estate duty to be raised and paid by instalments under s. 6 (8), and the tenant for life may pay it by those instalments. The particular point that now arises is whether the tenant for life, having power to raise the duty itself by a charge on the inheritance, is entitled also to raise the interest payable on that duty, having regard to the fact that the duty is paid by instalments, the interest payable in the present case amounting to £1,316 15s. 8d. That question depends on the construction of s. 9 (5), which is in these terms: [HIS LORDSHIP read the sub-section, and continued:] It has not been disputed by counsel for the tenant for life that it is the duty of the tenant for life to keep down the interest on charges or that that is a primary obligation on him. Ought he under this Act to keep down the interest on the instalments, or is he entitled to charge the interest as well as the instalments on the inheritance? According to the words at the end of the sub-section, the right conferred on him is to raise "any interest and expenses properly paid or incurred by him" in respect of this duty: and, unless the tenant for life who comes to ask to be allowed to raise the interest can aver and prove that the same have been "properly incurred" by him, he is not entitled to raise the amount.

How can it be said that a tenant for life has power to impose on the persons entitled in remainder the obligation to pay money which he ought himself to pay? How can it be said that interest has been "properly incurred" by him when he has not done that which he ought to do—that is, pay the money himself? This shortly put appears to be the principle on which BUCKLEY, J., has decided this case. It may be that other persons have a right to raise the interest on a different footing from a tenant for life. But when one comes to the case of a tenant for life it is impossible for the court to dismiss from its mind this latter part of the sub-section, and to say that without inquiry and as an abstract proposition the tenant for life can be allowed to charge the inheritance with the amount of interest on estate duty. Counsel say that to hold that a tenant for life cannot charge the inheritance with interest will be inconvenient to the insurance companies or banks who are in the habit of making advances to tenants for life to enable them to pay the duty and interest. But it is a matter of inquiry as to whether in any particular case

A the tenant for life has brought himself within the power given him by the sub-section to charge the interest by showing that the interest has been "properly incurred." The interest to be chargeable must of necessity have been "properly incurred," and the obligation is on the tenant for life seeking to charge it on the inheritance to show that it has been "properly incurred." There is nothing before the court in the present case to show that the interest has been properly incurred, and no special circumstances have been brought to the notice of the court as a reason for allowing the tenant for life to charge the inheritance with the interest. It is not necessary for us now to state what special circumstances would justify the court in allowing a tenant for life so to charge the interest, but certainly it is impossible for us to make the declaration asked for here by this tenant for life, that he has an unqualified power of raising the interest by charging it on the inheritance. I do not mean to say that there might not be cases of hardship in which the court would hold that interest had been "properly incurred" by the tenant for life within the sub-section, but no such case has been made here. I entirely agree with the reasoning of BUCKLEY, J., and in my opinion the conclusion at which he has arrived is right. The appeal must, therefore, be dismissed.

D **ROMER, L.J.**—I have come to the same conclusion. Under s. 6 (8), a tenant for life has the option given him of paying the estate duty by instalments, and, if he exercises that option, he has, on paying the first instalment of duty, to pay also interest on the unpaid portion of the duty. Unless under some very special circumstances, it is, in my opinion, the clear duty of the tenant for life as between himself and the remaindermen to keep down the interest which has to be paid on the unpaid portion of the duty, and he is not entitled to cast the duty of paying that interest on the remaindermen. It is a clear obligation cast on him alone, and one which, to my mind, he is bound to perform. I can find nothing in the Act which would justify the tenant for life, who is bound to pay the interest as between himself and the remaindermen, by exercising any of the general powers conferred on him by the Act to evade the obligation on him to pay the interest and enable him to cast that obligation on the estate. Counsel say that s. 9 (5) gives the tenant for life that power. In my opinion it does not. That sub-section is a general clause giving a general power to various persons, among whom, I agree, is a tenant for life; but a general power so given would not in my opinion justify a tenant for life exercising his power so as unduly to favour himself in the way he would do if he were allowed to do what he now asks. In my opinion both his duty and his obligation prevent him from exercising his power so as to give himself an undue advantage. There is nothing in the necessities of the Crown to induce us to give a tenant for life such a power as is now asked for—namely, a power to exercise the provisions of the sub-section in his favour so as to give himself something to which he is not entitled.

H Then there is this to be considered, that this application is an application coming from the tenant for life himself asking to be allowed to exercise this power for his own benefit. I think the court is entitled to say: "We will not give you the direction you ask for, because, although there is a general power given by the Act to various persons, that does not justify you in asking us to give a direction which will enable you to exercise that general power for your own benefit." We are not concerned with the position of any person who can say he has advanced money without notice of any duty on the part of the tenant for life in respect of raising the interest. Such person will be entitled to have his position considered, but all I say is that a tenant for life is not the person entitled to come and ask for it.

I It is said that our decision will cast doubts on the title of banks or insurance companies who are in the habit of lending money for the payment of estate duty on the security of the estate. I am by no means sure that a person can safely lend money to a tenant for life on the security of a charge on the inheritance to enable him to pay the interest on estate duty. If the tenant for life says to such a

person, "I am tenant for life, and I want to borrow the money to pay the interest A on the instalments of estate duty on the security of a charge made by me on the inheritance, which I am entitled to do as between tenant for life and remainderman." In my opinion the person lending the money on such a security would not have a good title. However, a person who had advanced money without such notice would be entitled to say that he had a good charge for the amount of principal and interest, but then the remainderman would be entitled to require the tenant for life, who had so improperly raised money which he ought himself to have paid at once to indemnify the estate.

The result, therefore, is that this tenant for life is asking us to decide that he is entitled to exercise the power in his own favour, while if he had so exercised it himself without coming to the court, he would have had to indemnify the estate at the instance of the remainderman. He has no right to come here and ask for any such general direction. In my opinion the decision of BUCKLEY, J., was right, and this appeal must be dismissed.

COZENS-HARDY, L.J.—I am of the same opinion, and will only add a few words. The question is: What are the rights of a tenant for life who pays estate duty? They are defined by s. 9 (6), which says that

"a person having a limited interest in any property, who pays the estate duty in respect of that property, shall be entitled to the like charge as if the estate duty in respect of that property had been raised by means of a mortgage to him."

In other words, he is to have a charge of the same nature and to the same extent as if a mortgage of the estate had been given him by the executor under sub-s. (5). How can it be said that a tenant for life finding money for the payment of the instalments of estate duty could under sub-s. (6) take a mortgage not only for capital, but also for the interest which he ought to keep down himself? It seems to me that reduces the contention to an absurdity. The tenant for life cannot under that sub-section himself get a charge in respect of interest which he ought to have kept down. Can it be said, then, that he is able to give a stranger a charge greater than that which he himself would have been entitled to? I do not think so.

The stress of the argument rests on sub-s. (5), which enables a tenant for life to raise by sale, mortgage, or charge not only the duty, but also "any interest and expenses properly paid or incurred by him in respect thereof." It is suggested that those words would be well satisfied by treating them as referring to a person who, not being under a personal liability to pay, is authorised to pay the duty, and may, therefore, be well entitled to say: "I have nothing to do with the limitations of the settlement. I have paid the Crown, and insist on receiving back the whole money and interest." But it occurs to me also that the words "interest properly incurred" may have reference to some part of the Act as amended by the Act of 1896. Looking at s. 6 (6) of the Act of 1894, the section providing for the collection and recovery of estate duty, we find it provided that

"Interest at the rate of 3 per cent. per annum on the estate duty shall be paid from the date of the death up to the date of the delivery of the Inland Revenue affidavit or account, or the expiration of six months after the death, whichever first happens, and shall form part of the estate duty."

Those latter words were struck out by Part 3 of the Schedule to the Finance Act, 1896. I observe that NORRIS, J., held in *Re Fish* (1) that the interest of 3 per cent. from the date of the death made payable by s. 6 (6) of the Act of 1894, as well as interest for that period on arrears of estate duty payable under s. 8 (10), was payable out of capital. Therefore, on the face of the Act there is to be found at least one instance in which interest might become payable out of capital. That s. 8 (10) provides that "interest on arrears of estate duty shall be paid as if they were arrears of legacy duty." That, again, is repealed by s. 18 of the latter Act, which provides

A that simple interest at 3 per cent. shall be payable on all estate duty from the date of the death, or where the duty is payable by instalments, or becomes due at any time later than six months after the death, from the date at which the first instalment or the duty becomes due, and shall be recoverable in the same manner as if it were part of the duty.

B I am, therefore, of opinion that the view taken by BUCKLEY, J., and by the Master of the Rolls and ROMER, L.J., of s. 9 (5) is right. It seems to me to be contrary to all principle to allow a tenant for life to charge on the estate interest which by the language of the Act and by the policy of law is payable by him. If any case of hardship arises in consequence of a tenant for life being called on to pay the interest or estate duty, an appeal must be made, not to the language of the Act, but to the general jurisdiction of the court; but, except in cases of that kind, I am clearly of opinion that a tenant for life cannot avail himself of the general power of charging given by the Act by exercising it for his own benefit. I agree, therefore, in thinking that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Trower, Still, Freeling & Parkin.*

[*Reported by P. S. OSWALD, Esq., Barrister-at-Law.*]

MILBANK v. MILBANK

[COURT OF APPEAL (Sir Nathaniel Lindley, M.R., Rigby and Vaughan Williams, L.JJ.), February 14, 1900]

[*Reported* [1900] 1 Ch. 376; 66 L.J.Ch. 287; 82 L.T. 63; 48 W.R. 339; 44 Sol. Jo. 259]

Practice—Particulars—Documents—Contents—Privileged documents—R.S.C., Ord. 19, rr. 6, 7, Ord. 31, r. 15.

The plaintiff brought an action claiming that she was entitled (subject to a mortgage) to certain freehold land. The defendant denied the plaintiff's title, pleading by his defence that he had purchased the land in good faith and for valuable consideration from the mortgagees, who had sold in the valid exercise of their statutory power of sale, and he had no notice of any prior claim of the plaintiff's. He also pleaded that he had re-mortgaged the land to the mortgagees. The defendant made an affidavit of documents in which he claimed privilege from production for "documents numbered 1 to 21 in a bundle marked A" on the ground that they related solely to his own case. Later, he stated that these documents included the deeds of the sale and re-mortgage referred to in the defence. The plaintiff took out two summonses asking for particulars of the sale and re-mortgage and for the production and inspection of the deeds relating to those transactions.

Held: the plaintiff was entitled to particulars of the transactions, which were insufficiently pleaded in the defence, even though the defendant's affidavit made out a good claim for privilege from producing the deeds relating to those transactions, for the question of production was irrelevant to the question of particulars; and, therefore, while the plaintiff was not entitled to inspection of the deeds, she was entitled to be given the date of and the consideration for the sale, and the date of the re-mortgage and for how much it was given.

Notes. Referred to: *Monk v. Redwing Aircraft Co., Ltd.*, [1942] 1 All E.R. 133; *Forshaw v. Baddeley Electrical Equipment, Ltd.*, [1942] 2 All E.R. 278.

As to further particulars, see 50 HALLBURY'S LAWS (2d Edn.) 80 et seq., and for cases see DIGEST (Practice) 34 et seq. As to inspection of documents, see 12 HALLBURY'S LAWS (3rd Edn.) 34 et seq., and for cases see 18 DIGEST (Repl.) 63 et seq. For R.S.C. Ord. 19, r. 6 and r. 7 and Ord. 31, r. 15, see THE ADVERSE PRACTICE.

Cases referred to :

- (1) *Taylor v. Batten* (1878), 4 Q.B.D. 85; 48 L.J.Q.B. 72; 39 L.T. 408; 27 W.R. 106, C.A.; 18 Digest (Repl.) 46, 374.
- (2) *Budden v. Wilkinson*, [1893] 2 Q.B. 432; 63 L.J.Q.B. 32; 69 L.T. 427; 41 W.R. 657; 37 Sol. Jo. 649; 4 R. 525, C.A.; 18 Digest (Repl.) 46, 375.
- (3) *Morris v. Edwards* (1890), 15 App. Cas. 309; 60 L.J.Q.B. 292; 63 L.T. 16; H.L.; 18 Digest (Repl.) 47, 377.

Also referred to in argument :

- Bewicke v. Graham* (1881), 7 Q.B.D. 400; 50 L.J.Q.B. 326; 44 L.T. 371; 29 W.R. 436, C.A.; 18 Digest (Repl.) 46, 376.
- Ind. Coope & Co. v. Emmerson* (1887), 12 App. Cas. 300; 56 L.J.Ch. 980; 56 L.T. 778; 36 W.R. 243, H.L.; 18 Digest (Repl.) 68, 528.
- Roberts v. Oppenheim* (1884), 26 Ch.D. 724; 53 L.J.Ch. 1148; 50 L.T. 729; 32 W.R. 654, C.A.; 18 Digest (Repl.) 53, 405.

Appeal from an order of KEKEWICH, J.

The plaintiff brought an action to establish her title to a freehold estate, alleging by her statement of claim that her deceased husband was (subject to a legal mortgage in fee made in 1883) tenant in tail of the estate, with remainder to the defendant for life, with remainder to his first and other sons in tail, with remainders over; that her husband had created a base fee which had afterwards been enlarged by him into a fee simple; and that by his will he had devised the estate to her. By his defence, the defendant denied the enlargement of the base fee, and pleaded that the mortgagees of the estate, in valid exercise of their statutory power of sale, had sold and conveyed the estate to him for valuable consideration, and that he had purchased the same in good faith and without notice of any claim which the plaintiff's husband, or she as claiming through him, might have had to the estate in priority to the title of the mortgagees, and he relied on his title as bona fide purchaser. He also pleaded that he had re-mortgaged the estate so purchased by him to the same mortgagees; and that the action could not be maintained in their absence. The defendant made an affidavit of documents in which he claimed privilege from production for "documents numbered 1 to 21 in a bundle marked A," on the ground that they related solely to his own case and did not relate to the plaintiff's case or tend to support it, and did not contain anything impeaching the defendant's case.

The plaintiff took out a summons for an order that the defendant should make a further and better affidavit of documents, and in particular set out full and sufficient particulars of the documents so numbered 1 to 21; and, further, that all such documents or other documents (if any) relating directly or indirectly to the alleged purchase and mortgage transactions might be produced for the inspection of the plaintiff. The plaintiff also took out a summons for particulars of (i) the alleged sale and conveyance by the mortgagees, stating when such sale and conveyance were executed, and what was the valuable consideration for the same; and (ii) the alleged re-mortgage, stating when the same was executed, and for how much; and for inspection of the documents. The summonses came on before KEKEWICH, J., on Jan. 20, 1900, when the defendant by his counsel offered to insert in the order a statement that the bundle marked A included the documents in question. KEKEWICH, J., dismissed both summonses holding, on the authority of *Taylor v. Batten* (1) and *Budden v. Wilkinson* (2), that the documents were sufficiently

A specified, and, further, that, there being a sufficient plea of privilege set up by the affidavit, the documents were privileged from production notwithstanding that they were documents of purchase for value without notice, and, accordingly, the plaintiff was not entitled to get the documents by another way, namely, by way of particulars. His LORDSHIP ordered that, as offered by defendant's counsel, words must be put in the order that the defendant stated by his counsel that the documents referred to in paras. 3 and 4 of the defence were comprised in the bundle marked A in the schedule, otherwise there would not be sufficient identification. The plaintiff appealed from that decision.

Warrington, Q.C., and S. O. Buckmaster (with them Mirey) for the plaintiff.

Warmington, Q.C., and John Henderson for the defendant.

C **SIR NATHANIEL LINDLEY, M.R.**—I do not think that there is any real difficulty in this case, although the argument has taken some time; and, of course, questions about documents are very important. The application before us is two-fold, and it is necessary to distinguish one application from the other. It is an appeal from an order of KEKEWICH, J., refusing particulars and refusing inspection.

D I will address myself first of all to the particulars. The plaintiff is claiming a certain estate to which the defendant says that she is not entitled, and he says that he is. He says in his defence, in para. 3, that certain mortgagees whose mortgage was created in 1883, and is in no way disputed, have in the valid exercise of their statutory power of sale sold and conveyed the estate to the defendant for valuable consideration. That is the long and short of it. The plaintiff says: "I want particulars of that transaction." Without going further, I cannot conceive any answer to that. I cannot conceive that this is such a plea as the defendant ought to be allowed to maintain without particulars. I quite agree that the plaintiff might have taken out a summons to strike it out. The plaintiff wants particulars of the transaction which is here referred to. Notwithstanding the ingenious arguments we have heard about production, I cannot see that they have any relevancy at all upon the question as to what particulars the defendants ought to give of the transaction if his pleading is in such a general way as to be technically irregular and insufficient. Therefore it appears to me that, on that short ground, the plaintiff is entitled to the particulars of the transaction. It does not follow that because that transaction is embodied in a deed that the plaintiff is not entitled to particulars of the transaction. It is not asking for a copy of the deed, nor the contents of the deed. G It is a false point altogether to say that because the defendant is not bound to produce a deed he is not bound to answer any question relating to the transaction which is embodied in the deed. It is a totally different thing.

With regard to the inspection there is a greater difficulty, and as the authorities now stand I am not prepared to say that a defendant cannot claim privilege for a number of deeds which are simply described as a bundle of documents. I think H that we have gradually slid into a lax practice about that because by allowing affidavits in that form, and holding them sufficient, a person may render it utterly impossible for anybody to test whether the documents put into the bundle do or do not relate to his case exclusively. I think that there is great danger of persons being able to obtain protection for documents to which they are not really entitled by taking advantage of that form which is comparatively modern. The right to I put documents into bundles was a concession to prevent what was very often a grievous oppression in compelling defendants to set out a whole list of documents which nobody cared anything at all about. But, on the other hand, I think that we have been a little lax in opening the door to enable defendants to obtain protection for documents for which, if they described them properly, they would not be entitled to protection. But as the decisions stand I am not prepared to say that that affidavit now it has been patched up by the statement embodied in the order is not technically sufficient. It was obviously insufficient without that statement for this reason. The pleadings show that the defendant must have deeds which relate to the matter

which he does not decline at all. That made the affidavit obviously wrong, but that has been patched up to this extent that it is now to be treated by me as it has been treated by the court below, as if it is a bundle of documents relating to the litigation. Having regard to the authorities, beginning with *Taylor v. Latimer* (1) and followed by *Morris v. Edwards* (3) and *Cadden v. Wilkinson* (2), I am not prepared to say that these documents are not protected. I rather think that they are. Therefore our order must be in favour of this appeal as regards particulars, but not as regards inspection. Then as regards the costs, inasmuch as the plaintiff has been partly right and partly wrong both here and in the court below, and the whole struggle has been for inspection (there is no question about that), I think that the costs both here and below ought to be costs in the action.

RIGBY, L.J.—I agree in granting the particulars and refusing the inspection.

VAUGHAN WILLIAMS, L.J.—I agree. There are two observations I wish to make. One is that we are now granting the order for these particulars because the allegations in para. 3 are too general. If the facts relied upon in para. 3 had been properly pleaded, they would have been pleaded with more particularity. There has been a deal of discussion about particulars. Particulars at different times in the history of proceedings at law, and in equity, have differed somewhat. Sometimes particulars have been matters that were allowed in order that there might not be a surprise at the trial. Sometimes they have been limitations of the claim, whether it was the claim of the plaintiff or the claim of the defendant, so as to narrow the field of the evidence at the trial. But particulars under the Judicature Acts are allowed for quite a different purpose. They are really supplemental to the pleadings; they are amendments of the pleadings; and these particulars we are ordering to-day are amendments of the pleadings. I do not wish to say anything as to matters which we have not got to decide to-day, as to what may be the effect of r. 15 of Ord. 31, but, speaking for myself, it seems to me that the defendant here will be rash if he considers that these particulars are not a pleading within the meaning of r. 15 of Ord. 31, because it is as an amendment of the pleading that we are really ordering these particulars. It would not, it seems to me, be at all right that the defendant, if he ought to have set out these matters in his defence, should get any advantage, or avoid any liability, by his own failure to have done that which he ought to have done. One word more about r. 19A (2) of Ord. 31. I wish to say of that that I am expressing no opinion as to how far the learned judge in the court below if he had been asked to do so, which he was not, could have looked at the papers in this bundle when an application was made for production and inspection.

Order that the defendant must give particulars of the sale and conveyance, stating when such sale and conveyance were executed and what was the valuable consideration for the same, and, as to the re-mortgage, stating when the same was executed, and for how much.

Order varied accordingly.

Solicitors : *G. M. Saunders ; Burch, Whitehead & Davidsons.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

GEDGE AND OTHERS v. ROYAL EXCHANGE ASSURANCE CORPORATION

[QUEEN'S BENCH DIVISION (Kennedy, J.), April 11, 1900]

Reported [1900] 2 Q.B. 214; 69 L.J.Q.B. 506; 82 L.T. 463; 16 T.L.R. 314; 9 Asp. M.L.C. 57; 5 Com. Cas. 229]

Action—Action based on illegal transaction—Dismissal by court—Illegality not pleaded by defendant.

When on the trial of an action the plaintiff's case discloses that the transaction on which the claim is based is illegal, the court cannot ignore the illegality and give effect to the claim even though the illegality was not pleaded by the defendants and the defendants themselves do not wish the transaction to be held void.

Dictum of LORD MANSFIELD in *Holman v. Johnson* (1) (1775), 1 Cowp. at p. 343, applied.

Buchanan & Co. v. Faber (2) (1899), 4 Com. Cas. 223, distinguished.

Insurance—Marine insurance—Policy—Illegality—Power of court to give effect to policy—Illegality not pleaded by insurers willing to treat policy as valid—Marine Insurance Act, 1745 (19 Geo. 2, c. 37), s. 1.

An assurance whereby the assured was entitled to be indemnified against loss in respect of the non-arrival of a ship at a certain port by a certain date was an insurance "on the ship" within the meaning of s. 1 of the Marine Insurance Act, 1745 [repealed by the Marine Insurance Act, 1906].

Kent v. Bird (3) (1777), 2 Cowp. 583, applied.

The plaintiffs, insurance brokers, effected on behalf of R. a policy of marine insurance on the steamship Radnorshire for £400 to be payable on the event of the ship not arriving at Yokohama on or before midnight on Dec. 31, 1898. The policy contained a p.p.i. clause, viz., a clause that in the event of loss the policy itself was to be deemed full and sufficient proof of the assured's interest. Such a policy was void under s. 1 of the Marine Insurance Act, 1745. Moreover, the policy was a mere wagering transaction as R. had no insurable interest in the ship. Though R. had told the plaintiffs to inform the insurers, the defendants, of the speculative nature of the transaction they had not done so as they had assumed that the insurers knew the circumstances. The ship having failed to arrive at Yokohama by Dec. 31, 1898, the plaintiffs claimed the amount insured. By their defence the insurers did not plead the invalidity of the policy, but alleged that the sum claimed was not recoverable on the ground that there had been concealment of material facts and that R. had no insurable interest. At the trial the evidence was that insurers, generally, understood the inclusion of a p.p.i. clause to mean at least the possible existence of a business interest, and not that the policy was a mere wager.

Held: (i) the insertion of the p.p.i. clause having rendered the policy illegal it was not open to the court to treat the policy as valid, and, accordingly, the claim failed; (ii) even if the policy were treated as valid, the claim failed because there had been concealment of a material fact, viz., the purely speculative character of the transaction, which, if communicated, would have affected the judgment of the insurers in entering into the contract at all, or entering into it at the particular rate of premium.

Notes. The Marine Insurance Act, 1745, was repealed by the Marine Insurance Act, 1906, s. 92 and sched. 2. By s. 4 (1) of the Act of 1906 every contract of marine insurance by way of gaming or wagering is void, and by sub-s. (2) of s. 4, p.p.i.

policy was deemed to be gaming or wagering contract. As to fish and ship loss, see 22 HALSBURY'S LAWS (3rd Edn.) 61-65.

Considered: *Kreger v. Hobbs* (1913), 109 L.T. 226; *Smith & Hill v. Hill* (1880), 13 Q.B. 578; *Robertson v. Glasgow* (1920), 123 L.T. 487; *Smith v. Dera Paragon & Co. (Cableways), Ltd.*, [1946] 1 All E.R. 286; *Eard v. British Columbia, Ltd.*, [1945] 1 All E.R. 488.

As to the effect of illegality on policies of marine insurance, see 22 HALSBURY'S LAWS (3rd Edn.) 55, para. 55; and as to wagering policies see *ibid.*, 106, 107. For cases on wagering policies, see 29 DIGEST 423 et seq. For the Marine Insurance Act, 1906, s. 4, see 13 HALSBURY'S STATUTES (2nd Edn.) 18.

Cases referred to:

- (1) *Holman v. Johnson* (1775), 1 Cowp. 341; 98 E.R. 1120; 12 Digest (Rep.) 313, 2404.
- (2) *Buchanan & Co. v. Faber* (1899), 15 T.L.R. 384; 4 Com. Cas. 223; 29 Digest 103, 603.
- (3) *Kent v. Bird* (1777), 2 Cowp. 583; 98 E.R. 1253; 29 Digest 424, 3301.
- (4) *Smith v. Reynolds* (1856), 1 H. & N. 221; 25 L.J.Ex. 337; 27 L.T.O.S. 1-7; 4 W.R. 644; 29 Digest 424, 3304.
- (5) *De Mitas v. North* (1868), L.R. 3 Exch. 185; 37 L.J.Ex. 116; 18 L.T. 797; 3 Mar.L.C. 141; 29 Digest 424, 3305.
- (6) *Berridge v. Min On Insurance Co.* (1887), 18 Q.B.D. 346; 56 L.J.Q.B. 223; 56 L.T. 375; 35 W.R. 343; 6 Asp.M.L.C. 104, C.A.; 29 Digest 425, 3308.
- (7) *Allkins v. Jupe* (1877), 2 C.P.D. 375; sub nom. *Allkins v. Jupe, Same v. Pembroke, Same v. Oppenheim, Same v. Chaisy*, 46 L.J.Q.B. 824; 36 L.T. 851; 3 Asp.M.L.C. 449, D.C.; 29 Digest 424, 3307.
- (8) *Scott v. Brown, Doring, McNab & Co., Slaughter and May v. Brown, Doring, McNab & Co.*, [1892] 2 Q.B. 724; 61 L.J.Q.B. 738; 67 L.T. 782; 57 J.P. 213; 41 W.R. 116; 8 T.L.R. 755; 36 Sol. Jo. 698; 4 R. 42, C.A.; 12 Digest (Repl.) 267, 2060.
- (9) *Rivaz v. Gerussi* (1880), 6 Q.B.D. 222; 50 L.J.Q.B. 176; 44 L.T. 79; 4 Asp.M.L.C. 377, C.A.; 29 Digest 101, 585.
- (10) *Carter v. Boehm* (1766), 3 Burr. 1905; 1 Wm. Bl. 593; 97 E.R. 1162; 29 Digest 36, 2.

Commercial Cause tried before KENNEDY, J., without a jury.

Rufus Isaacs, Q.C., and *J. A. Hamilton* for the plaintiffs.

J. Walton, Q.C., and *Scrutton* for the defendants.

Cur. adv. vult.

April 11, 1900. **KENNEDY, J.**, read the following judgment.—This action is brought by the plaintiffs, who are insurance brokers suing really on behalf and for the benefit of a Mr. Rouse and certain other gentlemen associated with him, against the defendants on an alleged policy of marine insurance, dated Nov. 14, 1898, upon the British steamship *Radnorshire*, belonging to the Shire Line. The policy, as pleaded by the plaintiffs, is a policy for £400 on the said steamship at and from London to Yokohama, to pay a total loss in the event of the vessel's not arriving at Yokohama on or before midnight on Dec. 31, 1898. It is pleaded by the plaintiffs that the vessel did not arrive at Yokohama on or before midnight Dec. 31, 1898, and the amount insured is claimed by the plaintiffs.

In fact, as appeared when the document was produced by the plaintiffs in evidence, the alleged policy is what is known as a "p.p.i." or honour policy, one of its terms being that, in the event of loss, "it is hereby agreed that this policy shall be deemed as full and sufficient proof of interest." The defendants, in the points of defence, do not plead the invalidity of the alleged policy, under the provisions of the Marine Insurance Act, 1745, s. 1. Their pleaded defences, in addition to a refusal to admit the correctness of the statement of the plaintiffs as to the terms of the alleged policy, are (i) concealment of material facts; viz that the persons on

whose behalf the plaintiffs effected the alleged policy had no insurable interest in the subject-matter insured. The alleged policy was, in truth, so far as regards the purpose of Mr. Rouse and certain other gentlemen for whom it was effected, a mere wager or wagering speculation. It appears that some time before Nov. 14, 1898, the government of Japan had made an ordinance whereby goods imported into Japan after Dec. 31, 1898, should be liable to a higher duty than had previously been levied. This was known to Mr. Rouse, who was employed in the London office of a Japanese insurance company called the Nippon, and he had a conversation with a Mr. Pound (who was an insurance clerk in the plaintiffs' office) upon the subject of insurances being, in consequence of the ordinance, effected in regard to the arrival in Japan of vessels carrying goods to that country. It occurred to Mr. Rouse that there was an opportunity of having what he called "a spec." He asked Mr. Pound if he thought he would be able to do a "spec." for him. Pound said he thought he might be able. They then parted. Mr. Rouse returned to his office and read in Lloyd's "Shipping Gazette" that the *Radnorshire* was the vessel of the line of steamships running between London and Japan under the management of Messrs. Jenkins & Co. which had last sailed for Japan; and that she was reported to have passed the Downs on Oct. 30. Believing that a vessel of that type might be expected to take roughly about two months on the voyage, he saw from her reported position that, to use his own words, her arrival before Jan. 1, 1899, was obviously a close thing, and what he wanted for a "spec." He mentioned his project to certain other gentlemen in the Nippon office, and they agreed to share with him in the speculation. In the result, through Mr. Pound, acting as their agent to procure an insurance, Mr. Rouse and his fellow speculators carried out their project by obtaining from the defendants the policy in question, the slip for which was initialled by Mr. Toulmin on behalf of the defendant company. Had Mr. Toulmin known the real nature of the transaction—namely, that it was a mere bet or speculation without any interest on the part of those for whom in reality the insurance was effected—he would have declined the risk altogether. It is at the same time only just to Mr. Rouse and his friends to add that they appear to have desired throughout the transaction to act in a candid and straightforward manner. It was not through any fault of theirs that the purely speculative nature of the transaction was not disclosed to Mr. Toulmin.

It appears to me that, when upon the trial of an action the plaintiff's case, as happens here, discloses that the transaction which is the basis of the plaintiff's claim is illegal, the court cannot properly ignore the illegality and give effect to the claim. Here the insertion of the "p.p.i." clause taints the whole of the plaintiffs' case. The Marine Insurance Act, 1745, s. 1, expressly forbids the making of an assurance upon a British ship without further proof of interest than the policy, and goes on to declare that every such assurance shall be null and void to all intents and purposes. It has been suggested by the plaintiffs that the present policy is not a policy "on a ship" within the meaning of this section. I am clearly of opinion that it is. An assurance whereby the assured is entitled to be indemnified against loss in respect of the non-arrival of the ship at a certain port by a certain date may, I think, be correctly described as an insurance on the ship. If authority is wanted I think that it appears in the case—very similar indeed in its circumstances—of *Kent v. Bird* (3), decided on the same statute in 1777. There the defendant undertook that a vessel should save her passage to China that season, and, in the action brought upon the document of insurance, judgment was given for the defendant on the ground that the transaction was the making of a gaming or wagering policy on a ship within the meaning of the statute. Attempts to narrow the section when it speaks of an assurance on "goods, merchandises, or effects," similar to the attempt of the defendants in this case in regard to an assurance "on ship," were unsuccessfully made in *Smith v. Reynolds* (4), *De Mattos v. North* (5) and *Berriège v. Man On Insurance Co.* (6). These cases show that assurances on profits, commission, and advances are covered by the section, when it speaks of assurances on "goods,

merchandises, or effects." This policy, then, being an illegal instrument—an assurance which, in the language of GHAVER, J., in *Alford v. Jago* (7) 19 C.P.D. at p. 300, is contrary to the direction of the statute, and so unlawful in all its incidents: that the law will not countenance any part of it—I cannot give judgment upon it in favour of the plaintiffs.

Then counsel argued that the illegality was not pleaded by the defendants. In my opinion that makes no difference.

"Ex turpi causa non oritur actio. This old and well-known legal maxim is founded on good sense, and expresses a clear and well-recognized legal principle which is not confined to indictable offences. No court ought to enforce an illegal contract, or allow itself to be made an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal. If the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him."

per LINDLEY, L.J., *Scott v. Brown, Doring, McNab & Co.* (8), [1892] 2 Q.B. at p. 728. LORD MANSFIELD, in his judgment in *Holman v. Johnson* (1) (to which LINDLEY, L.J., refers as an authority immediately after the passage which I have just quoted), said (Cowp. at p. 343):

"If from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, then the court says he has no right to be assisted. It is upon this ground the court goes, not for the sake of the defendant, but because they will not lend their aid for such a plaintiff."

Order 19, r. 16, upon which counsel for the plaintiffs laid much stress, does not touch (as the judgment of LINDLEY, L.J., which I have quoted clearly indicates) a case like the present in which the illegality of the transaction appears upon the face of the plaintiff's case. The purpose of that rule, as it appears to me, is to prevent the injustice which might arise from a litigant, without notice to his opponent, adducing evidence to show that a transaction which apparently is perfectly legal is really illegal—as, for example, that an apparently good deed was really fraudulent under 13 Eliz., c. 5 [repealed by the Law of Property Act, 1925, s. 207, 7th sched.]; or the similar injustice which might arise if a litigant, who would otherwise have been prepared with evidence to surmount them, was suddenly called upon at the trial for the first time to meet objections to the pursuit of a legal remedy based upon the Statute of Limitations or the Statute of Frauds, or was called upon to deal with issues of which he had no notice. The rule does not affect a case like the present.

There is, I think, only one other point in the argument of the plaintiffs' counsel upon this part of the case which I have to notice. It was urged that the defendants themselves were wishful that the policy should not be held void on account of its having been made in terms prohibited by the statute. Certainly the defendants' counsel did so state their attitude. But I hold that my judgment ought not to be affected by this consideration. I was referred to the course taken by BIGNAM, J., in the recent case of *Buchanan & Co. v. Faber* (2). In that case the policy sued on contained the "p.p.i." clause. In a note to the report (4 Com. Cas. at p. 227, n.) it is stated that my brother BIGNAM, after consultation with MATHEW, J., intimated that he would, with the consent of the parties, hear the case as if the policy did not contain the "p.p.i." clause. I need not say that I should be very slow not to adopt a course which they had approved, and if I ever felt impelled by my own conviction to take a different view from them I should have very great misgiving as to the correctness of my own view. But what I am invited to do here is something quite different from that which was asked by the parties and permitted by my brother BIGNAM in that case. That was, in effect, to treat the vitiating clause as deleted,

A What I am invited to do is to treat the policy as valid with the vitiating clause retained as part of it. If that were done here which the court did in *Buchanan & Co. v. Faber* (2)—viz., if I dealt with this policy as if it contained no “p.p.i.” clause—the plaintiffs, so far from being helped, would obviously be involved in a fatal difficulty. They, admittedly, never had any insurable interest; the absence of such an interest has been pleaded by the defendants; and the only possible reply to this defence lies in the presence in the policy of the “p.p.i.” clause. If that is treated as gone, the plaintiffs’ case goes with it.

B Deciding this case, as I do, upon the grounds which I have stated, I feel, nevertheless, in view of the care bestowed upon it by the learned counsel on both sides, that I ought not to let pass unnoticed another aspect of the case which was presented for my consideration. The defendants argue that, even if the policy can be treated as not invalidated by the “p.p.i.” clause, they have a good defence to the action, because it was obtained by the concealment of a material fact—a fact, that is to say,

“which if communicated would affect the judgment of a rational underwriter in considering whether he would enter into the contract at all, or enter into it at one rate of premium or another”:

D see per BRETT, L.J., *Rivaz v. Gerussi* (9), 6 Q.B.D. at p. 229. The fact referred to is the purely speculative character of the transaction. That it was not expressly communicated by Mr. Pound to Mr. Toulmin is indisputable; but the plaintiffs say to the defendants, “You are not entitled to rely on this non-disclosure; you knew perfectly well that we were negotiating for a policy with a ‘p.p.i.’ clause, and you contracted to give us such a policy. Mr. Pound was justified in assuming that Mr. Toulmin knew all he had to tell, and in the circumstances you must be taken to have waived being informed of the purely speculative nature of the risk”: see *Carter v. Boehm* (10). It appears to me that there is much to be said for this view, but upon the whole, if it was open to me to treat the policy as a valid policy and I had to decide the case upon this point, I should feel myself, upon the evidence given before me, obliged on this point also to decide in favour of the defendants’ contention. On the materiality of the fact of this being purely a speculative or wagering venture on the part of Mr. Rouse and his friends Mr. Toulmin is clear and emphatic. He would not have entertained the risk if he had known of it. As I understand his evidence, “policy proof of interest” in the ordinary understanding of underwriters means at least the possible existence of a business interest—an interest which may be hard to prove or may not admit of legal proof as an insurable interest, but still some business interest. The facts in *Buchanan & Co. v. Faber* (2), to which I have had occasion to refer, afford an illustration, I think, of a class of risk of this latter sort. In fact the clause is sometimes stipulated for in policies which are intended to cover substantial interests such as disbursements and advances. It is not understood, if I follow Mr. Toulmin’s evidence correctly, to cover a mere wager. The only case, according to Mr. Toulmin, in which he has accepted a purely speculative or wagering risk—and that he has done only on rare occasions—is in the particular case of “overdue” vessels, and then only at specially agreed rates of premium. The defendants’ evidence is substantially confirmed, I think, by the conduct and by the evidence of Mr. Rouse. Mr. Rouse is himself a clerk in an insurance office, and he expressly enjoined Mr. Pound to state in negotiating for the insurance the speculative nature of the transaction. The idea was, he says, that they could not be too careful. He says, no doubt, elsewhere in his cross-examination that he did not see the materiality of a “spec.” or real interest, but he goes on to admit that the underwriters would probably quote a higher rate of premium in the case of a “spec.” Mr. Pound’s excuse for not obeying Mr. Rouse’s instructions on this point as given to him by Mr. Rouse was that he had not got the chance of making the disclosure. It was quite an insufficient excuse, as I understood what took place between Mr. Pound and Mr. Toulmin; but I believe that Mr. Pound did not at all mean to do anything improper or unfair. I think he possibly drew an

unwarranted inference from Mr. Toulmin's words, and answer that Mr. Toulmin either knew or was willing to waive inquiry about the circumstances of the insurance. Upon the whole, as I have already said, upon the evidence before me, if I had to decide on this issue I should feel obliged to decide it in favour of the defendants. It is not, however, necessary for me to do so, and I give judgment for the defendants on the grounds which I have previously stated. Under the circumstances of the case, including those to which I need not refer, except for this purpose—namely, that, as appears by Mr. Toulmin's letter of Nov. 14, 1898, the defendants repudiated the policy for reasons which the facts do not warrant, and which implied an unjust imputation upon the plaintiffs' representative—I give judgment for the defendants without costs.

Judgment accordingly.

Solicitors : *Thos. Cooper & Co. ; Hollams, Sons, Coward & Hawkesley.*

[*Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.*]

THE STELLA

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Gorell Barnes, J.), March 12, 28, 1900]

[Reported [1900] P. 161; 69 L.J.P. 70; 82 L.T. 390; 16 T.L.R. 306; 9 Asp.M.L.C. 66]

Fatal Accident—Negligence—Exemption from liability—Free pass granted to husband by railway company containing condition excluding liability for "injury, loss or damage, however caused"—Pass covering journey from London to Jersey—Husband drowned on journey while in company's ship, and his and wife's luggage lost—Claim for lost luggage.

A husband and wife were travelling in the defendant railway company's steamship on a free pass obtained from the company for their journey from London to Jersey, the husband being a railway official. The steamship was wrecked, the husband was drowned, and both his and his wife's luggage was lost. On the free pass was printed a condition exonerating the defendants from liability for "any injury, . . . loss, or damage, however caused." The defendants obtained a decree of limitation of liability, and paid the limit of their liability into court. The wife and children brought a claim under the Fatal Accidents Act, 1846, for the loss of their husband and father. The registrar dismissed the claims, holding that the condition on the free pass precluded recovery under the Act. On appeal to the court,

Held (affirming the registrar), that the condition covered negligence, and was applicable to both sea and land transit; therefore, the deceased, if alive, could not have claimed damages for injury to himself and the claim under the Fatal Accidents Act, 1846, failed.

Held, further, that a claim by the wife for the loss of her property, and, as his personal representative, for the loss of her husband's property, was likewise barred by the condition.

Notes. The class of persons for whose benefit an action under the Fatal Accidents Act, 1846, may be brought has been enlarged by s. 1 of the Fatal Accidents Act, 1959 (39 HALSURY'S STATUTES (2nd Edn.) 941) to include any person who is, or is the issue of, a brother, sister, uncle or aunt of the deceased person.

Referred to: *Paman Steamship Co. v. Hull and Barnsley Rail. Co.*, [1914] 2 K.B. 788; *Trivers v. Cooper*, [1915] 1 K.B. 73; *Nunn v. Southern Rail. Co.*, [1923] All E.R. Rep. 21; *Greiv v. Imperial Airways, Ltd.*, [1936] 2 All E.R. 1258.

As to claims under the Fatal Accidents Acts, see 28 HALSBURY'S LAWS (3rd Edn.) 35 et seq., and for cases see 36 DIGEST (Repl.) 208 et seq. For the Fatal Accidents Act, 1846, s. 1, see 17 HALSBURY'S STATUTES (2nd Edn.) 4.

Case referred to :

- (1) *Watkins v. Rymill* (1883), 10 Q.B.D. 178; 52 L.J.Q.B. 121; 48 L.T. 426; 47 J.P. 357; 31 W.R. 337, D.C.; 3 Digest (Repl.) 93, 224.

Also referred to in argument :

Henderson v. Stevenson (1875), L.R. 2 Sc. & Div. 470; 32 L.T. 709; 39 J.P. 596, H.L.; 8 Digest (Repl.) 139, 898.

Zanz v. South Eastern Rail. Co. (1869), L.R. 4 Q.B. 539; 10 B. & S. 594; 38 L.J.Q.B. 209; 20 L.T. 873; 17 W.R. 1906; 8 Digest (Repl.) 58, 380.

Harris v. Great Western Rail. Co. (1876), 1 Q.B.D. 515; 45 L.J.Q.B. 729; 34 L.T. 647; 40 J.P. 628; 8 Digest (Repl.) 141, 908.

Cutler v. North London Rail. Co. (1887), 19 Q.B.D. 64; 56 L.J.Q.B. 648; 56 L.T. 639; 51 J.P. 774; 35 W.R. 575, D.C.; 8 Digest (Repl.) 65, 431.

Great Western Rail. Co. v. Bunch (1888), 13 App. Cas. 31; 57 L.J.Q.B. 361; 58 L.T. 128; 52 J.P. 147; 36 W.R. 785; 4 T.L.R. 356, H.L.; 8 Digest (Repl.) 134, 861.

Marshall v. York, Newcastle and Berwick Rail. Co. (1851), 11 C.B. 655; 21 L.J.C.P. 34; 18 L.T.O.S. 94; 16 Jur. 124; 138 E.R. 632; 8 Digest (Repl.) 132, 849.

Great Northern Rail. Co. v. Shepherd (1852), 8 Exch. 30; 7 Ry. & Can. Cas. 310; 21 L.J.Ex. 286; 155 E.R. 1246; sub nom. *Shepherd v. Great Northern Rail. Co.*, 19 L.T.O.S. 324; 8 Digest (Repl.) 128, 821.

Bergheim v. Great Eastern Rail. Co. (1878), 3 C.P.D. 221; 47 L.J.Q.B. 318; 38 L.T. 160; 42 J.P. 324; 26 W.R. 301, C.A.; 8 Digest (Repl.) 131, 846.

Gallin v. London and North Western Rail. Co. (1875), L.R. 10 Q.B. 212; 44 L.J.Q.B. 89; 32 L.T. 550; 39 J.P. 518; 23 W.R. 308; 8 Digest (Repl.) 111, 720.

Motion by way of appeal from a decision of the registrar of the Admiralty Court.

The matter arose out of the loss of the steamship *Stella*, the property of the London and South-Western Railway Co., which on Mar. 30, 1899, ran aground on the Black Rock, near the Casquets, in the Channel Islands, when she and many lives were lost. Among the passengers on board the *Stella* were a Mr. and Mrs. Le Mare. Mr. Le Mare was an official employed by the London and North-Western Railway Co., and as such had obtained a free pass from the London and South-Western Railway Co. for himself and his wife for the journey from London to Jersey. Mr. Le Mare was drowned, and, though Mrs. Le Mare was saved, both her own and her husband's luggage was lost. On July 24, 1899, BUCKNILL, J., made a decree limiting the liability of the owners of the *Stella* to a sum equal to £15 per ton of her tonnage ascertained according to the provisions of the Merchant Shipping Act, 1894. Such sum, amounting to £15,404 8s., was paid by the defendants into court. Among the claims put forward against this fund were claims by Mrs. Le Mare and her four children, under Lord Campbell's Act (the Fatal Accidents Act, 1846), for the loss they had sustained by the death of their husband and father. Mrs. Le Mare also claimed for the loss of her luggage, and, as his personal representative, for the loss of her husband's luggage.

On the face of the free pass under which Mr. and Mrs. Le Mare were travelling were the words "for conditions, see back"; and on the back there appeared the following :

"This free pass is granted on the following conditions :—Condition 2. That it shall be taken as evidence of an agreement that the company are relieved from all responsibility for any injury, delay, loss, or damage, however caused, that may be sustained by the person or persons using this pass."

The registrar held that Mrs. Le Mare and her children were discharged from the claim under the Act of 1845 by the wording of the above condition. The claimants appealed from this decision, and by consent the question of Mrs. Le Mare's right to recover in respect of the loss of her own and her husband's luggage was also dealt with at the hearing of the motion.

By the Railway and Canal Traffic Act, 1854, s. 7 (so far as is material)

"Every such company as aforesaid shall be liable for the loss of or for injury done to . . . any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability, every such notice, condition, or declaration being hereby declared to be null and void: Provided always that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said . . . articles, goods, or things as shall be adjudged by the court or judge before whom any question relating thereto shall be tried to be just and reasonable."

By the Railway Clauses Act, 1863, s. 31 :

"The provisions of the Railway and Canal Traffic Act, 1854, so far as the same are applicable, shall extend to steam vessels, and to the traffic carried on thereby."

By the Regulation of Railways Act, 1868, s. 14 :

"Where a company by through booking contracts to carry any . . . luggage or goods from place to place partly by land and partly by sea . . . a condition exempting the company from liability for any loss or damage which may arise during the carriage of such . . . luggage or goods by sea from . . . accidents of . . . navigation of whatever nature and kind soever, shall, if published in a conspicuous manner in the office where such through booking is effected and if printed in a legible manner upon the receipt or freight note which the company gives for such . . . luggage or goods, be valid as part of the contract between the consignor of such . . . luggage or goods in the same manner as if the company had signed and delivered to the consignor a bill of lading containing such condition."

Tindal Atkinson for Mrs. Le Mare and her children. . .

Acland for the London and South-Western Railway Co.

Cur. adv. vult.

Mar. 28, 1900. **GORELL BARNES, J.**, read a judgment in which he referred to the claim, and continued: The registrar disallowed the claim on behalf of the widow and children, on the ground that the deceased was travelling under conditions which really amount to this, that he was travelling at his own risk.

Two grounds are put forward in support of the claim, so far as it was made by the widow and children. The first was that the plaintiffs, the persons limiting their liability, were responsible for negligence--the loss having occurred, as I understand, through negligence--because the ticket or pass with which he was travelling was not binding, so far as the conditions exempting the plaintiffs from negligence were concerned, upon the traveller at all; and, secondly, that even if they were binding, that they were not binding or applicable so far as related to the sea transit. I think it was conceded that the widow and children could only claim for loss, under Lord Campbell's Act, where the passenger himself, if alive, could claim for injury done to himself. I think there is no dispute about that. But the two points taken have to be considered.

With regard to the first one, it appears that the deceased was travelling with a free pass. The document which was given to him is headed "free pass."

A and the terms on which it was granted appear on the back of it. It was granted from London to Jersey, and at the foot of it there is, in print, "for conditions, see back." On the back the conditions are set out. [His LORDSHIP read the conditions.] The deceased was chief officer and secretary of the stores department of the London and North-Western Railway Co., and according to the affidavit of the claimant he had obtained a free pass, similar accommodation being given by the London and North-Western Railway Co. to the employés of other railway companies. That is how he and his wife came to have free passes on the journey which they had undertaken. The argument on this first point for the claimants was that the conditions really did not form part of any agreement entered into between the company and the traveller. On the other hand, it was said that this was a mere licence to the passenger to travel on the conditions which are set out on the back of the pass. I do not think it makes very much difference in the case, whether it is termed a licence, pass, or a contract to carry upon the terms mentioned, because, in my view, if the terms which are on the back are terms which the passenger agreed to, then those terms, if applicable, do exclude such a loss as that which happened in this case. It seems to me that it is a free pass granted on certain conditions, whether it is termed a mere licence or a contract to carry upon those conditions, and although a number of cases were cited, connected with this class of subject, all those cases were very fully considered in the judgment which was delivered in *Watkins v. Rymill* (1), and it seems to me quite clear that this pass bears upon the face of it a stipulation that it is issued upon certain conditions which are to be found on the back of it, and especially as it was given to a gentleman who was fully cognisant of such matters as free passes over different railways, that the terms upon which he was carried were the terms which are found on that free pass and which are set out on the back. My conclusion of fact with regard to the first point is that the deceased was carried upon the terms which are mentioned on that free pass.

F The second point is that those terms are only applicable to land transit, and were not applicable to the loss which happened in consequence of the boat on which the deceased was being lost. The point made was that all the conditions are only conditions which apply to transit on railways. I am not able to take that view, because it seems to me that although it is possible to read some of those conditions in that way, yet the second condition, which is quite general in its terms, is applicable to the whole of the transit from London to Jersey, which was the transit mentioned on the face of the ticket, and also that the whole transit is upon the conditions upon the back so far as they are applicable. Therefore, it appears to me that these terms apply all through, so far as they can apply, and the second condition is clearly one which exonerates the company from liability for the accident in this case.

H That would be sufficient to dispose of the appeal, which was only against the decision dealing with the claim by the widow and children. But a further point has been taken by counsel on behalf of the widow, Mrs. Le Mare—namely, that she, as the administratrix of her husband and also in respect of her own rights, had a claim for loss of luggage belonging to her husband and herself. Although that was not part of the matter disposed of by the registrar, it was discussed and considered by counsel on both sides and, therefore, I have to dispose of it. It appears to me that, for the reasons which I have already given in relation to the claim under Lord Campbell's Act, the ticket or pass is equally binding so far as it relates to any claim for loss of or injury to the luggage which either of them had put under the charge of the company. That would, therefore, dispose of the case so far as the luggage is concerned, unless there is some statute preventing the application of these conditions to the contract to carry the luggage. The precise particulars of the luggage I do not think were very fully gone into. It was stated that there was luggage in the ordinary mode of transit, sent off with the passengers, and there was a bag containing jewellery which, when on board, the lady placed

in the charge of the stewardess. I do not think there is any difference between the claim so far as it relates to the luggage delivered in the ordinary way of stowing and so far as it relates to the loss, because both seem, I think, in the custody of the company for carriage; but, as I have said, it seems to me that the ticket or pass is binding with regard to the loss in respect of time articles, unless the operations of the conditions is controlled by the effect of some statute.

The point made with regard to this was that either under the Railway and Canal Traffic Act, 1854, or under the Regulation of Railways Act, 1868, the contract was controlled and could not affect this liability because of the provisions of either one or other of those Acts. I have felt some difficulty in disposing of this part of the case, because I do not think counsel were quite prepared to discuss these Acts with any great nicety, especially as the point was freely made by counsel for the claimant. But counsel for the railway company has been good enough to send me the Acts relating to the London and South-Western Railway Co. which bear upon this case. First of all it was said that the Railway and Canal Traffic Act, 1854, controlled the contract. That point was based upon s. 7 of the Act, the terms of which I need not go into. If that section applied there would be, of course, liability upon the company in this case. But that Act only applies to land carriage. Then it was said that it was extended to steamers belonging to railway companies by subsequent legislation, and there is no doubt that it was extended by s. 31 of the Railway Clauses Act, 1863, to steam vessels and the traffic carried thereby. But that Act was what is termed a Clauses Act, and s. 30 shows that it applies to railways whose special Acts are after that time passed, and which incorporated the part of the Act which deals with this subject. I think s. 31 is applicable to steam vessels referred to in the fourth part of the Act. The London and South-Western Acts were before that date. The first is the Act of 1848, and the next is the Act of 1860, so that both those Acts were passed before the Act of 1863. It follows that they do not and could not incorporate the provisions of the fourth part of the Clauses Act of 1863. Then came the later Act of 1868—the Regulation of Railways Act—and s. 16 of that Act extended the Act of 1854 to all railway steamers; but there came a later Act in 1888, s. 59 of which repealed that part of s. 16 of the Act of 1868 which extended the provisions of the Act of 1854 to all railway steamers.

Therefore, it seems to me, upon such consideration of these Acts as I have been able to give, that the Act of 1854, so far as the London and South-Western Railway Co. is concerned, does not apply. But that does not quite exhaust the case, because it was further said that s. 14 of the Regulation of Railways Act, 1868, was applicable to this contract, and prevented the company from taking advantage of the exonerating clause of the free pass. That is a section which deals with the case of a company agreeing, by through-booking contracts, to carry any animal, luggage, etc., partly by railway and partly by sea, etc., and provides that any conditions exempting the company from liability for loss and damage shall not have effect unless they have been published in a conspicuous manner in the company's office, and printed in a legible manner on their documents. But my view is that that section does not apply to such a case as the present. It really, I think, was intended to apply to through-booking contracts made in the ordinary course of business, and I cannot in its terms find anything preventing the railway company from making such conditions as in the present case. For these reasons it appears to me that the appeal must be dismissed with costs, and the claims put forward excluded from the fund which has to be distributed in this case.

Appeal dismissed.

Solicitors: Willson & Norman; Clarksons, Greenwell & Co.

[Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMS, Esq.,

Barristers-at-Law.]

**JENNER INSTITUTE OF PREVENTIVE MEDICINE v. ST. GEORGE'S,
HANOVER SQUARE, ASSESSMENT COMMITTEE AND
SURVEYOR OF TAXES**

[QUEEN'S BENCH DIVISION (Grantham and Channell, J.J.), June 15, 1900]

Reported 69 L.J.Q.B. 814; 83 L.T. 344; 16 T.L.R. 444; Ryde & K. Rat. App. 242]

Rates—Scientific society—Study and application of preventive medicine—Manufacture and sale of scientific remedies—Exclusive use of premises by society—Part sub-let—Scientific Societies Act, 1843 (6 & 7 Vict., c 36), s. 1.

A society was instituted for the purposes of advancing the study and application of preventive medicine, and it provided instruction and education for medical practitioners, veterinary surgeons and advanced students and also laboratories and a library for effecting such purposes. The society prepared and sold certain protective and curative medicines such as antitoxins. It was supported by interest from investments, fees from lectures and students, receipts from sales of medicines, donations, some of which had been spent on building premises, and by subscriptions from members, but the society did not distribute any dividend, gift or bonus in money among its members. The society had sub-let certain rooms in its premises to the Local Government Board and by the terms of the yearly tenancy these rooms were only to be used for the preparation of glycerinated calf lymph and for investigations in connection with vaccination. The society had obtained the certificate required by s. 1 of the Scientific Societies Act, 1843.

Held: as the society carried on the manufacture and sale of preventive medicines it was not a society instituted for the purposes of science exclusively within s. 1, of the Scientific Societies Act, 1843, and, accordingly, was not entitled to have its premises exempted from rates.

Per CHANNELL, J.: On the ground also, that as the occupation of the Local Government Board was not such as to be separately rateable the premises of the society were not used exclusively for the purposes of the society and did not come within the exemption under s. 1 of the Act of 1843.

Notes. Section 40, of the Valuation (Metropolis) Act, 1869, has been repealed; see now the Local Government Act, 1948, s. 33, s. 36 (20 HALSBURY'S STATUTES (2nd Edn.) 223, 229). The Scientific Societies Act, 1843, is prospectively repealed (i.e. on April 1, 1963) by s. 12 (2) (b) of the Rating and Valuation Act, 1961, but reduction or remission of rates may be granted under s. 11 (4) (b) of the Act of 1961: see 41 HALSBURY'S STATUTES (2nd Edn.) 950, 954.

Considered: *V. O. Cane v. Royal College of Music*, [1961] 2 All E.R. 12. Referred to: *British Launderers' Research Association v. Central Middlesex Assessment Committee and Hendon Rating Authority*, [1949] 1 All E.R. 21.

As to exemption from rates of societies exclusively established for purposes of science, see 24 HALSBURY'S LAWS (3rd Edn.) 337 et seq., and SUPPLEMENT, and for cases see 38 DIGEST (Repl.) 582 et seq.

Cases referred to:

- (1) *Art Union of London v. Savoy Overseers*, [1894] 2 Q.B. 609; 63 L.J.M.C. 253; 71 L.T. 40; 59 J.P. 20; 42 W.R. 690; 10 T.L.R. 576, C.A.; reversed sub nom. *Savoy Overseers v. Art Union of London*, [1896] A.C. 296; 65 L.J.M.C. 161; 74 L.T. 497; 60 J.P. 660; 45 W.R. 34; 12 T.L.R. 377, H.L.; 38 Digest (Repl.) 587, 653.
- (2) *Bradford Library Society v. Bradford (Churchwardens)* (1858), 1 E. & E. 88; 23 J.P. 485; 5 Jur.N.S. 513; 120 E.R. 841; sub nom. *R. v. Bradford Library and Literary Society*, 28 L.J.M.C. 73; 32 L.T.O.S. 105; 7 W.R. 36; 38 Digest (Repl.) 579, 609.

- (3) *Hopital College of Music v. Westminster Vestry*, [1899] 1 Q.B. 809; 27 L.J.Q.B. 540; 78 L.T. 441; 62 J.P. 367; 14 T.L.R. 351, C.A.; 38 Digest (Repl.) 587, 669.

Also referred to in argument:

- R. v. Manchester Overseers* (1851), 16 Q.B. 449; 4 *Temp. Term. Cas.* 422; 30 L.J.M.C. 113; 16 L.T.O.S. 435; 15 J.P. 193; 15 Jur. 219; 117 K.R. 331; 38 Digest (Repl.) 585, 635.
- St. Anne (Churchwardens) v. Linnean Society* (1854), 3 E. & B. 793; 118 E.R. 1338; sub nom. *R. v. Linnean Society of London*, 2 C.L.R. 761; 23 L.T.O.S. 186; 18 J.P. 504; 2 W.R. 516; sub nom. *Linnean Society of London v. St. Anne's Westminster (Churchwardens and Overseers)*, 23 L.J.M.C. 148; 18 Jur. 859; 38 Digest (Repl.) 580, 614.
- R. v. Royal Medical and Chirurgical Society of London* (1857), 30 L.T.O.S. 132; 21 J.P. 789; 38 Digest (Repl.) 581, 616.
- Purvis v. Traill* (1849), 3 Exch. 344; 3 New Mag. Cas. 88; 3 New Sess. Cas. 88; 3 New Sess. Cas. 459; 18 L.J.M.C. 57; 12 L.T.O.S. 379; 13 J.P. 219; 154 E.R. 876; 38 Digest (Repl.) 585, 634.
- Earl Clarendon v. St. James's (Rector, etc.)* (1851), 10 C.B. 806; 4 New Sess. Cas. 639; 20 L.J.M.C. 213; 17 L.T.O.S. 75; 15 J.P. 340; 15 Jur. 492; 138 E.R. 319; 38 Digest (Repl.) 579; 610.
- I.R. Comrs. v. Forrest* (1890), 15 App. Cas. 334; 60 L.J.Q.B. 281; 63 L.T. 36; 54 J.P. 772; 39 W.R. 33; 6 T.L.R. 456; 3 Tax Cas. 117, H.L.; 38 Digest (Repl.) 582, 626.

Appeal (by way of Case Stated under s. 40 of the Valuation (Metropolis) Act, 1869) against an assessment to rates.

The appellant institute was incorporated on July 25, 1891, under s. 23 of the Companies Act, 1867, under the name of "The British Institute of Preventive Medicine" without the word "Limited" under a licence from the Board of Trade, and on Dec. 6, 1898, the Institute pursuant to s. 13 of the Companies Act, 1862, changed its name to "The Jenner Institute of Preventive Medicine." The memorandum of association provided as follows:

"The objects for which the institute is established are as follows: (a) To study, investigate, discover, and improve the means of preventing and curing infective diseases of men and animals, and to provide a place where research may be carried on for the purposes aforesaid. (b) To provide instruction and education in preventive medicine to medical officers of health, medical practitioners, veterinary surgeons, and advanced students. (c) To prepare and to supply to those requiring them such special protective and curative materials as have been already found and shall in future be found of value in the prevention and treatment of infective diseases. (d) To treat persons suffering with infective diseases or threatened with them in buildings of the institute or elsewhere. (e) With a view to effecting those objects to provide laboratories, to appoint a scientific staff, to institute lectures and demonstrations, to issue publications of the transactions of the institute, and to found a library. (f) In case it should be thought desirable so to do, to examine students of the institute and to award prizes and certificates, subject to such regulations and conditions as the institute may from time to time determine; Provided that no certificate shall be granted unless there is clearly expressed on it a note to the effect that it is granted as showing the result of the examination held on behalf of the institute, and has no special virtue or effect by any statute or charter. (g) Subject to the provisions of s. 21 of the Companies Act, 1862, to purchase, sell, rent, let, or hold lands, tenements, or other real or personal property which may be necessary or advantageous to the aforesaid objects, and to mortgage the same for the purposes of the institute. (h) To receive donations and subscriptions from persons desiring to promote the

A objects aforesaid or any of them, and to hold funds in trust for the same, provided that if the institute shall take any funds or property upon any such special trust, so as to make it subject to the jurisdiction of the Charity Commissioners, the institute shall observe all the directions of the commissioners with respect thereto, and if required by them vest the same in special trustees. (ii) To construct, alter, and maintain any buildings necessary or convenient for the purposes of the institute. (j) To do all such other lawful things as may from time to time be conducive to the attainment of the objects above set forth or any of them."

By the memorandum of association it was further provided as follows :

"The income and property of the institute whencesoever derived shall be applied solely towards the promotion of the objects of the institute as set forth in this memorandum of association, and no portion thereof shall be paid or transferred directly or indirectly by way of dividend, bonus, or otherwise howsoever by way of profit to the members of the institute, provided that nothing herein contained shall prevent any payment in good faith of interest not exceeding 5 per cent. on any loan advanced by members of the institute to promote the objects thereof, or of remuneration to any professor, lecturer, director, officer, or servant of the institute, or to any member or other person in anywise howsoever connected with the institute in return for any services actually rendered to the institute, or undertaken by the authority of the council to promote the objects of the institute."

The institute was supported by interest and dividends from investments, profits on sale of investments, by fees derived from lectures and from students and for the use of the laboratories, and by receipts from the sale of the records of the transactions of the institute, by fees received for diagnoses made at the institute, and receipts from the sale of protective and curative materials prepared and sold by the institute, such as mallein, tuberculin, and antitoxins, and also by donations and subscriptions. Part of the donations had been spent on the buildings or invested by the appellants, and the rest had gone in current expenditure. The subscriptions amounted in 1895 to £15 10s., in 1896 to £13 13s., in 1897 to £8 8s., in 1898 to £14 14s., and in 1899 to £14 8s. Annual subscriptions of £5 and upwards, under art. 3 (d) of the articles of association, entitled the subscribers to membership of the institute if they signified in writing their desire to become members, but of the subscribers mentioned in the detailed accounts only two were members of the institute. Members had the rights and privileges to which they were entitled under the Companies Acts and the institute's memorandum and articles of association, but had no other or further rights or privileges. Annual subscribers who were not members obtained nothing in return for their subscriptions. The Poplars Farm mentioned in the institute's accounts was a branch establishment of the institute, and was the place where the preparation of antitoxin was regularly and continually carried on. The farm and preparation were managed from the headquarters of the institute. The institute had obtained the certificate of exemption required under s. 1 and s. 2, of the Scientific Societies Act, 1843. The certificate was obtained on June 18, 1898, and the respondents had notice of its grant but there had been no appeal against such grant under s. 6 of that Act. About March, 1894, the institute had purchased freehold land in Chelsea Bridge Road, in the parish of St. George, Hanover Square, in the County of London, and erected buildings thereon for the purposes and objects stated in the memorandum of association. The land and buildings were the premises which were the subject of the assessment (hereinafter referred to as the "assessed premises").

An agreement was made between the institute of the one part and the Local Government Board, of the other part, dated May 31, 1898, whereby the institute agreed to let and the Local Government Board agreed to take certain rooms in the assessed premises for the term of one year from Mar. 25, 1898, and thereafter

from year to year at an amount not of £200 upon the terms that the institute should furnish two of the rooms demised as laboratories and the other as an office, that it should provide them with gas and water free of charge, that the board should not without the consent of the institute use the rooms for any other purpose than for the preparation of glycerinated calf lymph and investigations in connection with vaccination, and that the director of the institute should have access to the rooms at all times for the purpose of inspecting the same. The Local Government Board had entered into and had since been and were now in possession of the rooms which formed part of the assessed premises which were the subject-matter of this appeal. The rooms were used by the Local Government Board for no other purpose than the preparation of glycerinated calf lymph and investigations in connection with vaccination. The rooms let were in no way structurally severed from the rest of the building, nor had they any separate entrance or staircase, and they opened into the landings by an ordinary door just as all the other rooms in the premises did. With the exception of the parts let to the Local Government Board the assessed premises had been and were exclusively used by the institute. The assessed premises were the headquarters of the institute, and were the place where or from whence all its affairs and proceedings for which the institute was incorporated as aforesaid were managed and regulated.

In the accounts of income of the institute the item "interest on investments" included sums derived from the investment of donations, gifts, bequests, etc. The fees from students represented payments made by pupils for courses of instruction. Such fees had hitherto not been sufficient to defray the expenses of such instruction, and the teaching of the institute was not carried on so as to result in a profit over and above the expenses thereof. The lectures were a means of imparting knowledge to the students which would be useful to them in their professions and assist them therein. The institute did not train medical officers of health, medical practitioners, or veterinary surgeons as such, nor had it instituted a course of study by attending which students could qualify for the above professions; but it had established courses of instruction on the subject of bacteriology, which would be of value to such persons. The lectures and courses of instruction were given in the assessed premises. The antitoxin, mallein, and tuberculin were the protective, curative, and diagnostic materials which were produced (though not exclusively so) for sale, and were sold by the institute in pursuance of the powers contained in its memorandum of association. Mallein and tuberculin were prepared on the assessed premises. By far the largest portion of the receipts from sales were derived from antitoxins. The institute had, notwithstanding that it had so far sustained loss by carrying on the making and selling of antitoxins, continued the preparation of antitoxins because, among other reasons, they can only be produced in the necessary uncontaminated form and at the requisite grades of strength by exceedingly high scientific skill and care, and because the continued making of antitoxins is the only means of improving the process and through this great improvements are constantly being effected. The preparation of the antitoxin was carried on on the Poplars Farm, but was directed from the headquarters of the institute, where also orders were taken for its sale and delivery. The institute had not and did not make any dividend, gift, or bonus in money to or between any of its members. The institute carried out for fees charged by it examinations of materials sent to it for the purposes of bacteriological and chemical investigation. These investigations were carried out in the assessed premises.

A supplemental valuation list for the parish of St. George, Hanover Square, made by the overseers, was dated and deposited on May 31, 1898, and the institute was therein rated, charged, and assessed in respect of the assessed premises comprised by them at and upon a gross value of £1,000 and a rateable value of £834. The institute objected before the assessment committee that the premises comprised were exempt from rates, and they gave notice of objection and specified the corrections which they desired to be made, but the committee refused to amend the

list and confirmed the assessment, and the institute thereupon appealed. The questions for the opinion of the court were: (i) was the institute exempt under the Scientific Societies Act, 1843 from being assessed or rated and from liability to the payment of county, borough, parochial, and other local rates and cesses in respect of the assessed premises? (ii) if the institute was not exempt from liability to be assessed or rated in respect of the whole of the assessed premises by reason of the letting to the Local Government Board, was the institute exempt from being assessed or rated in respect of such parts of the assessed premises as were not let to the Local Government Board.

By the Scientific Societies Act, 1843, s. 1:

"No person or persons shall be assessed or rated, or liable to be assessed or rated, or liable to pay to any county, borough, parochial, or other local rates or cesses in respect of any land, houses, or buildings, or parts of houses or buildings, belonging to any society instituted for purposes of science, literature, or the fine arts exclusively, either as tenant or as owner, and occupied by it for the transaction of its business and for carrying into effect its purposes, provided that such society shall be supported wholly or in part by annual voluntary contributions, and shall not, and by its laws may not, make any dividend, gift, division, or bonus in money unto or between any of its members, and provided also that such society shall obtain the certificate of the barrister-at-law or lord advocate as hereinafter mentioned."

McCall, Q.C., and *E. M. Pollock* for the appellant institute.

Danckwerts, Q.C., and *Ryde* for the respondents.

GRANTHAM, J.—We have to determine whether or not the objects of this society bring it within the provisions of s. 1 of the Scientific Societies Act, 1843, so as to exempt it from rateability in respect of the premises occupied by it. I have no doubt myself that they do not. It seems to me that the earlier cases cited on behalf of the appellants are no authority for adopting the contrary view. It is not necessary to go into these cases, but I may remark that they were all decided by LORD CAMPBELL, who seems to have had a fixed view with regard to the objects of such societies. LORD MACNAGHTEN in *Savoy Overseers v. Art Union of London* (1) ([1896] A.C. at p. 312) states that these earlier decisions have given rise to a great deal of difficulty. Thus in one of these earlier cases—*Bradford Library Society v. Bradford (Churchwardens)* (2)—an institution which I should be inclined to call a circulating library was held to be within the exception; but we have not to deal with such an institution as that at the present time. This is not a society instituted for purposes of science, literature, or the fine arts exclusively. One main object of the society is clearly the manufacture of certain medicines which have been found of infinite value in preventing and curing certain diseases, but which demand the greatest skill in their manufacture, and which can be manufactured properly only by such an institution as this. Having succeeded in manufacturing the materials or medicines of the necessary purity, they then sell them, as I understand it, to anyone requiring them for medical use; but, as the prices charged or obtained for them are not sufficient to maintain the institution, it seeks and fortunately obtains subscriptions and donations which enable it to continue its most valuable work. There is no case, however, in which such an object as this has been held to exempt a society from rateability and we have, therefore, no power to extend the exemption to this society.

CHANNELL, J.—I am of the same opinion. Although one of the objects of the society is undoubtedly the promotion of science, another, and probably the chief of them, is to give to individuals the practical benefits of science. It, therefore, seems to me that it is not a society instituted for purposes of science exclusively, within the meaning of s. 1 of the Scientific Societies Act, 1843. That view is borne out by

the case, if I understand them rightly. In *Royal College of Music v. Westminster Vestry* (3), A. L. SMITH, L.J. ([1898] 1 Q.B. at p. 819), defines the expression "instituted for the purpose of science, literature, or the fine arts exclusively" used in the Act as meaning "instituted for the purpose of advancing, disseminating, or propagating science, literature, or the fine arts." In that definition the only word which could be considered to apply to the distribution of the products or results of science is the word "disseminating"; but I do not think it was the intention of the learned Lord Justice that the word should have any such application. I desire to base my judgment mainly on the ground that this is not a society instituted for the purpose of science exclusively. I should not wish to base my judgment upon the ground that the society is not supported wholly or in part by "annual voluntary contributions." Though not entirely free from doubt, still I am inclined to think that the donations to this society would come within those words. They are not like the contributions which were paid to the Art Union of London; they resemble subscriptions rather. I do not suppose that it is contended that subscriptions are other than annual contributions. Another difficulty in the way of this society arises from the occupation of a portion of its premises by the Local Government Board. The answer to the question whether or not a subordinate occupation of this kind prevents the premises from being used exclusively for the purposes of the society appears to me to depend upon whether or not the occupation of the subordinate occupier is such that he can himself be rated in respect thereof. If the occupation of the subordinate occupier is of such a character as to render him separately rateable, then the remaining portion of the premises, if used exclusively for the purposes specified in s. 1 of the Scientific Societies Act, 1843, would be exempt from rateability notwithstanding the subordinate occupation; but if the occupation of the subordinate occupier is not such as would make him separately rateable, then no portion of the premises would be exempt. That, in my opinion, is the effect of the cases. In this case, apart altogether from the question whether the Local Government Board could be rated as if it were an individual, it is very doubtful whether its occupation is a separate rateable occupation. I am inclined to think that it is not; and if that is so, the appellant society would be prevented from coming within the exemption. Upon these two grounds I base my judgment.

Appeal dismissed.

Solicitors: *Hunters & Haynes; W. J. Fraser.*

[Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.] G

A

DUNLOP PNEUMATIC TYRE CO. v. ACTIENGESELLSCHAFT FÜR MOTOR UND MOTORFAHRZEUGBAU VORM. CUDELL & CO.

[COURT OF APPEAL (Sir Richard Henn Collins, M.R., Romer and Mathew, L.J.J.), January 13, 1902]

[Reported [1902] 1 K.B. 342; 71 L.J.K.B. 284; 86 L.T. 472; 50 W.R. 226]

Process—Service—Service on foreign company—Service of writ within jurisdiction—Writ served on representative at stand in exhibition—Stand occupied by company for nine days.

The defendants, a foreign corporation, who were manufacturers of motor cars abroad, hired a stand to exhibit their goods at the National Cycle Show which lasted for nine days. They had the exclusive use of the stand which was in charge of S. who had been sent from abroad for that purpose, and his duty was to explain the working of the exhibits and to press for orders from customers. M., who had also been sent from abroad, acted as the assistant of S. during any temporary absence of S. from the stand. A motor car exhibited at the stand was fitted with tyres which the plaintiffs alleged was an infringement of their patent. The writ in the action for infringement was served on M. who was in charge of the stand in the absence of S.

Held: at the material time the defendants were carrying on business and were resident within the jurisdiction and the writ had been properly served under R.S.C., Ord. 9, r. 8.

Notes. Considered: *Saccharin Corp'n. v. Chemische Fabrik von Heyden Akt.*, [1911] 2 K.B. 516. Explained: *Okura v. Forsbachs Jernverks Akt.*, [1914] 1 K.B. 715. Referred to: *De Beers Consolidated Mines v. Howe*, [1905] 2 K.B. 612; *Employers' Liability Assurance Corp'n., Ltd. v. Sedgwick, Collins & Co., Ltd.*, [1926] All E.R. Rep. 388; *Re Tovarishestvo Manufactur Ludvig Rabenek*, [1944] 2 All E.R. 556; *Davies v. British Geon, Ltd.*, [1956] 3 All E.R. 389.

As to service of process on a foreign corporation, see 9 HALSBURY'S LAWS (3rd Edn.) 94, and for cases see 13 DIGEST (Repl.) 350 et seq. As to application to set aside proceedings for irregularity, see 30 HALSBURY'S LAWS (3rd Edn.) 400, and for cases see DIGEST (Practice) 320 et seq.

Cases referred to:

- (1) *Newby v. Von Oppen and Colt's Patent Firearms Manufacturing Co.* (1872), L.R. 7 Q.B. 293; 41 L.J.Q.B. 148; 26 L.T. 164; 20 W.R. 383; 13 Digest (Repl.) 349, 1581.
- (2) *La Bourgogne*, [1899] P. 1; 79 L.T. 331; 15 T.L.R. 28; 8 Asp. M.L.C. 462, C.A.; affirmed sub nom. *Compagnie Générale Trans-Atlantique v. Thomas Law & Co., La Bourgogne*, [1899] A.C. 431; 68 L.J.P. 104; 80 L.T. 845; 15 T.L.R. 424; 8 Asp. M.L.C. 550, H.L.; 13 Digest (Repl.) 352, 1597.

Also referred to in argument:

Haggin v. Comptoir d'Escompte de Paris, Mason and Barry v. Same (1889), 23 Q.B.D. 519; 58 L.J.Q.B. 508; 61 L.T. 748; 37 W.R. 703; 5 T.L.R. 606, C.A.; 13 Digest (Repl.) 350, 1582.

The Princesse Clementine, [1897] P. 18; 66 L.J.P. 23; 75 L.T. 695; 8 Asp. M.L.C. 222; Digest (Practice) 324, 454.

Badcock v. Cumberland Gap Park Co., [1893] 1 Ch. 362; 62 L.J.Ch. 247; 68 L.T. 155; 41 W.R. 204; 9 T.L.R. 113; 37 Sol. Jo. 116; 3 R. 188; 13 Digest (Repl.) 350, 1583.

Mackereth v. Glasgow and South Western Rail. Co. (1873), L.R. 8 Exch. 149; 28 L.T. 167; 21 W.R. 339; 13 Digest (Repl.) 352, 1600.

Appeal by defendants from an order of CHANNELL, J., at chambers refusing to set aside the writ and service thereof.

The plaintiffs brought this action against the defendants for an injunction to restrain them from infringing the plaintiffs' patent for a pneumatic tyre and the damages for the infringement.

The defendants were a foreign company having their registered office in Germany and carried on the business of manufacturers and sellers of motor cars in Germany and had no place of business in England. They rented a stand at the Crystal Palace to exhibit their goods at the National Cycle Show held there from Nov. 22 to Nov. 30, 1901. The defendants had the exclusive use of the stand during the exhibition and exhibited, among other articles, a motor car with pneumatic tyres, tyres which the plaintiffs alleged had infringed their patent. For the exhibition the defendants had sent over Struck and his assistant Müller; Struck's duty was to look after the stand and exhibits, answer inquiries and to push the sales of the goods, and Müller was to perform these duties while Struck was absent. The writ in the action had been served on Müller, at the defendants' stand, while Struck was absent. The defendants applied to set aside the writ and service of the writ on the ground as stated in the summons "that at the time of service of such writ of summons the defendants were a foreign corporation resident out of the jurisdiction of the court." CHANNELL, J., refused the order asked for and held that the defendants, a foreign corporation, were carrying on business in this country; and also refused leave to amend the summons by adding a ground for setting aside service that Struck and not Müller was the proper person to be served and held that if that objection had been taken distinctly in the first instance, Struck might have been served. The defendants appealed.

Danckwerts, K.C., and R. B. Acland, for the defendants.

Bray, K.C., and A. J. Walter, for the plaintiffs.

SIR RICHARD HENN COLLINS, M.R.—I am of opinion that this appeal must be dismissed. The question is whether this foreign corporation can be brought within the jurisdiction of the courts of this country. Two points were raised. First, that the defendants, being a foreign corporation, were, therefore, not amenable to the jurisdiction of these courts; and, secondly, assuming that they could be made amenable to the jurisdiction, that the writ had not been served upon the right person. The ground upon which the defendants' application was made was stated in the summons to be "that at the time of the service of such writ of summons the defendants were a foreign corporation resident out of the jurisdiction of the court." It was not stated as a ground of the application that the writ was served upon a person who was not the proper officer of the corporation, within R.S.C., Ord. 9, r. 8. The application was heard by CHANNELL, J., and he refused to make an order to set aside the service upon the ground stated in the summons, and held that the foreign corporation were carrying on business in this country; and he refused to amend the summons by adding as a ground for setting aside service that Struck and not Müller was proper person to be served, because, if that objection had been taken distinctly in the first instance, Struck might have been served. The learned judge refused to allow the defendants to amend their summons by stating as a ground of objection that service was effected upon the wrong person. The defendant could not be entitled to rely upon that objection without an amendment, and they ask us to permit them now to amend their summons so as to raise that point. The learned judge has refused, as a matter of discretion, to allow that amendment for the purpose of raising a merely technical point, and I think that, in the circumstances, it would be wrong for us to overrule the exercise of his discretion.

We come then to the rule by which this process is regulated. R.S.C. Ord. 9, r. 8 provides that,

"in the absence of any statutory provision regulating service of process, every writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, . . ."

A It seems to me that Struck clearly came within the term "head officer" in that rule. He was a person sent over by the defendants to do that which, if the defendants had been an ordinary individual, that individual would have done himself. Struck had to do everything incidental to carrying on that part of the defendants' business, which consisted in showing and vending their goods at the Crystal Palace. The defendants hired a special place for that purpose; they occupied it exclusively with their goods; and they employed their own servant to occupy himself exclusively in conducting that part of their business at that place. In those circumstances I think that Struck was clearly the proper officer upon whom to serve the writ, assuming that the defendants were within the jurisdiction so as to be liable to be served with a writ.

C It is necessary then to consider the facts in order to see whether this corporation can be said to have been resident within the jurisdiction so as to be liable to be served with a writ within the jurisdiction. If this corporation was resident within the jurisdiction, then it could be served with a writ in the manner prescribed by R.S.C. Ord. 9, r. 8. It is, therefore, necessary to ascertain whether this foreign corporation was, or was not, resident in England when the writ in this action was served upon it. It has been held over and over again in the cases, from *Newby v. Von Oppen and Colt's Patent Firearms Manufacturing Co.* (1) down to *La Bourgoigne* (2) that the real test of residence is whether the corporation is conducting its business at some defined place in this country. If it is doing so, that is the way in which a corporation existing for business purposes can be said to reside in this country. If a trading corporation carries on its business, by its own agents, in a particular place, then it is resident in that place. No doubt in some of the cases difficulties have arisen upon the question whether the business which was being carried on for the benefit of the foreign corporation was being carried on by the corporation at a definite place so as to justify the statement that it was resident in that place. That question sometimes must be, and was in some of those cases, rather a nice question of fact. That difficulty does not arise in the present case, for this corporation has not resorted to the assistance of some person who carries on an independent business in this country, and the difficult question is not raised as to how far a foreign corporation which utilises the services and premises of a person, who carries on an independent business of his own, for the purposes of having its business conducted, can be said to be itself residing and carrying on business in this country. That question was considered in this court in *La Bourgoigne* (2). In that case a French company availed itself of the services of a broker, who had other business and was agent for other steamship companies, and we came to the conclusion that the French company was resident and carrying on business in this country. That question does not, however, arise in this case, for, as I have pointed out, this foreign company has hired for its own exclusive use certain premises and has not resorted to the agency of some person having an independent business in this country, but has sent over its own servant to conduct its business exclusively on the premises which it has hired exclusively for its own purposes.

H The only real difficulty which arises in this case arises from the fact that these premises were taken and required and occupied for the time of the duration of the exhibition at the Crystal Palace, and for that time only, a period of nine days. I It has been argued on behalf of the defendants that on the question of residence time is an essential element. I agree that time is an element; residence is to be inferred from a number of facts, and time cannot be excluded. It was conceded that, if it were clearly proved that this foreign corporation had announced its intention of carrying on its own trade in England for a period of nine days, the mere fact that the period was limited to nine days would not of itself make it impossible that there should be residence during those nine days. That is not such a short period as to be a negligible quantity; it is a substantial period of time, and may in certain circumstances be a very substantial period of time. In this

particular and the period of nine days during the exhibition, the purpose of which was to gather together from all parts of the country a large number of people interested in this particular class of work to see these things, and to invite their attention and secure their orders, might well be a period during which as much business could be done as during an ordinary period of nine months in an ordinary town. It seems to me, therefore, that we cannot, upon the ground that nine days is too short a period from which to infer a residence, say that this corporation, which fulfilled in all other respects the conditions necessary to constitute residence by a corporation, ought to be held not to have resided in this country because the period was only nine days. In my opinion, there are here all the elements necessary to constitute residence; exclusive possession of the premises acquired for the purpose of carrying on the business of the corporation exclusively, and business carried on by the corporation there by its own servant and not through the medium of another person having an independent business of his own, a servant sent specially for the purpose and exclusively employed in that business.

It was further contended that the defendants could not be said to be carrying on business so as to be resident in this country unless they were carrying on the whole of their business here; that they were manufacturers and manufactured abroad; and that, inasmuch as they did not manufacture upon those premises at the Crystal Palace, they cannot be said to have been resident there. That contention scarcely requires to be answered. I agree that the defendants did not carry on their whole trade at the Crystal Palace; but the selling of their manufactures is a very substantial part of their trade, and everything incident to the vending of their manufactures was done here in the only way in which it could be done, by affording inspection, information, prices, and every opportunity of examination, and by taking orders. The mere fact that they were manufacturers elsewhere appears to me not to touch the question at all. In my opinion the learned judge was perfectly right in his decision, and this appeal must be dismissed.

ROMER, L.J.—I agree. The result of the authorities appears to me to be that, if for a substantial period a foreign corporation carries on business at a fixed place of business in this country, hired or taken by or on behalf of the corporation, then during that period the corporation is resident here for the purpose of being served with a writ. In my opinion, the facts of this case clearly bring the defendants within that statement of the law. I think that upon this short ground this appeal fails on the main ground upon which it was based. I also think that, in the particular circumstances of the case, leave to amend ought not to be given.

MATHEW, L.J.—I am of the same opinion. I agree that the technical point was properly decided by the learned judge, and that there is no reason why we should differ from him as to the exercise of his discretion. With regard to the main point, can anyone doubt that, if this corporation were an English company, it must be held to have been carrying on its business at this place in the Crystal Palace? It was a place hired by the foreign corporation, and intended to be used exclusively by the corporation for the purposes of its business, and the corporation carried on business there. That appears to me to satisfy the necessary conditions for residence, as stated in many of the cases. A corporation can only figuratively be said to reside anywhere. The criterion of residence is a fixed place used by the corporation exclusively for the purposes of the business which it is carrying on. I agree, therefore, that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Cruesemann & Rouse; J. B. & F. Purchase.*

[*Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.*]

NORTH EASTERN RAIL. CO. v. LORD HASTINGS

HOUSE OF LORDS (The Earl of Halsbury, L.C., Lord Macnaghten, Lord Davey, Lord Brampton and Lord Robertson), March 22, 23, 27, April 5, 1900]

[Reported 1900] A.C. 260; 69 L.J.Ch. 516; 82 L.T. 429; 16 T.L.R. 325]

Document—Construction—Plain and unambiguous language—Alteration or qualification in light of conduct of parties.

No principle has even been so universally or more vigorously insisted on than that written instruments, if they are plain and unambiguous, must be construed according to the plain and unambiguous language of the instrument itself. No conduct by the parties while purporting to act under the contract—e.g., the failure of the grantor of a way-leave to charge a rent which is clearly provided for in the deed effecting the grant—can alter or qualify words which are plain and unambiguous.

Per the EARL OF HALSBURY, L.C.: It may be that in particular instances an adherence to the letter of a contract may produce an apparent injustice, but a different rule would render all contracts uncertain and produce much graver injustice.

Document—Construction—Document to be read as a whole—Interpretation of each provision to be in harmony with rest of document—No violence to be done to meaning of which words of provision naturally susceptible.

Per LORD DAVEY: A deed must be read as a whole to ascertain the true meaning of its several clauses, and the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed if that interpretation does no violence to the meaning of which they are naturally susceptible. You may disregard the literal meaning of the words and give them another meaning if the words are sufficiently flexible to bear that interpretation.

Notes: Referred to: *Van Dieman's Land Co. v. Table Cape Marine Board*, [1906] A.C. 92; *Watcham v. A.-G. of East Africa Protectorate*, [1918-19] All E.R. Rep. 455; *Hvalfangerselskapet Globus Aktieselskap v. Unilever, Ltd.* (1933), 39 Com. Cas. 1.

As to general rules of interpretation of documents see 11 HALSBURY'S LAWS (3rd Edn.) 381 et seq., and for cases see 17 DIGEST (Repl.) 253 et seq.

Cases referred to:

- (1) *Clifton v. Walmesley* (1794), 5 Term Rep. 564; 101 E.R. 316; 17 Digest (Repl.) 336, 1417.
- (2) *Clyde Navigation Trustees v. Laird* (1883), 8 App. Cas. 658, H.L.; 42 Digest 685, 986.
- (3) *Caledonian Rail. Co. v. North British Rail. Co.* (1881), 6 App. Cas. 114; 29 W.R. 685, H.L.; 17 Digest (Repl.) 275, 799.

Also referred to in argument:

- Atkinson v. Pillsworth* (1787), 1 Ridg. Parl. Rep. 449; Vern. & Scr. 161; 17 Digest (Repl.) 309, *568.
- Doe d. Pearson v. Ries* (1832), 8 Bing. 178; 1 Moo. & S. 259; 1 L.J.C.P. 73; 131 E.R. 369; 17 Digest (Repl.) 336, 1418.
- River Wear Comrs. v. Adamson* (1877), 2 App. Cas. 743; 47 L.J.Q.B. 193; 37 L.T. 543; 42 J.P. 244; 26 W.R. 217; 3 Asp.M.L.C. 521, H.L.; 17 Digest (Repl.) 259, 633.
- Gibson v. Doeg* (1857), 2 H. & N. 615; 27 L.J.Ex. 37; 30 L.T.O.S. 156; 21 J.P. 808; 6 W.R. 107; 157 E.R. 253; on appeal (1862), 7 L.T. 71, Ex. Ch.; 17 Digest (Repl.) 293, 981.

R. v. Cutbush (1867), L.R. 2 Q.B. 379; 36 L.J.M.C. 70; sub nom. *R. v. Cutbush*, *Ex parte Paine*, 10 Cox, C.C. 489; sub nom. *Re Paine*, 8 B. & S. 319; 15 W.R. 742; sub nom. *R. v. Paine*, 16 L.T. 282; sub nom. *R. v. Maidstone Justices, Ex parte Paine*, 31 J.P. 454; 42 Digest 667, 776.

Dunell v. Toulser (1854), 3 H. & C. 455; 11 L.T. 217, 13 W.R. 115, 160 F.R. 610; sub nom. *Fowell v. Franter*, 34 L.J.Ex. 6; 17 Digest (Repl.) 280, 867.

Appeal by the defendants to the action from a decision of the Court of Appeal (SIR NATHANIEL LINDELL, M.R., RIGBY and VAUGHAN WILLIAMS, L.J.J.) reported 1899, 1 Ch. 656, affirming a decision of Byles, J., reported 1898, 2 Ch. 674, in favour of the respondent.

The action was brought to establish liability on the part of the North Eastern Railway Co. to pay a way-leave rent to the respondent for coal shipped at loading staiths erected by them on the north bank of the estuary of the Blyth. This coal in its passage from the collieries to the staiths was not carried over any land of the respondent, and the contention of the company was that the respondent was, therefore, not entitled to any way-leave rent in respect of its carriage. The question depended upon the true construction of an agreement for a way-leave lease executed on May 18, 1854, by Jacob, Lord Hastings, and the Blyth and Tyne Railway Co., the predecessors in title of the respondent and the appellants respectively. It was not in dispute that since the date of the agreement no such rent had ever been demanded or paid. The Blyth and Tyne Railway Co. was incorporated by the Blyth and Tyne Railway Act, 1852, and was thereby authorised to maintain a railway running from the town of Blyth on the south side of the estuary of the Blyth to coal staiths on the river Tyne at Hayhole. The main railway passed for part of its length through the estate of Lord Hastings, and on May 20, 1853, a lease was executed by which Lord Hastings granted a way-leave for 1,000 years to the Blyth and Tyne Co., and that company agreed to pay 5s. per ten (each ten being about 48 or 49 tons) of all coal, etc., passing over the railway, and 1s. 3d. per ten of all coal, etc., conveyed from the coalfield situated northward of the estate of Lord Hastings described as the Seaton Delaval estate to Blyth over a line known as the Bedlington branch. The Bedlington branch was a colliery line which passed for part of its length over lands of Lord Hastings.

In 1853 the Blyth and Tyne Co. applied to Parliament for power to make two branch railways, to Morpeth and Tynemouth respectively, and on May 21, 1853, that company and Lord Hastings entered into an agreement by which the company agreed to execute a counterpart of a lease by Lord Hastings in favour of the company of a way-leave over his lands for the said branch railways for the same term of years and upon the terms and conditions specified in the lease of May 20, 1853, it being understood that the rents reserved were to apply to the railway already authorised as well as the proposed branches. Early in the year 1854 a Bill was introduced into Parliament, which afterwards became the Blyth and Tyne Railway Consolidation and Extension Act, 1854. This Act repealed but substantially re-enacted the Acts of 1852 and 1853, and authorised the construction of further branches, one called the Tynemouth extension, being the southern portion of the proposed line to Tynemouth, for which Lord Hastings had agreed to grant a way-leave in 1853, and the other called the Loughirst branch, which did not pass over any lands of Lord Hastings.

On May 18, 1854, there was executed an indenture containing a form of way-leave lease to be granted by Lord Hastings to the Blyth and Tyne Co. This indenture recited that a Bill had lately been introduced into and was then pending in Parliament for the purpose of enabling the company to continue and maintain or make complete and maintain the Dairy House branch, the Tynemouth extension, and the Morpeth branch. No reference was made to the Loughirst branch. It further recited that the railways and works were intended to be made to a great extent upon lands belonging to Lord Hastings, and that the company had applied to him to make to them, in the event of the passing of the Bill, a grant of way-leave

over his lands through which the railways were intended to be made. Then followed a covenant by Lord Hastings and the company, that after the passing of the Bill Lord Hastings would grant and the company would accept a grant of way-leave over such portion of the lands of Lord Hastings as were thereafter mentioned, which grant of way-leave was agreed to be in the form of a lease as thereafter set forth. The term of lease which was then set forth reserved as was reserved by the indenture hereinbefore mentioned of May 20, 1853, rents calculated at the rate of 5s. per ten of coals, etc., passing along the railways and not comprised in the subsequent reservations, and at the rate of 1s. 3d. per ten of coals, etc., conveyed from the coalfield situate northward of the Seaton Delaval estate to Blyth over the Bedlington branch. But in addition to the rents of 5s. per ten and 1s. 3d. per ten reserved by the earlier indenture, the agreed form of lease also reserved a rent calculated at the rate of 3s. per ten on coals, etc., conveyed over any part of the railways comprehended in the Blyth and Tyne Railway Consolidation and Extension Act, 1854, and shipped at the port of Blyth (other than coals, etc., comprised in the reservation of 1s. 3d. for coals, etc., carried over the Bedlington branch).

The appellants contended that the true construction to be put upon the reservation of the rent of 3s. in the indenture of May 18, 1854, was that in respect of coals, etc., conveyed over any part of the railways comprehended in the Act of 1854 for shipment at the port of Blyth and passing over the lands of the respondent, but not otherwise, the company were liable to pay a rent of 3s. per ten instead of 5s. per ten as provided by the earlier indenture of May 20, 1853. It was admitted that the rent of 3s. applied, and had always been treated as applying, to the main railway as well as to the branches authorised by the Acts of 1853 and 1854. The respondent contended that the appellants were liable to pay the 3s. rent on all coals, etc., conveyed over any part of the railways for shipment at the port of Blyth, whether they passed over his lands or not. For a period of upwards of forty years from the year 1854—the date of the execution of the indenture—the respondent had not nor had any of his predecessors in title ever claimed, nor had the appellants or their predecessors in title ever paid, the rent of 3s. per ten or any other rent of any kind in respect of coal, etc., whether conveyed to Blyth or elsewhere, which did not pass over some part of the respondent's lands, although rent had been regularly claimed and paid upon all coal which had passed over any land of the respondent.

Swinfen Eady, Q.C., Astbury, Q.C., and Mackarness for the appellants.

Eve, Q.C., and G. Henderson, for the respondent.

Their Lordships took time for consideration.

April 5, 1900. The following opinions were read.

THE EARL OF HALSBURY, L.C.—In this case I think that the whole question turns upon a very few words to be found in the instrument under construction. A variety of circumstances have been insisted upon to alter the construction which the words themselves naturally bear, but I am unable to see that either in the language used or on the construction of the whole instrument there is any room for doubt. The chief argument used to give an unnatural construction of the words is that the parties have so acted during a period of forty years that the only reasonable inference to be drawn from their conduct is that they have understood and acted on their bargain in a sense different from that which the words themselves convey. I am of opinion that if this could be truly asserted it is nothing to the purpose. The words of a written instrument must be construed according to their natural meaning, and it appears to me that no amount of acting by the parties can alter or qualify words which are plain and unambiguous.

So far as I am aware, no principle has ever been so universally or more vigorously insisted upon than that written instruments, if they are plain and unambiguous, must be construed according to the plain and unambiguous language of the instrument itself. More than one hundred years ago a case arose in the Court of King's

Bench (*Clifton v. Walmsley* (1)) in which under a demise of certain coal mines the lessee had covenanted to pay (among other rents and royalties reserved) one-half part or share of all such sum or sums of money as any of the coal to be gotten by virtue of the said indenture should sell for at the pit's mouth. At the time when the covenant was made, all the coal was sold at the pit's mouth, but after that time a canal had been made and an opportunity afforded of carrying the coal to a more distant market where it was sold at an enhanced price. For a period of ten years the lessee had paid to the lessor the half of the enhanced price when the coal was sold at the distant market, and the same line of argument was presented in that case which has been put before your Lordships here. It was said that the circumstances showed what the real meaning of the parties must have been—namely, that the lessor should receive one-half of the price which the coal produced in the market, and it was urged that the court would not tie down the parties to the mere words, but would look to the meaning, that for a period of ten years the parties had acted on that view of the contract, and whether the coal was sold further from the pit or nearer to it could not possibly vary the real rights of the parties. The court rejected the evidence, and held that the covenant, not being ambiguous in its terms, could not be explained in the way suggested. It certainly in that case could not have been much matter of doubt that what the parties really had in their minds—if one had been at liberty to reject the words of the covenant or treat them as ambiguous—was that the lessor should obtain one-half of the selling price of the coal. As was argued by the learned counsel in that case, it was very difficult to conceive any hypothesis upon which a distinction should have been insisted on as to the place of sale. It may be that in particular instances an adherence to the letter of a contract may produce an apparent injustice, but a different rule would render all contracts uncertain and would produce much greater injustice.

In the case of *Clyde Navigation Trustees v. Lord* (2) LORD BLACKBURN says (8 App. Cas. at p. 668):

"But though I think the reasonableness of a scheme is a very good reason for thinking that the Legislature might have wished to adopt it, and therefore for construing the words as showing an intention to carry it out, if the words used will bear such a sense, it affords no justification for introducing new words, or construing the words used in a sense which they cannot bear, and I find no words in this Act of 1858 capable of bearing a meaning which would show that the legislature intended this reasonable scheme. I equally fail to see words indicating an intention to make this perhaps not unreasonable exemption from the general rate if it were imposed."

The facts out of which the present case arises are simple enough. In May, 1853, Lord Hastings granted certain way-leaves to a railway company, and, without going very minutely into the terms of the instrument in question, it is enough to say that the way-leave then granted or agreed to be granted was a way-leave by which in certain terms the coal going over any part of the railway which crossed Lord Hastings' land should pay certain rates. It cannot be denied that in this agreement the sole right of Lord Hastings was to claim in respect of railways or parts of railways conveying coal through or over his own land. But the agreement of May, 1854, is the instrument upon which the question arises. Certain way-leaves and rights in respect of them are granted by Lord Hastings, and the whole question is whether in this instrument, like that of 1853, the right to get rents or sums is dependent upon whether the coal carried is carried through or over any part of Lord Hastings' land. The appellants seek to limit it by suggesting that the real meaning of the words used must be read by the light of the earlier agreement in which undoubtedly Lord Hastings' rights were limited to coal carried over some portion of his land. But I am very clearly of opinion that no such limitation can be imported. I agree with SIR NATHANIEL LINDLEY, M.R., that the

A clause under construction is clear and unambiguous. It is not denied that the language of the covenant, *videlicet* "the railways comprehended in the Blyth and Tyne Railway Consolidation and Extension Act, 1854" is conclusive against the appellants unless these words can be read in some different sense, and I am wholly unable to see how they can be. The coal in respect of which way-leave rent has been charged and has not been paid undoubtedly did pass over railways comprehended in this description, and it is sought to qualify the rights of Lord Hastings under this instrument by three considerations.

First it is said that it is unreasonable that Lord Hastings should receive way-leave rent in respect of coal passing over a railway or part of a railway which was not on Lord Hastings' land. But it is a very familiar thing that in granting similar rights a proprietor will protect himself against an evasion of the obligations by a railway company, to guard against alternative routes by which when a railway company has obtained, so to speak, the key of the situation it may render a reservation of rents for way-leaves of little value. Next it is said that the instrument reserves no rights of inspection, or right to account, whereas such rights are expressly given in respect of such portions of the railway as pass over Lord Hastings' land. This is true. But though it may go to show the bad drafting on which the appellants so strongly insist, I am wholly at a loss to see that the absence of such provisions can affect the plain and unambiguous words in which the obligation to pay is created. The next argument is the practice, which has prevailed for forty years between the parties, which, it is said, is inconsistent with the only sense in which the words creating the obligation can be understood. I think the argument overstated, since there may have been circumstances which caused one particular pit, which was undoubtedly comprehended within the language of the covenant, not to be called upon to pay. The question has neither been litigated nor inquired into, and I am not at liberty to inquire into it, but whatever may be the history of it, it cannot affect the generality of the covenant or its construction between these parties, whatever may be the rights of the proprietor of the Cowpen Colliery. What those circumstances were, and how it happened that the coal carried from that pit over part of the designated lines was not charged for, I do not know nor am I at liberty to conjecture. It may be that circumstances peculiar to itself or an agreement with the owner of it caused this omission, but now that an alternative line has been created by legislation it is difficult to see what relation that immunity has to the claim in respect of the coal carried by that alternative line.

But, in truth, I do not think that I have any right to know what the parties have done. I think in strictness the course they have pursued is not evidence. I think that the true view is that laid down by LORD KENYON, C.J., in 1794, and I have no right to construe the covenant now in question differently from the mode in which I should have construed it if the controversy had arisen the day after the agreement had been executed. For those reasons I must adhere to the judgment given by BYRNE, J., and by the Court of Appeal, and move your Lordships that this appeal be dismissed with costs.

LORD MACNAGHTEN.—I agree. I cannot see my way to differ from the view expressed by BYRNE, J., and by the Court of Appeal. There is not, in my opinion, any ambiguity of any sort in the clause which has given rise to so much discussion at the Bar, and, therefore, I think that the agreement must have effect according to the plain meaning of the language the parties have deliberately chosen to employ.

LORD DAVEY.—In this case we have to construe an instrument which has never been executed as a deed, but is contained in an agreement dated May 18, 1854, which binds the parties to execute one in that form. It is not an executory instrument because there is nothing left for the draftsman to settle, and your Lordships have to construe it in the same way as if it were an executed deed.

It cannot be denied that there are provisions in this instrument which, read literally, are not in harmony with other provisions to be found in it, and in one not unimportant respect—viz., the proviso against the payment of double rents under this deed and the previous wayleave lease of 1853—it is impossible to make the words fit what was agreed on both sides of the Bar to have been the real intention.

The principle on which an instrument of this description should be construed is not doubtful. It is no quote the words of Lord Watson in an unreported case that the deed must be read as a whole in order to ascertain the true meaning of the several clauses, and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed if that interpretation does no violence to the meaning of which they are naturally susceptible, or (as was said by Lord Selborne, L.C.,) you may disregard the literal meaning of the words and give them another meaning if the words are sufficiently flexible to bear that interpretation: *Caledonian Railway Co. v. North British Rail. Co.* (3). Applying this rule of construction to this deed, I am disposed to construe the second reservation as confined to coals, etc., conveyed over Lord Hastings' land, if the words will legitimately bear that construction. If this construction could be adopted it would have the effect of harmonising all the parts of the deed, and making it consistent throughout. It would be in accordance with what may *prima facie*, from the subject-matter of the grant, from the other contents of the instrument, and from the absence of any recital in the agreement of 1854 showing an intention to charge a royalty on coals not carried over Lord Hastings' land, be presumed to be the intention of the parties. It may, I think, be argued with some force that as the words "the said railways" in the first reservation bear the artificial meaning of "such parts of the railway and works as pass through the land of Lord Hastings" so the words "the railways comprehended" in the Act of 1854 in the second reservation may have the meaning not less and not more artificial of "such parts of those railways as pass through the lands of Lord Hastings." But after mature consideration I have somewhat reluctantly come to the conclusion that to put that meaning on the very plain words of the second reservation would be not to construe the words which are there, but to add other words which are not there. I, therefore, feel constrained, though with some hesitation, to concur in the interpretation which your Lordships have given to these words.

I have formed my opinion on what is to be found within the four corners of the instrument to be construed without adverting to the fact that the actings of the parties for forty-three years before the commencement of the action have been inconsistent with the view taken by your Lordships. I do not think that I could properly advise your Lordships to hold that the actings of the parties during that period which does not exceed the limits of living memory is evidence upon which you can act without other grounds for doing so of a lost agreement varying that of 1854 or, which is the same thing in another form, adopt the construction acted on by the parties as *contemporanea expositio*. To do so would be inconsistent with what was said by Lord Blackburn and Lord Watson in this House in *Glyde Navigation Trustees v. Laird* (2), speaking in 1883 of an Act passed in 1858, and so far as I know would be unsupported by any authority. But (adopting Lord Blackburn's language in that case) I think that the fact of the respondent and his predecessor having acquiesced in this construction against their own pecuniary interest for this length of time raises a strong *prima facie* ground for thinking that there must exist some legal ground on which they could not resist, and a court should be cautious and not decide unnecessarily that there is no such ground. It appears that the only case in which until recently the respondent might have claimed the royalty now claimed, to which your Lordships think he is entitled, is the coal bed from a colliery called the Cowpen Colliery. It also appears from the first agreement of April 27, 1852, that there was some previous right of wayleave belonging to the proprietors of that colliery which became vested in the railway company, and it was suggested by counsel for the respondent that there might be some explanation,

the plan to which was now lost, why the respondent and his predecessor did not claim the full royalty to which they were apparently entitled upon coal carried from the Cowpen Colliery. It occurred to me at one time that in these circumstances we might except coal from Cowpen Colliery from the operation of BYRNE, J.'s, *decree*; but I agree with my noble and learned friend on the Woolsack that this variation has never been asked for by the appellants and the question has not been made the subject of investigation, and, therefore, there are no sufficient materials before the House on which your Lordships would be justified in making such a variation in the decree. I, therefore, agree in the judgment which has been moved.

LORD BRAMPTON.—I also agree in the opinion that this appeal should be dismissed. The whole question turns upon the construction of that short clause contained in the agreement of May 18, 1854, to which I need only refer. As it stands it seems to me to be clear and free from ambiguity and incapable of any other construction than that assigned to it by the respondent. Certainly there is nothing to be found in the rest of the agreement to suggest any other interpretation. But it is said that it must have been differently understood by the parties themselves, and that the omission by the plaintiff for upwards of forty years to claim the rents now sought to be recovered is cogent evidence that such was the case. I grant that if the clause were capable of two constructions, one of which would support, the other of which would defeat the claim, the omission would afford irresistible proof the latter was the interpretation intended by the parties. No such ambiguity, however, exists, and it seems, therefore, to me that, in the absence of any proof to the contrary, it must be assumed that the parties knew and understood the language which they were using, and that in executing the agreement containing that clause they were truly expressing their intentions, and are bound by the writing which they have signed. Why the agreement was so framed, what were the considerations which induced it, and why the claim was so long allowed to sleep, are mere matters of speculation; but one has no right to act upon speculation to set aside a deed or agreement which is on the face of it clear and definite. This appeal ought, therefore, to be dismissed with costs.

LORD ROBERTSON.—I agree, for the reasons stated by my noble and learned friend on the Woolsack.

Appeal dismissed.

Solicitors: *Williamson & Hill*, for *A. Kaye Butterworth*, York; *Bircham & Co.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

BEVAN AND OTHERS v. WEBB AND ANOTHER

[COURT OF APPEAL (Henn Collins and Stirling, L.JJ.), April 24, 1901]

[Reported [1901] 2 Ch. 59; 70 L.J.Ch. 556; 84 L.T. 609; 49 W.R. 546, 19 T.L.R. 440; 45 Sol. Jo. 465]

Partnership—Books and documents—Partner's right to inspect and copy—Exercise of right by agent—Partnership Act, 1890 (53 & 54 Vict., c. 39), s. 24 (9).

By s. 24 (9) of the Partnership Act, 1890: "The partnership books are to be kept at the place of business of the partnership . . . and every partner may, when he thinks fit, have access to and inspect and copy any of them." By an article in a deed of partnership: ". . . each of the partners shall have free access to and liberty to examine and copy or take extracts from any of the books and writings of the partnership at all reasonable times."

Held: the right of inspection, copying, etc., above mentioned covered everything which was necessary to make it effective, and, therefore, it was not confined to a partner personally, but could be exercised by an agent of a partner provided he was a person to whom no reasonable objection could be taken and was willing to put himself on terms not to use the information which he obtained for any improper purpose.

Decision of JOYCE, J., [1901] 1 Ch. 724, reversed.

Notes. Applied: *Norey v. Keep*, [1909] 1 Ch. 561; *Dodd v. Amalgamated Marine Workers' Union*, [1923] All E.R. Rep. 194.

As to the right of a partner to inspect partnership books and documents, see 28 HALSBURY'S LAWS (3rd Edn.) 539, 540, and for cases see 36 DIGEST (Repl.) 564, 565. For Partnership Act, 1890, see 17 HALSBURY'S STATUTES (2nd Edn.) 579.

Cases referred to:

- (1) *Cameron v. M'Murray* (1855), 17 Dunl. (Ct. of Sess.) 1142.
- (2) *Brown v. Perkins* (1843), 2 Hare, 540; 8 Jur. 186; 67 E.R. 223; 18 Digest (Repl.) 102, 859.
- (3) *Dadswell v. Jacobs* (1887), 34 Ch.D. 278; 56 L.J.Ch. 233; 55 L.T. 857; 35 W.R. 261, C.A.; 18 Digest (Repl.) 7, 23.
- (4) *Nelson v. Anglo-American Land Mortgage Agency Co.*, [1897] 1 Ch. 130; 66 L.J.Ch. 112; 75 L.T. 482; 45 W.R. 170; 13 T.L.R. 77; 41 Sol. Jo. 112; 10 Digest (Repl.) 812, 5266.
- (5) *Mutter v. Eastern and Midlands Rail. Co.* (1888), 38 Ch.D. 92; 57 L.J.Ch. 615; 59 L.T. 117; 36 W.R. 401; 4 T.L.R. 377, C.A.; 10 Digest (Repl.) 1255, 9081.
- (6) *Re Credit Co.* (1879), 11 Ch.D. 256; 48 L.J.Ch. 221; 27 W.R. 380; 10 Digest (Repl.) 812, 5264.
- (7) *Re West Devon Great Consols Mine* (1884), 27 Ch.D. 106; 51 L.T. 841; 32 W.R. 890, C.A.; 10 Digest (Repl.) 1196, 8368.
- (8) *Re Whitley Partners, Ltd.* (1886), 32 Ch.D. 337; sub nom. *Re Whitley Partners, Callan's Case*, 55 L.J.Ch. 540; 54 L.T. 912; 34 W.R. 505; 2 T.L.R. 541, C.A.; 9 Digest (Repl.) 81, 335.
- (9) *Trego v. Hunt*, 1896 A.C. 7; 65 L.J.Ch. 1; 73 L.T. 514; 44 W.R. 225; 12 T.L.R. 80, H.L.; 36 Digest (Repl.) 564, 1231.

Also referred to in argument:

Williams v. Prince of Wales Life, etc. Co. (1857), 23 Beav. 338; 3 Jur.N.S. 55; 53 E.R. 133; 18 Digest (Repl.) 63, 497.

Appeal by the plaintiffs from a decision of JOYCE, J., in an action for an injunction. *Younger, K.C.*, and *Lyttleton Chubb* for the plaintiffs. *Hughes, K.C.*, and *George Cave* for the defendants.

A HENN COLLINS, L.J.—This is an appeal from JOYCE, J., refusing to grant an injunction claimed by the plaintiffs. They asked that the defendants might be restrained from preventing or interfering with the examination or investigation by Mr. Frederick Charles Bridges, of Bloomsbury, in the county of London, a member of the firm of Messrs. Hunt, Bridges & Sons, brewery and hotel auctioneers and valuers, or such other accountant or valuer as may be duly appointed for that purpose by the plaintiffs, of the books of account, bills, and other writings kept by the defendants as the managing partners of the business of brewers carried on at the Aberberg Brewery, in the county of Monmouth."

The plaintiffs are sleeping partners in the brewery business which is carried on by the two defendant partners, who are the managing partners of the business. They have a considerable interest in the business. One of them is a clergyman who resides in Canada; two are surgeons; and one is a married woman. They are all persons of no technical experience in such a business, and the defendants, as I have said, are the persons who are actually carrying it on and are in possession of the business and act as managers of it. The articles of partnership provide, by art. 16, that

"proper books of account shall be kept by the managing partners for the time being, in which all transactions relating to the partnership business shall be duly entered, and such books, together with all bills, letters, and other writings which shall from time to time concern the said partnership business shall be kept at the counting-house of the partnership, and each of the partners shall have free access to and liberty to examine and copy or take extracts from any of the books and writings of the partnership at all reasonable times."

Negotiations had been going on between the sleeping partners, on the one hand, and the managing partners, on the other, with the view to the acquisition by the managing partners of the interest of the sleeping partners in the business, and an offer had been made by the managing partners for its acquisition at a minimum price of £32,000, any sum over that to be ascertained by arbitration, and it was in view of that offer that the plaintiffs were desirous of obtaining the inspection which they sought and of restraining the defendants from refusing it. The defendants refused absolutely to give the inspection asked for—that is, the inspection by a person named by the sleeping partners—unless and until those persons had bound themselves by a contract to sell the interest to the managing partners.

The question arises whether the sleeping partners have a right to claim inspection by some person other than themselves, that person being a person to whom the defendants can have no reasonable objection. The question in controversy between the partners is formulated by two letters, from which I will read two short passages. The plaintiffs on Nov. 1 wrote in these terms by their solicitors:

"My clients claim to nominate whoever they think proper to make the investigation on their behalf, provided of course that the person appointed is of standing and not in himself objectionable. They claim to have full and complete examination of the books of the partnership, and they also claim to be entitled to inspection of the properties and other assets of the partnership."

That is answered by a letter of the same date from the solicitors of the defendants:

"It is, of course, unnecessary for us to consult our clients on this, and we decline it on their behalf. We do not think the articles entitle any partner to send a valuer (although he may be a person of standing and not in himself objectionable) to make an examination of the books or to inspect the properties or other assets of the partnership, and, until you satisfy us that such power is given, we, on behalf of the managing partners, decline to allow it."

These two letters open the controversy and enable us to distinguish the point. JOYCE, J., has held that art. 16 of the partnership articles does not give the sleeping

partners say right in respect by any person other than themselves—that it is a personal right not carrying with it any right to name an agent for the purpose of inspection. That article is practically, although not identically, in the terms of s. 24 (9) of the Partnership Act, 1890, which is in these terms:

“The partnership books are to be kept at the place of business of the partnership (or the principal place if there is more than one), and every partner may, when he thinks fit, have access to and inspect and copy any of them.”

Joyce, J., in his judgment deals with the matter as one entirely free from authority. A Scottish case of *Cameron v. M'Murray* (1) was cited before him in which a dictum of the Lord President was said to be adverse to the plaintiff's contention, but, if that dictum is really adverse, JOYCE, J., does not appear to have considered it, or certainly not to have treated it, as adverse, because he treats the matter as *res integra* so far as authority is concerned, and, therefore, to be approached on principle and dealt with as a question of principle.

With reference to the construction of art. 16 of the partnership deed and s. 24 (9) of the Partnership Act, 1890, I think they are practically on all fours, and I ask myself what is the object with which this right or permission or privilege is given to each of the partners in a partnership. Surely it is to enable the partners to ascertain the position of the partnership. The partnership is their business; the books are their own books, and each partner has a right to the books, though of course that right is qualified and regulated by the corresponding rights of the other members of the partnership; but the books which are desired to be inspected, and the books which they have the right to inspect, are their own books. For what purpose, then, is the provision in art. 16 made? It must be that the partners may inform themselves of the position of the partnership. It is said that, because there is not an express provision either in the articles or in the Act of Parliament enabling the partners in terms to inspect by the agency of somebody else, that amounts to an exclusion of any such right. I ask again how are we to arrive at the view that there is any such exclusion? What is there upon which to found the presumption that there is an exclusion, for there is certainly no express exclusion? If it is to be implied, it must be because the word “agent” has not been used. If I were dealing with a matter that was not partnership, I should say *prima facie* the permission accorded to a particular person is accorded to him or his agents, if the object is to enable him effectively to use the objects secured and if such effective user involves the use of means to that end. If he is a near-sighted man, can he not have the use of spectacles? Or if he is a man who cannot see at all, the use of another person's eyes instead of his own; or if he is a man empowered to take copies and he cannot write, having lost his hands, the use of another person's hands. I should say that *prima facie* the permission to do a thing carries with it a right to use the necessary instrument to prevent the right which is conferred being ineffective according to the nature and relations of the persons against whom it is given, and we are bound to infer that the right must be unlimited.

Do I find anything to suggest a limitation in the fact that the books that are to be inspected are the books of the partnership? It seems to me that there is nothing whatever in the fact that the person seeking inspection is a partner which would narrow the *prima facie* right to use to the full extent the privilege that is accorded. To hold the other view would be to say that while all the partners ought to be on an equal footing and ought to have equal opportunities of informing themselves from time to time of the affairs of the partnership, yet if it should happen that some members of that partnership, either from mental infirmity, want of experience in the particular business, or physical incapacity, were unable to avail themselves of it personally, they shall cease to be on equal terms with their other partners, and be debarred from using the only means by which they could put themselves in a position of equality and gain that information which it is absolutely essential that they should possess. I cannot believe that any Act of Parliament could have

least intended to bring about such a result, and I certainly cannot agree that persons could have intended to curtail their rights in such a way. It seems to me that so far from the presumption being against the intention that such a right should be given it is all the other way, and that the burden is on those who deny it to point to words suggesting such an exclusion. That appears to me to be the position, looking at the thing from the mere common-sense point of view a priori without considering any of the authorities. There is, of course, a natural and common-sense limitation of such a right of inspection. That which is sought to be inspected is the books and documents in which all are interested, and it cannot be inspection in such a way as to curtail the rights or prejudice the position of the other partners. They are all interested, but one person cannot assert his right in derogation of the rights of the others. But the interests of the others can be abundantly safeguarded by putting a limitation upon the particular agency which the inspecting partners desire to employ. The person employed must be a person to whom no reasonable objection can be taken, and the purpose for which he intends to use the inspection must be one consistent with the main purposes and well-being of the whole of the partnership. That is easy of application. I have read the two letters which formulate the issue between the partners here, and nobody suggests that there is any personal objection whatever to the gentleman named to conduct the inspection, and the parties are willing to accept him, and the court will impose a fetter upon the user by that person of the information which he gains in that way.

Having said so much as to the a priori position here, dealing with the thing in principle, I desire to consider shortly how far there is authority on the matter. It seems to me that if the matter has not been in terms decided, the principle has been assumed in more than one case. So far from being free from authority, it seems to me that all the real authority in the matter is in favour of the position which I have indicated. *Brown v. Perkins* (2) seems to me to have a very direct bearing upon the point. Brown and Perkins were solicitors in partnership at Merthyr Tydvil. Brown died, and his representative filed a bill against the surviving partner for an account, and, an answer being put in, the plaintiffs moved for the production of the papers admitted in the answer of the defendant to be in his possession and material to the account. The defendant stated that many of the papers referred to related to the business of the clients of himself and his late partner and concerned matters with which they had been entrusted in their professional character in secrecy and confidence, and that the disclosure of such matters to the solicitor for the plaintiffs, who practised in the same town and neighbourhood, might be prejudicial to such clients, and would be a breach of duty towards them, and that in several of such matters the solicitor for the plaintiffs was employed adversely in his professional character, for other persons. WIGRAM, V.-C., said (2 Hare, at p. 541) :

"The partners themselves, if they had both been living and the question of account had arisen between them, would both have been entitled to see the papers which are part of the materials for taking the account, and it must, I think, follow that either of the partners might have employed a competent agent for the purpose of examining the papers in his behalf. If this be not so, no solicitor can employ another person to assist in the settlement of his partnership accounts without submitting to have such accounts taken in an insufficient manner. In this case I should think it would be a reasonable course for the papers to be inspected by some disinterested person, such as a town solicitor, or one not practising in the neighbourhood of these parties; but such an arrangement if made must be by consent."

The comment that has been made on this case is that that was an inspection during litigation, that it was ancillary to the main purpose of the litigation and not of itself the main purpose, and that that is a sufficient distinction to negative

He having not bearing upon this discussion. I take exception in that of two points. First of all, I say that it is an authority not limited to the rights of the parties to litigation, because it seems to me that the Vice-Chancellor puts it so on 4 other pages. He takes the rights of the parties as if there had been no litigation. He stated what would have been the rights of those two parties if they had been alive, and not, as I read it, in a contentious suit for an account, but as if the one demanded from the other without litigation an account. What he says is that either would have been entitled to examine the books, and for that purpose to have employed a competent agent. Therefore, it seems to me that it is an expression of opinion of the Vice-Chancellor in a case outside litigation. But, secondly, even if it is limited to cases where there is litigation, I do not see that that is a very significant observation in this case, for what is the meaning of granting it in cases of litigation? The courts have to make up their minds whether or not it is a case in which the party asking for it should have inspection. That is the point that has to be decided. When we have arrived at the conclusion that he ought to have inspection, then we are in the same position as we are now, unless the partnership deed or the nature of the conditions negative it. We are in the position that the person asking for it has a right of inspection. That is all that is decided in the litigation. Having decided that he has a right to inspection, how is it effectively to be given? There is none the less the necessity for it being effective if it is taken under a private agreement than there would be if it is given as the result of litigation. The question is: How is the inspection to be effective? It is useless to say that they are in litigation as a reason why they should not get it as they would under a private agreement, unless something can be pointed to that excludes the right to it. When once you have construed the private agreement and desire to give effective inspection, then you give it exactly on the same principle and by the same standard as in the case of litigation.

But there is another case which seems to me an authority; although not decided with reference to partnership, it seems to me an a fortiori case. That is *Dadswell v. Jacobs* (3). The headnote is this (34 Ch.D. 278):

"A firm of merchants, residing abroad, brought an action against their agent in this country, claiming production of the documents relating to their business to a person appointed by them for that purpose. The defendant put in a defence stating that the person appointed by the plaintiffs was a clerk in a rival and unfriendly house of business, for which reason he objected to produce the documents to him, but that he was willing to produce them to any proper person. The plaintiffs moved under Ord. 25, r. 4, to strike out the defence. HELD (affirming the decision of CURRY, J.), that, although a principal had a general right to the production of documents in the hands of his agent to any person appointed by him, he cannot insist on their being produced to an improper person, and therefore the defence disclosed a reasonable answer to the claim."

In his judgment COTTON, L.J., said (*ibid.* at p. 281):

"The plaintiffs are abroad, and of course it was the duty of the defendant, as agent, to produce to the principals any accounts that were kept for them; and where the principal is abroad, in my opinion the agent is bound to produce to any properly appointed agent of the principal any books of account kept for the principal."

It is said that in this case it is a question between partners and the case I have cited was a case of agency; but partnership is only one division of the law of agency. A partner is a principal, but he is also an agent. If the right to inspection by agents exists in a case between principal and agent, it seems to me a fortiori that it ought to exist in a case where the relation is not that of principal and agent, but where each for certain purposes is a principal. Therefore, it seems to me that *Dadswell v. Jacobs* (3) is an authority in the absence of any special agreement that out of the

relation of principal and agent arises the right to inspection, and that inspection may be carried out, where the circumstances justify it, by means of an agent. In the present case one of the parties seeking inspection happens to be abroad, but being abroad is only one circumstance showing that inspection by an agent is the only effective way. It does not exhaust all the cases in which inspection may be offered to the inspecting agent. In *Dadswell v. Jacobs* (3) LINDLEY, L.J., said (*ibid.* at p. 286) :

"No doubt the principal is entitled to come and see the books if he likes, and he is entitled to have a copy of them sent by the agent at the principal's expense. There is no controversy about that and I am not at all prepared to deny his right to have the books inspected by a person whom the court thinks is a proper person in case of dispute on that point."

So that although he had no absolute and unqualified right to have the books inspected by anyone he liked which was not set up in the action, the court held that he had the qualified right of inspection by somebody else, provided that person was one to whom no reasonable objection could be taken.

I should have said earlier that the contention of the defendants appears to me to be still more difficult to support in view of the fact that they have to concede that these persons who in their view are debarred from inspecting by a third person have the right to sit from day to day in the office of the brewery and make a full copy of all the books, and when they have done that to hand it over to the very person to whom the right of inspection is denied. The defendants must concede that, and, conceding that, they say the plaintiffs may do in that roundabout fashion something that might cause them greater mischief than if it was done in a simple fashion.

The principle upon which this right rests has been also discussed in other cases, and it has been distinctly stated where the question has been whether the right to inspect involved the right to take copies. A right to take copies has been held to be implied in the right to inspect, and why? Because the inspection is not effective in the sense which it was intended to be effective unless it carries with it as a corollary that incidental right. It is put nowhere more fully than in *Nelson v. Anglo-American Land Mortgage Agency Co.* (4). The headnote to that case is ([1897] 1 Ch. 130) :

"The right of a creditor or member of a company to inspect the register of mortgages under s. 43 of the Companies Act, 1862, includes a right to take copies of the register."

STIRLING, J., in that case cites the judgment of LINDLEY, L.J., in *Mutter v. Eastern and Midlands Rail. Co.* (5) where he says (38 Ch.D. at p. 107) :

"Parliament having conferred the right to inspect, the court ought not so to construe the statute as to render the right conferred illusory, and if the court were to hold that in such a case as the present the right to inspect existed, but the right to take copies did not, the court would in effect be rendering the statute of no avail."

That, I think, is very material upon this point. The right, although in an Act of Parliament, which was limited merely to inspection, carried with it the means to render it effectual. Why is that principle not to be applied in the case before us? It seems to me that these cases are direct authority that it can be and ought to be applied unless there is something in the nature of the partnership which negatives the right. Otherwise you must read into the enabling provisions of the articles some disabling exclusion of a particular mode of availing themselves of the right conferred.

So also with reference to the decision of HALL, V.-C., in *Re Credit Co.* (6), where he held that the solicitor of a shareholder was, under s. 43 of the Companies Act, 1862, entitled to inspect the company's register of mortgages although that right in

terms was given by the section only to the shareholders. He said (11 Ch.D. at p. 260):

"As regards the right of inspection, I am of opinion that there has been a refusal by the company to allow a shareholder to inspect it, though it has been contended that there was no refusal to him, but to his solicitor. I consider that the refusal was to produce to the applicant, and that there was no ground for that refusal."

That is simply an affirmation of the same principle as that which STURGEON, L.J., followed in *Nelson v. Anglo-American Land Mortgage Agency Co.* (4). It is said that these cases have no bearing on the discussion because they are cases of shareholders and cases of statutory enactments, and so forth. It seems to me, for the reasons I have given, that they are directly in point as to what is to be implied by a permission to inspect. The decisions are that it covers everything to make it effective. That is the principle followed, and the only way these cases can be distinguished is not merely by saying that they are company cases and this is a partnership case; they cannot be effectually distinguished except by pointing to some difference between the two. Those cases are direct authority to show that the permission to a man to do something which he cannot do effectually without an agent to help him carries with it the right to employ an agent.

Our attention was very properly called to *Re West Devon Great Consols Mine* (7), in which, without the point having been discussed at all or mentioned in argument or considered by BAGGALLAY, L.J., who gave the leading judgment. COTTON, L.J., expressed an opinion that the right of a shareholder in such a company to inspection was personal to himself. Whatever may be the true view on the special terms regulating the rights of shareholders in that case, I do not think it applies to such a case as the present, and, therefore, is not an authority in point, nor does it appear to me to be an authority that outweighs these decisions on fact and on principle to which I have already referred. Then it is said that there is a dictum of the President of the court in the Scottish case of *Cameron v. M'Murray* (1), decided, I think, as far back as 1855, but that dictum, when read in its context, does not appear to me to be an authority against these plaintiffs at all. I do not know whether it is as exactly and precisely stated in point of language as one could wish, but it seems to me to be merely an affirmation of that limitation, which it is conceded must exist, upon the right of a partner demanding inspection. It is nothing more than an affirmation that the right of a partner to inspect by anybody else does not affect the obligation of not allowing inspection by a more stranger to whose intervention the parties can reasonably object. The obligation to submit to inspection by such a person I do not think does exist. I think the right of inspection is qualified by the limitation to some person to whom the parties cannot reasonably object, and I doubt very much whether the learned President, in uttering the dictum which has been referred to, meant anything more than that. The actual decision in the case was that inspection must be given, and given by means of an agent in the litigation.

There is one more observation I desire to make. It has been urged in argument that a different standard is to be applied in litigation as compared with the standard to be applied where there is no litigation, and it was said that that was suggested by COTTON, L.J., in *Dudswell v. Jacobs* (3), that where such inspection is outside litigation the court can have no control over the person who inspects, and therefore that, although the right to inspect by a third party might not exist outside litigation, it may well be held to exist where there is litigation, because the court can exercise control over the actual person inspecting. Be it so. How does that apply to this case? The court at the moment has got seisin of the whole case, and it clearly has power to impose terms upon the person inspecting, and the plaintiffs are ready to accept the limitations sought to be put upon them. Therefore, even if this were to be tried by the standard which the defendants contend for in this case, and that

standard was somewhat different from what it would be if there were no litigation, we are in a position to give the rights which can only be obtained by litigation, and to impose the limitations which can be imposed only as the result of litigation. I have gone into the question at some length because unquestionably this is a case of very considerable importance, and, in my opinion, it is a case in which I think we must accept the responsibility of dealing, not only with the particular provision in these articles, but incidentally, and because they are practically to the same effect, with the construction of s. 24 (9) of the Partnership Act, 1890. Therefore, after considering the matter and the authorities, I am of opinion that the judgment of the learned judge cannot be supported, and that the injunction must be granted with the addition of the terms that have been suggested by my brother STIRLING and accepted by counsel for the plaintiffs and which the lord justice will mention in his judgment.

STIRLING, L.J.—I entirely agree with the conclusion my learned brother has arrived at and with the reasons which he has given, but, as the point which we have to consider is one of considerable importance and also as we are differing from the judgment given in the court below, I should like to add a few words to show that I have given the matter my serious consideration.

The contention on behalf of the defendants is that the rights of access to and inspection of, and the right of copying, partnership documents, which are conferred by s. 24 (9) of the Partnership Act, 1890, and also by art. 16 of the articles of partnership in the present case, are exercisable only by the partners personally, and are not exercisable by them through agents. But the general rule of law is that whatever a person who is *sui juris* can do personally he can also do through his agent. No doubt there are some exceptions. The reason of the rule may be stated in a few words which I will read from STOREY ON AGENCY. The learned author says (9th Edn.), p. 2:

"In the expanded intercourse of modern society it is easy to perceive that the exigencies of trade and commerce, the urgent pressure of professional, official, and other pursuits, the temporary existence of personal illness or infirmity, the necessity of transacting business at the same time in various and remote places, and the importance of securing accuracy, skill, ability, and speed in the accomplishment of the great concerns of human life must require the aid and assistance and labours of many persons in addition to the immediate superintendence of him whose rights and interests are to be directly affected by the results. Hence the general maxim of our laws, subject only to a few exceptions above hinted at, is, that whatever a man *sui juris* may do of himself he may do by another."

That principle has been adopted by the English courts in many cases, as a good illustration of which I may refer to the decision of the Court of Appeal in *Re Whitley Partners, Ltd.* (8). It has no direct bearing upon the present case, but I refer to it as an illustration of the way in which the principle has been applied by the English courts. The headnote is (32 Ch.D. 337):

"C. verbally authorised O. to sign on his behalf the memorandum of association of a company. O. accordingly signed the name of C. to the memorandum without his own name appearing. The company being in course of winding-up, C. was put on the list, and applied to have his name removed, on the ground that he had never signed the memorandum nor agreed to take shares. HELD that, there being nothing in the Companies Act, 1862, to show that the legislature intended anything special as to the mode of signature of the memorandum, the ordinary rule applied that signature by an agent is sufficient."

I agree that where the right which is to be exercised is conferred by some written instrument, either by a statute incorporated in the general partnership contract or by the article of partnership, it may be found upon the true construction

of the document and from the context that the intention of the parties was that inspection should be personal, but, unless you find something of that kind in the document itself, you have no right to say that, although an agent is not specially mentioned, the exclusion of the right by the agent is excluded.

We come, therefore, to the consideration of the Partnership Act, 1890, and of the article of partnership with which we have to deal with this view in our minds, that prima facie whatever rights are given to the partners they are, unless there is something to be found in the Act or acts for limiting those rights, capable of being exercised by agents. If we look at the present deed of partnership, it does seem to me that it is one in which the reasons pointed out by STOUT in that passage which I have read are very applicable indeed. The general scheme of this partnership was that the management of the business should be placed in the hands of the defendants in this action as managing partners, who should have the direct control of the partnership assets and books. The other partners, I see by the description of them which appears in the articles of partnership themselves, are, first, a clergyman who is resident in Canada; secondly, two gentlemen of the name of Bayan who are surgeons at Monmouth; and the next is a lady described as a splinter; and those persons have conferred upon them under the Act, and by virtue of the article to which reference has been made, rights of access to and examination and the right of taking copies and extracts from any of the books and partnership documents. All the plaintiffs to whom I have referred are, in the strict sense of the word, laymen as regards those matters. The whole control and management of the business is in the hands of the defendants as the managing partners, and, if those rights are meant to be seriously used at all, it is a case in which recourse must be had to the advice and assistance of experts, with a view to the proper and beneficial use of the right conferred. That right was conferred for a purpose—namely, that the plaintiffs might be enabled to make themselves acquainted with the affairs of the partnership, and might be enabled to use the information which they acquired, not, of course, to the detriment of the partnership or of their fellow partners, but certainly with a view, so long as the rights of the firm in general, or the rights of the partners, are not infringed, to making a proper use of, and having the beneficial use and enjoyment of, their own property. It must be remembered throughout that these books and documents, like the rest of the partnership property, are just as much the books and papers of the plaintiffs as they are the books and papers of the defendants.

Do we find anything in the Partnership Act or in this article which excludes the right of a partner to avail himself of the assistance of an agent in the examining of the books, and taking copies of them? I confess I cannot find anything. If we look at art. 16, it begins in this way :

“Proper books of account shall be kept by the managing partners for the time being, in which all transactions relating to the partnership business shall be duly entered.”

That throws the duty of keeping the books on the managing partners, but it does not follow that the managing partners were bound to keep those books themselves, or that they were to make entries in those with their own hands. No one supposes anything of the kind. It is quite obvious that the managing partners may rightly and properly employ clerks and other persons to make up the books. Then, what is the right which is conferred upon the other partners? .

“Each of the partners shall have free access to and liberty to examine and copy or take extracts from any of the books and writings of the partnership at all reasonable times.”

Each partner, therefore, has a right, among other things, of copying and taking extracts from any of the books and writings of the partnership at all reasonable times. Can it be contended that he who is desirous to avail himself of this right is bound himself to go and sit in the counting-house of the firm and make the copies

A and extracts which he desires to make with his own hands? I confess that seems to me to be quite unreasonable, and it seems to me that he may for the purposes of making these extracts and copies, just as the managing partners may for the purpose of making up the books, employ a proper clerk or other person to do the work. We then come to the question whether the right of access and the right of examination are to be limited to the partner personally. I confess I cannot see why it should be so. It is said that the idea of a third person being introduced is contrary to the nature of confidence which exists in every partnership relation, but I cannot see that that prevents a partner for a proper purpose from acquiring the necessary information in order that he may exercise his own right properly. I cannot see that if a clergyman, or a surgeon, or other person, desires, as he is entitled to, to obtain full information as to the transactions of a large brewery in which he is a partner, he is to be entirely devoid of all assistance, and, indeed, I do not think the defendants contend that if a partner himself succeeded in getting from the books the information which he desires to acquire by his agent, he could not immediately go to his agent from whom he wished to get confidential advice and submit the extracts and copies which he had himself made, and get his confidential advice upon them.

D At the same time I think that the right which the partner has to employ an agent must be limited. *Dadswell v. Jacobs* (3) shows that it does not follow that because a partner has a right to avail himself of the services of an agent he may choose as that agent any person he pleases. This agent must be a person to whom no reasonable objection could be taken, and, further, the agent must, I think, be one who is willing to put himself upon terms not to use the information which he acquires otherwise than properly. A partner is subject to the same limitation; he must not use information obtained by him as to the business improperly, as was pointed out in *Trego v. Hunt* (9), I believe by nearly every judge who dealt with it, but very clearly by LORD DAVEY in the House of Lords, who said ([1896] A.C. at p. 26) :

F "The notice of motion asked that the defendant might be restrained from making any copy or extract from the books of the partnership for any purpose other than the business of the partnership. In my opinion, that relief asked was misconceived. As well under the general law as under the express provisions of the articles of partnership, the defendant was entitled during the partnership to have access to the books, and to make copies thereof or extracts therefrom. It is conceivable that if the defendant proposed to use such extracts for purposes injurious or hostile to the interests of his firm he might be restrained from so doing. But in such case it would not be the obtaining of the information, but the use the partner proposed to make of it when obtained which would be restrained."

Therefore, the partner who obtains information is bound to abstain from using it for an improper purpose. Equally the agent whom he employs in order to procure the information is under an obligation to abstain from using it for an improper purpose. In the present case the plaintiffs have nominated a gentleman to whom no objection is offered on the part of the defendants, and that gentleman is willing to give an undertaking that the knowledge which he acquires shall not be used for any purpose other than giving confidential advice to his employers with regard to their interests. It seems to me that the only possible injury to the defendants which they can suggest in their affidavits is protested against by an undertaking given in that form, and under these circumstances it seems to me that, upon that undertaking being given, there ought to be an injunction in the terms asked for.

Order accordingly.

Solicitors: Andrew, Wood & Purves, for Powell & Hughes, Brynmawr; Le Brasseur & Oakley, for Le Brasseur & Bowen, Newport, Monmouthshire.

[Reported by W. C. BISS, Esq., Barrister-at-Law.]

ATTORNEY-GENERAL (ON THE RELATION OF PACK) AND ANOTHER v. BRIGHTON AND HOVE CO-OPERATIVE SUPPLY ASSOCIATION

COURT OF APPEAL (SIR Nathaniel Lindley, M.R., Vaughan Williams and Romer, L.JJ.), January 20, 22, 1900]

Reported 1900 1 Ch. 276; 69 L.J.Ch. 204; 81 L.T. 762; 48 W.R. 314; 16 T.L.R. 144; 64 J.P.Jo. 68]

Highway—Nuisance—Obstruction—Loading and unloading goods outside trader's premises—Trader's right to reasonable use of highway—Proof of nuisance—Obstruction inconsistent with lawful use of highway by public—Public right to prevail in case of doubt or difficulty.

A trader is prima facie entitled in respect of his premises bordering on a highway to use that highway in a reasonable way for the purpose of unloading and loading goods from and into vehicles for the purpose of his business, and such loading and unloading would not necessarily be an unreasonable user of the highway merely because it might cause a temporary obstruction or some inconvenience to passers-by or others using the street. On the other hand, it does not follow from the fact that such user is required, or is useful, for the purpose of carrying on the trader's business, or is reasonable if one regards his interests alone, that the user must be held to be a reasonable user. To support an action against a trader for nuisance by causing an obstruction of the highway it must be shown not only that there was a temporary reduction of the user of the highway available to the public, but also that that reduction was not consistent with the lawful use of the highway, and that the right of the public to use the highway was so obstructed that it could not be used to the extent which the law requires. In a case of doubt or difficulty the trader's private right to carry on his business reasonably must give way to the public right to use the highway.

Notes. This case deals with the position at common law. Obstruction of the highway by vehicles in various circumstances is now dealt with in the Road Traffic Act, 1960, and statutory regulations: see 33 HALSBURY'S LAWS (3rd Edn.) 505 et seq., and 40 HALSBURY'S STATUTES (2nd Edn.) 990.

Considered: *Vanderpant v. Mayfair Hotel Co., Ltd.*, [1929] All E.R. Rep. 296. Referred to: *A.G. v. Scott*, [1905] 2 K.B. 160; *Re Great Eastern Rail. Co. and L.C.C.* (1906), 71 J.P. 95.

As to obstructions by vehicles on highways at common law, see 19 HALSBURY'S LAWS (3rd Edn.) 270 et seq., and for cases see 26 DIGEST (Repl.) 484 et seq.

Cases referred to:

- (1) *R. v. Russell* (1805), 6 East, 427; 2 Smith, K.B. 424; 102 E.R. 1350; 26 Digest (Repl.) 484, 1701.
- (2) *R. v. Cross* (1812), 3 Camp. 224, N.P.; 26 Digest (Repl.) 485, 1707.
- (3) *R. v. Jones* (1812), 3 Camp. 230, N.P.; 26 Digest (Repl.) 479, 1655.
- (4) *A.G. v. Sheffield Gas Consumers Co.* (1853), 3 De G.M. & G. 304; 22 L.J.Ch. 811, 21 L.T.O.S. 49; 17 Jur. 677; 1 W.R. 185; 43 E.R. 119; sub. nom. *Sheffield United Gas Co. v. Sheffield Gas Consumers Co.*, *A.G. v. Sheffield Gas Consumers Co.*, 7 Ry. & Can. Cas. 650, L.C. & L.JJ.; 26 Digest (Repl.) 518, 1953.

Appeal by the defendants from a decision of KEKEWICH, J., in an action brought by the Attorney-General on the relation of James Pack, and by James Pack, against the Brighton and Hove Co-operative Supply Association, claiming an injunction to restrain the defendants, their servants, and agents from causing a nuisance to the public and James Pack (i) by wilfully obstructing and putting to excessive and unreasonable user a public highway known as Lansdowne Street, Hove, Sussex;

(b) by wilfully obstructing and using to the interference with, and danger of, the public, the footway on the side of the street. The plaintiff, James Pack, further claimed damages.

Warmington, Q.C., and *Beddall* for the defendants.

Macmoran, Q.C., and *Parkyn*, for the plaintiffs, were not called on to argue.

SIR NATHANIEL LINDLEY, M.R.—It appears to me that it is quite impossible for us to reverse the judgment of the learned judge in the court below. He has granted an injunction to restrain the defendants from causing a nuisance to the public by “wilfully”—I do not think that “wilfully” is right, and it should, therefore, be omitted—obstructing and putting to excessive and unreasonable user a public highway known as Lausdowne Street, or by “wilfully”—again “wilfully” is wrong in my opinion—obstructing and using to the interference with and danger to the public the footway on the side of the street.

The substance of the case is this. The defendant company carry on a large business—a business which is beneficial to the public as well as to the shareholders. They have stores, and they supply things which the public want; and they carry on that business in a street the roadway of which is a little less than 20ft. wide. Their business, as shown by the evidence, has increased of late years, and the complaint is that they obstruct this street. Let me first of all see to what extent they obstruct, and, without reference to any consideration as to reasonability or unreasonability, let me see what they do. They certainly block up one-half of the street for some distance by putting six vans—I will call the number six, that being the number which is now apparently used—which are packed close together tail on towards the kerb, and projecting into the road. The vans have horses, and the horses are turned round so far as they can be in order to leave as much room as possible on the other side of the roadway. There is no obstruction at all at night—that seems to be conceded. But during the daytime there are half a dozen vans there, packed in the way to which I have alluded, every other hour. The loading and unloading begins at 8.45 a.m. and goes on until 9.40 a.m., when there is an interval of an hour. Then there is another hour during which the loading and unloading continues, and then another interval of an hour, and so on every other hour during the daytime. From 8.45 a.m. down to 5.45 p.m. there is this accumulation of vans and horses, and there is the loading and unloading of goods across the pavement to such an extent that the footway is materially obstructed. There is evidence, evidence which I cannot disregard, that the carriage passage along the street is obstructed. I do not mean to say that the traffic is stopped for long, but the evidence shows that there is so much difficulty in getting along it that people shirk the street. There is evidence that carriages have been turned back; and there is evidence, from one person at all events, that if you drive along there you are very apt to be annoyed by the defendants’ horses, which interfere with the passing horses. The passage left is very narrow, and if there happens to be anything in that passage at the time you want to pass, you cannot pass at all. On those facts it is impossible to say that there is not an obstruction to the right of way.

Prima facie, that is enough to constitute a nuisance in point of law on the highway. The public have a right to pass and re-pass freely and without obstruction, not only over the half of the street occupied by the defendants’ vans, but over the whole of the street. There must be in all streets and in all populous places a good deal of give and take, and it would be ridiculous to say because a cart is standing opposite a house for a short time that that is such an obstruction as to amount to a nuisance. Of course, that is absurd, and the whole difficulty in the present case arises from the difficulty of drawing the line. I will refer presently to what I consider to be the law. Let me see what the defendants have to say for themselves. They say that they are carrying on a lawful business; they say that they are carrying it on in a way which is reasonable; and they say that, if they are to carry on their business at all, it is necessary that they should do pretty much as they are doing. It strikes me, if you look only at the carrying on of their business, that what they

are doing is perfectly reasonable. They have a large business; there is a great deal of loading and unloading to be done. They have a large number of carts, and they do not dawdle so far as I can see—that is to say, each cart is loaded and unloaded with this despatch—there is no complaint about that. Therefore, I have to consider what is the consequence of their reasonable exercise of their rights coming into conflict with the rights of the public to use this highway.

I take the law to be that which was laid down long ago, and, I believe, with perfect correctness, in *R. v. Russell* (1) (6 East, at p. 430). The facts there were not quite the same as here, but what I am going to read appears to me to express in language better than I could call up what the law is. And it has the great advantage of having stood the test of the best part of a hundred years of opinion. What the court said was this:

"It should be fully understood that the defendant could not legally carry on any part of his business in the public street to the annoyance of the public. The primary object of the street was for the free passage of the public; and anything which impeded that free passage without necessity was a nuisance. If the nature of the defendant's business was such as to require the loading and unloading of so many more of his waggon than could conveniently be contained within his own private premises, he must either enlarge his premises, or remove his business to some more convenient spot."

I take that to be the law.

What does that mean; and, in substance, what does it come to? It comes to this, that in a case of doubt, in a case of difficulty, the private reasonable right to carry on one's business must give way to the public right of using the highway. If the public right of using the street is so obstructed in fact that that right cannot be used to the extent which the law requires, then the private right must give way. To my mind, it is not an answer to say that the defendants can go on using this street in a way that is reasonable if you look to their interests alone. It is urged, as of course it is always urged, that it is difficult to draw the line. I admit that it is extremely difficult to draw the line. You may say that if a cart stands opposite a grocer's door for five minutes to take up some goods, it is obstructing the street, and so it is to a certain extent. But it is only to such an extent that it would be ridiculous to say that that is an indictable nuisance, or an actionable nuisance, or a ground for an injunction. It is a question of degree. You may say, "What is the difference between one cart and two?" You cannot draw the line. Nothing is more common in life than to be unable to draw the line between two things. Who can draw the line between plants and animals; and who has any difficulty in saying that an oak tree is a plant and not an animal? When I come to look at the facts of this case, I find that there is such an amount of obstruction—obstruction to such an extent—as to block up this street for so long and so much that people avoid it rather than face the inconvenience of going along it. That is, to my mind, utterly unjustifiable. I think that the injunction ought to be granted, with the variation that the word "wilfully" ought to be struck out. I think, therefore, that the appeal ought to be dismissed, and dismissed with costs. If the defendants should want a stay for a time that is another matter altogether, but what they do is at their own peril. They must so arrange their business as not to commit a nuisance.

VAUGHAN WILLIAMS, L.J.—I agree. I regard the decision of the court below as a decision upon a question of fact as to which there was evidence. I should not agree if the decision in the court below had been a decision on a question of law resulting from the facts proved in evidence. I think that it is right to make the observations that I am going to make, because I cannot help feeling that the decision which we are giving to-day is one of great public importance in all populous places where commercial business is conducted, and I should not like it to be said hereafter that there has been a decision of the Court of Appeal which shows

that it is unlawful to do the particular kind of act which was done by the defendants in the present case. If that were our decision here, I should hesitate a long time before I could assent to it, because I think that such a decision would be a very serious blow to the interests of the public throughout the kingdom by preventing commercial business from being securely carried on at all in crowded neighbourhoods. That there was a physical obstruction in this case is beyond a doubt. There was no room in the highway by reason of what the defendants did. There was displacement in the highway by the presence of the defendants' carts there. But this action could not be supported merely by showing that there was a physical displacement, or a physical reduction in the amount of space available for the public during the time that the defendants' carts were standing at their warehouse. It must be shown, in order to support this action, not only that there was such a physical displacement or physical reduction in the temporarily available user of the highway by the public, but also that such displacement or reduction was not consistent with the lawful user of the highway. A highway is primarily, no doubt, for the purpose of the passage of Her Majesty's subjects, but it is also to enable those who pass along the highway to stop at such houses as abut on the highway, and either call for goods or persons there, or discharge goods or persons there. The mere fact that you temporarily reduce the width of the roadway does not make that act unlawful, and does not make your obstruction an unlawful obstruction. It not only does not do so in a broad street, but it does not do so in a narrow street. Where there is a narrow street that will only admit of one vehicle going down it, if you have a cart drawn up at a house in that narrow street that highway is no longer available for the use of the public during the time that the cart is standing in it. But it is no more unlawful to call at a house in such a narrow street than it is unlawful to call at a house in a broad street. In either case part of the proper and part of the lawful user of a highway includes access to the premises which abut upon the highway.

If the authorities are looked at, I do not think that there will be found any case, at all events any case of an indictment, in which there has been a conviction upon evidence that merely shows excessive user—a very large user of a lawful right as distinguished from an improper use of a highway. In *R. v. Russell* (1) there was obviously an improper user of the highway. In *R. v. Cross* (2) and *R. v. Jones* (3), there was also an improper user of the highway. But in each one of those three cases the judgment as delivered expressly asserts the right of access to houses, provided that is reasonably exercised. To take the judgment of LORD ELLENBOROUGH in *R. v. Jones* (3), he says (3 Camp. at p. 231):

"If an unreasonable time is occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or waggon may be unloaded at a gateway, but this must be done with promptness."

I will not occupy time by reading the other two judgments, but each one explicitly affirms the lawfulness of such user of the highway. In *A.G. v. Sheffield Gas Consumers' Co.* (4) the same proposition is affirmed as plainly as can be by LORD CRANWORTH in delivering the judgment of the court. On the other hand, it cannot possibly, to my mind, be said that no amount of user could possibly amount to a nuisance if that user consisted of an aggregate of lawful acts. I do not agree with that proposition at all.

The truth of the matter is that you have always got in these cases—before you can answer the question yes or no, was that particular user necessary or reasonable—to take into consideration all the facts of the case. If you are dealing with a narrow street—a single carriage street—it obviously may be necessary to block up that street much more than it ever can be in the case of a wide street with a wide roadway. Again, if a railway station or business premises have got a yard in which they can discharge, I apprehend that that would be one of the circumstances which might be taken into consideration in showing that it was wholly unreasonable

in reason and unnecessary for them, having the benefit of such a right, to obstruct the highway by discharging their waggons or loading their waggons at the back end. And one of the circumstances that you have to take into consideration would be if a trader had got so large a business that the approach of the road to the point which he can lawfully use the highway would substantially deprive the rest of the public of the use of the highway in the daytime. Soberly, I think, can doubt that that would be an unlawful obstruction, and not the less an unlawful obstruction because the unreasonableness of the proceeding is only demonstrated by showing the effect upon the public of the number of occasions on which the defendants used the highway for this purpose. Under those circumstances I agree with the decision of KIRKWITH, J., who came to the conclusion on the evidence before him, that the user by the defendants of Lansdowne Street was unreasonable and unnecessary.

ROMER, L.J.—I agree in thinking that we ought not to interfere with the injunction granted by KIRKWITH, J., subject to the clerical alteration which has been pointed out by the Master of the Rolls. No doubt any tradesman is prima facie entitled, in respect of his premises bordering on a highway, to use that highway in a reasonable way for the purpose of unloading and loading goods from and into carts for the purposes of his business, and such loading and unloading would not, of necessity, be an unreasonable user of the highway merely because it might cause a temporary obstruction, or some inconvenience to passers-by or others using the street. Whether a user by a tradesman of a highway for such purposes is reasonable or unreasonable is a question of degree and of fact to be determined in each particular case. It does not follow that because such user is required, or is useful, for the purpose of carrying on the tradesman's business, it must, of necessity, be held to be a reasonable user. For example, suppose a person established a very large business indeed, requiring the use of an enormous number of vans, and his premises bordered on a very narrow highway, it might well be that in order to enable him to carry on his business he would require to keep the highway exclusively for himself and his waggons the whole day long, and so as not to allow anybody else to be able to come up or down that highway. I should say in such a case as that his use of that highway would not be a reasonable user of it, even though it might be useful or necessary for his business, it amounting practically to an appropriation of the highway to himself for the purposes of his business.

In the present case the question is whether the user by the defendants of this highway is or is not, looking at the whole facts of the case, a reasonable user. In my opinion, on the evidence it is not reasonable, for I think that it practically amounts to an appropriation by them of at least half this highway for several hours in every day, except Sundays, exclusively for the purposes of their business, making it, as it were, a part of their business premises—a private yard, as it were, of their own. Moreover, during those hours they are, in my opinion, on the evidence also seriously interfering with the public user of even that portion of the highway that they do not occupy or appropriate to themselves, and I am further satisfied that what they are doing has caused and is causing considerable inconvenience to the public—so much so that the public are beginning to cease to use this highway because of the seriousness of the obstruction. In my opinion, what the defendants are doing amounts, on the whole, to an improper user of this highway on their part, and one which ought to be and has been properly restrained by injunction. The order which we are affirming does not stop the defendants from using the highway for the purpose of loading and unloading in a reasonable manner. It only stops them from committing a nuisance, that is using it in an unreasonable manner. Reasonable user is not a nuisance, and so is not restrainable.

Appeal dismissed.

Solicitors: *Booth & Smees*, for *Fitz-Hugh, Woolley, Baines & Woolley*, Brighton; *Radford & Frankland*, for *Woods & Holmes*, Brighton.

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

Re SCOTT. LANGTON v. SCOTT

COURT OF APPEAL (Vaughan Williams, Stirling and Cozens-Hardy, L.J.J.),
November 12, 13, 1902]

Reported [1903] 1 Ch. 1; 72 L.J.Ch. 20; 87 L.T. 574; 51 W.R. 182; 47 Sol. Jo. 70]

Administration of Estates—Advancement—Rule against double portions—Consideration of all circumstances—Payment of substantial sum—Presumption of advancement—Rebuttal—Gift made as temporary assistance—Payment of pressing debt.

The testator carried on business with his son J., the partnership deed providing that J. should not during the continuance of the partnership withdraw any part of his capital without the consent of his father. By his will, dated May 12, 1891, the testator devised and bequeathed his residuary real and personal estate upon trust for all his children living at his decease in certain shares, and declared that the sum of £5,000 which he had given to each of his daughters was not to be brought into account in ascertaining their respective shares. In 1892 the testator gave a sum of £5,000 to his son A. who was not aware of his father's intention to make the gift until he received it and had not asked for it, and it appeared that the testator always referred to this payment as a gift. In 1894 the testator made a codicil making a slight alteration in his will, but in other respects confirming it. For some years before 1897 the profits of the business had diminished and J.'s expenditure had exceeded his income and his capital had been reduced. In August of that year J. had an interview with his father, when he explained his difficulties and asked him to assist him, pointing out that he had never given him any assistance. The father afterwards transferred in the books of the firm the sum of £5,000 from his capital account to that of his son, and he also gave him £1,500 to pay off a mortgage on his house.

Held: (i) in deciding whether or not the sums given to the testator's sons were to be treated as advances and brought into account on the distribution of the testator's estate all the facts must be taken into account: (ii) with regard to the payment to J., on consideration of all the circumstances, and, in particular, those stated above so far as they applied to his case, although the amount of the payment of £5,000 was large enough to raise a *prima facie* presumption that it was an advance within the rule against double portions, that presumption was rebutted; the payment of £1,500 was made for J.'s temporary assistance; and, therefore, both sums were to be regarded as gifts and not as advances: (iii) in the circumstances the payment to A. was also a gift and not an advance.

The view of SIR GEORGE JESSEL, M.R., in *Taylor v. Taylor* (1) (1875), L.R. 20 Eq. 155, adopted in preference to that of WOOD, V.-C., in *Boyd v. Boyd* (2) (1867), L.R. 4 Eq. 305, and that of PEARSON, J., in *Re Blockley* (3) (1885), 29 Ch.D. 250.

Notes. Followed: *Re Crozier*, *Cooper v. Thorneycroft* (1906), 50 Sol. Jo. 206. Distinguished: *Re Binns*, *Public Trustee v. Ingle*, [1929] All E.R. Rep. 542. Considered: *Re Hayward*, *Kerrod v. Hayward*, [1957] 2 All E.R. 474. Referred to: *Re Aynsley*, *Kyrle v. Turner*, [1914] 2 Ch. 422; *Re George's Will Trusts*, *Barclays Bank v. George*, [1948] 2 All E.R. 1004.

As to payments by way of advancement, see 16 HALSBURY'S LAWS (3rd Edn.) 93, 404, and for cases see 20 DIGEST (Repl.) 478 et seq.

Cases referred to:

(1) *Taylor v. Taylor* (1875), L.R. 20 Eq. 155; 44 L.J.Ch. 718; 23 W.R. 719; 20 Digest (Repl.) 482, 1898.

- (3) *Dodd v. Dodd* (1800), 1 R. 340; 26 L.J.Ch. 571; 16 L.T. 620; 13 W.R. 1071; 20 Digest (Repl.) 483, 1900.
- (3) *Re Biddley, Biddley v. Biddley* (1827), 29 Ch.D. 250; 34 L.J.Ch. 722; 20 W.R. 777; 20 Digest (Repl.) 483, 1912.
- (4) *Re Lacon, Lacon v. Lacon*, [1891] 2 Ch. 482; 60 L.J.Ch. 403; 64 L.T. 429; 39 W.R. 514; 7 T.L.R. 457, C.A.; 20 Digest (Repl.) 477, 1841.
- (5) *Frederic v. Palmer* (1853), 10 Ch. App. 343; 41 L.J.Ch. 367; 32 L.T. 545; 29 W.R. 538, C.A.; 20 Digest (Repl.) 486, 1953.
- (6) *Ravenscroft v. Jones* (1864), 4 De G.J. & Sm. 224; 33 L.J.Ch. 482; 9 L.T. 818; 12 W.R. 362; 46 E.R. 404, L.J.J.; 20 Digest (Repl.) 483, 1902.

Also referred to in argument:

Leighton v. Leighton (1874), L.R. 18 Eq. 458; 43 L.J.Ch. 594; 22 W.R. 727; 20 Digest (Repl.) 478, 1850.

Le page Ppe. Le page Dubois (1811), 18 Ves. 110; 31 E.R. 271; 20 Digest (Repl.) 487, 1961.

Pym v. Lockyer (1841), 5 My. & Cr. 29; 10 L.J.Ch. 153; 5 Jur. 620; 41 E.R. 284 L.C.; 20 Digest (Repl.) 477, 1840.

Appeal from a decision of KIRKWHICH, J., on a question whether sums of money given by a testator, after he had made his will, to two of his sons ought to be treated as advances and brought into account by those sons in the distribution of the testator's estate.

The testator, John Scott, carried on business in partnership with his eldest son, John Scott, jun., and two other persons. The son's capital in the business consisted of various sums which he had from time to time placed to the capital account out of his share of the profits. The partnership deed provided that he should not at any time during the continuance of the partnership withdraw any part or parts of his capital without the consent of his father, but that the father might withdraw any portion of his capital or other moneys as he might think fit, provided he did not reduce the amount of his capital below the sum of £5,000. The other partners were under an obligation to keep a certain amount of capital in the business, but had no power to interfere in any way with the arrangements between the father and the son. The testator died on May 12, 1899, leaving surviving him a son, Alfred, and six daughters, four of whom were married. His eldest son, John, had died in January, 1899. By his will, dated June 5, 1891, the father, after making certain bequests, devised and bequeathed the residue of his real and personal estate to trustees.

"In trust for all my children who may be living at my decease in such proportions that the shares of each of my sons shall be double the amount of the shares of each of my daughters; and that the shares of my daughters shall be equal. And I further declare that the sum of £5,000 given by me to each of my married daughters on their respective marriages, and the like sum of £5,000 recently given by me to each of my unmarried daughters, is not in any way to be brought into account in ascertaining the share of my daughters of and in the residuary trust funds, but is to be retained and enjoyed by her in addition to such share."

The testator declared that

"If any child of mine shall die in my lifetime leaving a child or children who shall survive me and being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry under that age, then and in every such case the last-mentioned child or children shall take (and if more than one equally between them) the share which his or their parent would have taken of and in my residuary trust estate if such parent had survived me."

It was also provided that in case either of the testator's sons died before him leaving a widow the trustees should, out of the income of the share to which

that son would have been entitled if he had survived the testator, pay £5,000 per annum to the widow during her widowhood. In 1892 the testator, without being asked to do so, gave his son Alfred a sum of £5,000 upon the terms referred to in the following letter, which was dated Aug. 3:

"My dear Alfred,—I have this day placed to your order £5,000 with our firm on which you will be paid 5 per cent. per annum so long as it is in the hands of the firm. I hope you will find it useful and something to lean on and call your own."

This was the first intimation the son had of his father's intention to give him the money.

In 1894 the testator made a codicil to his will by which he altered a provision which he had made therein with regard to his capital in the partnership business, and in all other respects he confirmed his will.

For some years before 1897 the profits of the business had diminished, and the expenditure of the son John had exceeded his income, and he had drawn out of the business more than he was entitled to draw, with the result that his capital in the business was considerably reduced, and this had been done without the father's consent. On Aug. 31, 1897, the son John had an interview with his father, and in the following letter which he wrote on that day to his sister Fanny Scott (who lived with her father and kept house for him, his wife having died some years previously) he gave an account of what took place between them:

"Dear Fanny,—Finding father clear this p.m., I took the opportunity of placing the anxiety of my position before him, noting, not that our expenditure had increased, but that the profits from the business for the last three or four years had been so small that I had been compelled to encroach on my capital to a serious extent, and that, unless he was willing to help me, I should feel it compulsory to save what little is left, to give up here [his house], and part with my position in society. I pointed out that I had never before asked him directly for myself, and that, though his eldest son, he had never given me any money or assistance of any sort. It was a very hard and painful struggle for him to part at all, but he has given me £5,000, the amount you all have had, to be added to my capital, and £1,500 to reduce the mortgage on this place. I need scarcely say it is a most welcome and a huge relief."

On Aug. 31, 1897, a sum of £5,000 was transferred from the testator's account in the books of the firm to the account of the son John, and on Sept. 21, 1897, a further sum of £1,500 was transferred from the account of the testator to that of John. John left a widow and one daughter surviving him.

A summons was taken out by the executors and trustees of the testator for the determination of the question whether the sum of £5,000 advanced by the testator to his son Alfred, and the sums of £5,000 and £1,500 advanced by the testator to his son John, ought respectively to be brought into account by way of hotchpot in the division of the testator's residuary trust funds. In an affidavit made by the daughters Fanny and Emily Scott, they said:

"Our father on more than one occasion in speaking to us referred to the £5,000 which he gave to our brother Alfred, and to the best of our recollection our father spoke to us on the subject of the said gift both before and after he made it. The exact words used by our father we are unable to state, but he referred to it in this way, that he had given each of his girls £5,000 and £5,000 to his dear Alfred. As a fact, our father had given to each of us the sum of £5,000 before the month of August, 1892, and he always in his conversations with us alluded to the sum given to Alfred as a gift to him; and we gathered from his conversation with us that he never in any way meant or intended that the £5,000 so given to our brother Alfred should

be in any way taken into account on his death, but should be treated in the same manner in which the two sums of £5,000 given to us were to be treated."

KEKEWICH, J., held that the sums given to the sons need not be brought into account. He was further of opinion that even if John himself would have been liable to account, he took no share under the will, and his daughter, who took the share which he would have taken if he had survived his father, was not liable to account for the advances which her father had received.

The daughters appealed.

Younger, K.C., and Rowland Whitehead for the daughters.

Warrington, K.C., and Christopher James for John's daughter.

Renshaw, K.C., and E. S. Ford for Alfred Scott.

VAUGHAN WILLIAMS, L.J.—We think that the judgment of the learned judge must be supported in both respects—that is to say, in respect of John and in respect of Alfred. But I may as well say, although I do not know that it is material for the purpose of dealing with this appeal, that we cannot agree with the conclusion that he arrived at about the daughter of John. We think that it is quite plain that the daughter could only take that which her father would have taken, and it is impossible to arrive at the conclusion that in the case of the father the result would have been one way, and in the case of the daughter, who took in case of his death, the result would have been different.

The real question here is whether the payment by the father to the two sons of the sums of money which he gave them brings the case within the rule against double portions, so that those sums must on the distribution of the residue under the father's will (which was made before the payment of those sums of money to either of the sons) be brought into account or into hotchpot by them. I think that the case is not within the rule. I will deal with the case of John first, and I shall deal with it upon the basis which is pointed out in *Re Lacon* (4) as being the right basis. I will refer to the statement of the law in the judgment of BOWEN, L.J., in *Re Lacon* (4), not because I do not think it appears in the other judgments, but because it is more conveniently stated in the judgment of BOWEN, L.J. He said ([1891] 2 Ch. at p. 498): "In the first place, both of the suggested gifts or donations must be gifts in the nature of a portion." So every gift will not bring the case within this rule against double portions; there must be two portions, and the gift which follows the will must be a gift in the nature of a portion. Then BOWEN, L.J., continues:

"The first presumption here comes under discussion: it is said that, whatever gifts are made by the father, which it may be supposed will have to be distributed among the children, or which are given by the father to one child with a view to establishing him in life, are presumed to be portions within the meaning of the rule."

That does not mean that every gift is to be taken to be a portion within the meaning of the rule, but gifts which show those characteristics.

"We have, therefore, to ask ourselves in the first place were these two shares which were received during the lifetime of the father received under such circumstances as to justify their being treated and considered as a portion."

I am of opinion with regard to the son John, that the gift, or whatever it may be called, of this £5,000—a large sum of money—is a gift which bears the characteristics of a portion to such an extent that, in the absence of anything to rebut the conclusion, we ought to assume the first of those presumptions which is mentioned by BOWEN, L.J., in this judgment. But BOWEN, L.J., goes on:

"But supposing both gifts are gifts in the nature of portions, then comes a further question, for the solution of which a further presumption is invoked.

That question is, whether it was intended that the former gift or portion should take the place of an advancement of the gift which is given by the will, and there the second presumption which is invoked has to be dealt with—a presumption to the effect that the former gift, the gift *inter vivos*, was intended as an advancement *pro tanto* of the gift under the bequest—a presumption, it is said, which ought to be made in favour of equality among children, it being the view of the law that equality is what the father, in dealing with his children, would, in most cases, presumably intend."

It seems to me that according to that judgment of BOWEN, L.J., we are entitled, and it is our duty, to consider the circumstances of this case and see whether this presumption is rebutted or not; and in connection with that I desire to call attention to a passage in the judgment of JAMES, L.J., in *Fowkes v. Pascoe* (5). He says (10 Ch. App. at p. 350):

"The principle is that the will shows the distribution which the father thinks just and expedient for his children, and if, after having made such a scheme for distribution, he advances one of his children on marriage, or going out to establish himself in the world, or the like, it is to be presumed, as a *presumptio juris et de jure*, that the advancement is an anticipation of the testamentary provision, just as under the Statute of Distributions an advancement is to be brought into hotchpot."

I do not think by that JAMES, L.J., meant in any way to say that these presumptions are irrebuttable presumptions. It seems to me that to so read his judgment would be inconsistent with all the other cases on this subject. It is not necessary that I should go through them one by one, but, among those which have been cited to us in the course of the argument, there were several cases in which the circumstances were such as to raise a *prima facie* presumption which was afterwards rebutted. COZENS-HARDY, L.J., reminds me that *Re Lacon* (4) itself is an instance of that. That being so, I have to consider here whether this £5,000 was intended by the father as something on account of the son's share of the family fund which he was distributing by his will, and I think it was not.

I do not propose to base that conclusion upon any one fact alone—the whole matter must be taken into consideration. Before one can come to the conclusion that the £5,000 was so intended, one must ask oneself whether this was a payment which, taking all the facts into consideration, was intended for the establishment of the child in life, or for any one of those purposes which are detailed by SIR GEORGE JESSEL in *Taylor v. Taylor* (1). It appears that the sum of £5,000 was a sum which he had given to all his children. He makes an express provision in his will in the case of the daughters that these sums of £5,000 are not to be brought into account. John was in partnership with him, and, when he had overdrawn his capital account, which was a matter which could be complained of by the father, and by the father only, and when he had brought that matter to his father's notice, the father dealt with his son in the same way that he has dealt with his daughters—he makes him a gift of £5,000. In my judgment, the fact that the sum was identical is itself a matter which must not be left out of consideration when one has to consider whether this is a gift or an advancement of a portion. But, more than that, the father, who is, as I have said, the only person who could complain of John's overdrawing his capital account, is releasing the debt of the son to him. He is, in fact, according to my judgment, extricating the son from the difficulties in which the son then found himself; and it seems to me that for this purpose it makes no difference whether the debt was a debt due to the father or was a debt due to someone else. The ultimate object of the father was to relieve the son from his embarrassments. In *Taylor v. Taylor* (1) the father, who had paid £650 to extricate his son from debts of honour in India, was treated by SIR GEORGE

testator as having made a gift to his son and not an advancement by way of portion. Taking all these circumstances together, I think that there is sufficient here, even assuming that the amount of the payment was such as to raise a *prima facie* presumption that it was an advancement, to displace that presumption and leave the £5,000 a gift.

There was a further sum of £1,500, and with regard to that it seems to me that that payment clearly falls within the rules laid down by Sir George Jessel, to which I have just called attention. It was a plain payment to relieve the son from a debt which might have been satisfied by the mortgage against the son unless the father had come forward with his assistance. In the case of the son Alfred, again, the amount which was given to him was the same as had been given to the daughters, and *prima facie* it seems to me that that payment is to be treated as upon the same basis. That is, as a sum which was not to be brought into hotchpot. But in the case of Alfred there is the additional fact that after the gift the father executed a codicil which confirmed his will in all respects. In these circumstances I think the conclusion of the learned judge as to Alfred was right also, and, therefore, this appeal fails.

STIRLING, L.J.—I am of the same opinion. The question arises here with regard to certain sums which were given by a testator, after he had made his will, to his two sons. By the will the testator had directed his residuary estate to be divided between his sons and daughters in certain proportions, and on the face of the will he took notice that he had given a sum of £5,000 to each of his daughters, and, although it was not necessary for him to do so, he expressly excluded those sums so given from being brought into account. At that date, except that he had taken one of his sons into partnership, he had not made any such gift or advance to his sons, but after the date of the will he in the first place in 1892 gave his son Alfred, who was a clergyman, a sum of £5,000 upon the terms referred to in a letter of Aug. 3, 1892. I shall assume that *prima facie* that sum, being a large sum, is to be taken as and would in the ordinary case be *prima facie* an advance within the rule against double portions, but I think it is a circumstance which in this particular case must be taken with consideration and have considerable weight given to it that he had given the large sum of £5,000 to each of his daughters, and yet he had expressly stated by his will that those sums were not to be deemed advancements. So that here we are dealing with a testator who has given six sums of £5,000 and yet did not wish those to be brought into account in the ultimate distribution of his estate. But the matter as regards Alfred does not rest there. Two of the daughters have made an affidavit in which they state the conversations which after this event took place between themselves and their father. So that we get this general result, that in his conversations with the daughters, in speaking of what he had given to the daughters and also of what he had given to this son, he dealt with them on the same footing. The reasonable inference from that would be that he meant, and his intention in giving this sum of £5,000 was to put this son, who was not in business with him, on the same footing as the daughters. Lastly, there is this circumstance to be observed, that after he had made this gift, but before he had made the gift to his other son, with which I shall presently have to deal, he made a codicil to his will. He does not expressly refer to the gift he made to Alfred, but in express terms, after making certain dispositions which it is unnecessary to mention, he does in all other respects confirm his will. In *Reversoff v. Jones* (6) it is laid down by KNIGHT-BRICE, L.J., that that is a circumstance which is to be taken into consideration, and, looking at all the circumstances of this case, I think that KEREWICH, J., has come to the right conclusion with respect to the sum of £5,000 which was given to Alfred.

With respect to the son John the case is not the same, and it is one, perhaps, of more difficulty. Two of the elements upon which I have rested my judgment

A In the case of Alfred do not occur here, for, in the first place, there is no evidence of any such conversation with reference to the gift in favour of John as we have in reference to the gift made to Alfred, and, in the second place, the testator made the gift to John after the codicil to which I have alluded, and he did not make any subsequent codicil. Nevertheless, looking at all the circumstances, I come to a similar conclusion. No doubt the advances which were made to the daughters and to the son Alfred were perfectly well known to this son; there would seem to have been no secret in the family about it, and the application which John made to the father was partly based on the ground that he had had nothing, whereas his brother and sisters had. The result was that the father dealt with him in this way. He transferred £5,000 capital from his own account to the account of the son John, and he gave him £1,500 in cash to pay off the mortgage on his house.

The question is whether these payments ought to be treated as advances within the rule or not. I have come to the conclusion that they ought not. I think that the distinction which was taken by SIR GEORGE JESSEL in *Taylor v. Taylor* (1), which has been so carefully examined in the course of the argument, is sound. In that case the father, among other things, had paid the debts of a son, and SIR GEORGE JESSEL said (L.R. 20 Eq. at p. 159) that sums paid for debts in India appeared to be in the nature of temporary assistance. Thus, if a child were in business and required further capital, a sum given for that purpose would be an advancement, but a sum given merely to assist him temporarily would not. It was said that in form this case fell within what is laid down by SIR GEORGE JESSEL with reference to a son engaged in business and requiring additional capital, for it is perfectly true that the form of the transaction which took place as between father and son was a transfer of £5,000 from the father's capital to the son's, but it will be observed that no further capital is brought into the business by that transaction, and it seems to me that it is not really the case of further capital being required for the business, but of a debt from the son to the father in the business being wiped out by means of the £5,000 which was so transferred.

As regards the £1,500 which was advanced to pay off the mortgage, it seems to me it was also a temporary assistance. The whole thing was done with a view to enabling the son to keep the position which he had acquired by means of the partnership originally entered into between the father and the son without the son bringing in any capital, and to tide over the difficulties which had arisen from the small amount of profits earned during the three or four years preceding this transaction. I think, therefore, the appeal ought to be dismissed.

COZENS-HARDY, L.J.—I am of the same opinion. If nothing more were known than that a large sum of £5,000 was given by a father to a child in the interval between the date of his will and the date of his death, there would be a presumption, which in that case would not be rebutted, that it was to be taken by way of partial ademption; but I think it is equally clear, to use the language of KNIGHT-BRUCE, L.J., in *Ravenscroft v. Jones* (6) that all the circumstances and the manner of the gift must be looked at, and if I came to the conclusion, as the lord justice did in that case, that the testator in making the gift had not the will or his testamentary disposition in any way in his mind, I think it is clear that then the presumption is one which ought to be rebutted. I do not propose to go over the facts of the case again. We are dealing here with a very wealthy man, with an estate worth £200,000 or £250,000. He had before his will given £5,000 to each of his daughters; he gave this £5,000 to his son Alfred, identical in amount; the terms of the gift we know by the letter, and we also have the evidence of two of the daughters, which alone, I think, would be quite sufficient to negative the presumption. They say they were told by their father that the gift to Alfred was the same kind substantially as their own—

£5,000; that is to say, under circumstances which would not require it to be brought into hotchpot or to be accounted for. Then there is the codicil, to which I attach also considerable weight, because it is a confirmation of the will with regard to the gift of the £5,000. As to John, there is, no doubt, more difficulty, but for the reasons which have been assigned by VAUGHAN WILLIAMS and STIRLING, L.J.J., I agree that in this case also the presumption is rebutted. Our decision, no doubt, involves this, that in so far as there is a difference between the view expressed by SIR GEORGE JESSEL in *Taylor v. Taylor* (1), on the one hand, and by WOOD, V.-C., in *Boyd v. Boyd* (2) and PEARSON, J., in *Re Blackley* (3), on the other hand, we adopt the view of SIR GEORGE JESSEL and not the view of WOOD, V.-C. and PEARSON, J. I think in so doing we are really following, not perhaps the decision, but the indication of view of the Court of Appeal in *Re Lacon* (4) which has been so much discussed before us. For these reasons I think the appeal ought to be dismissed.

Solicitors : Phelps, Sidgwick & Biddle ; P. W. Chandler.

[Reported by W. C. BISS, Esq., Barrister-at-Law.]

PEARKS, GUNSTON AND TEE, LTD. v. WARD

[KING'S BENCH DIVISION (Lord Alverstone, C.J., Darling and Channell, J.J.), April 22, 23, 1902]

[Reported [1902] 2 K.B. 1; 71 L.J.K.B. 656; 87 L.T. 51; 66 J.P. 774; 18 T.L.R. 538; 20 Cox, C.C. 279]

Food and Drugs—Proceedings against corporation—Competency—Limited company—Sale of Food and Drugs Act, 1875 (38 & 39 Vict., c. 63), s. 6—Interpretation Act, 1889 (52 & 53 Vict., c. 63), s. 2 (1).

A corporation, e.g., a company incorporated under the Companies Acts, held to be liable to be convicted under s. 6 of the Sale of Food and Drugs Act, 1875 [now Food and Drugs Act, 1955, s. 2 (1)], for selling to the prejudice of the purchaser an article of food not of the nature, substance, and quality demanded by the purchaser.

Food and Drugs—Sale to prejudice of purchaser—"Prejudice"—Prejudice of purchaser in abstract—Purchaser not actually prejudiced through special knowledge of condition of article sold.

A sale is none the less to the prejudice of the purchaser because such purchaser has special knowledge (as where the article is bought for the purpose of analysis), unless such special knowledge is derived from what the seller informs the purchaser, either by notice or otherwise.

Notes. Referred to : *Smithies v. Bridge* (1902), 71 L.J.K.B. 555; *Korten v. West Sussex County Council* (1903), 88 L.T. 466; *Harke v. Hullon*, [1909] 2 K.B. 93; *Re Royal Naval School*, *Seymour v. Royal Naval School*, 1910 1 Ch. 806; *Claxton v. Freeth and Pocock*, 1911-13 All E.R. Rep. 138; *R. v. Ascanio Puck and Paice* (1912), 76 J.P. 487; *Monsell Bros. v. London and North Western Rail. Co.*, [1916-17] All E.R. Rep. 1101; *Pearks' Dairies v. Tottenham Food Control Committee* (1918), 88

A 1 T.K.B. 623; *Orpen v. Haymarket Capitol, Ltd.*, [1931] All E.R. Rep. 360; *D.P.P. v. Kent and Sussex Contractors, Ltd.*, [1944] 1 All E.R. 119; *R. v. I.C.R. Haulage, Ltd.*, [1944] 1 All E.R. 691; *Brentnall and Cleland, Ltd. v. L.C.C.*, [1944] 2 All E.R. 552.

As to sale to the prejudice of the purchaser, see 17 HALSBURY'S LAWS (3rd Edn.) 484-490, and for cases see 25 DIGEST 80 et seq. For Food and Drugs Act, 1955,

B s. 2 (1) see 35 HALSBURY'S STATUTES (2nd Edn.) 97.

Cases referred to:

(1) *Pharmaceutical Society v. London and Provincial Supply Association* (1880), 5 App. Cas. 857; 49 L.J.Q.B. 736; 43 L.T. 389; 45 J.P. 20; 28 W.R. 937, H.L.; 34 Digest 568, 257.

C (2) *Bells v. Armistead* (1888), 20 Q.B.D. 771; 57 L.J.M.C. 100; 58 L.T. 811; 52 J.P. 471; 36 W.R. 720; 16 Cox, C.C. 418, D.C.; 25 Digest 80, 95.

(3) *Kearley v. Tonge* (1891), 60 L.J.M.C. 159; sub nom. *Kearley v. Tylor*, 65 L.T. 261; 56 J.P. 72; 17 Cox, C.C. 328, D.C.; 25 Digest 82, 103.

Also referred to in argument:

Sundys v. Small (1878), 3 Q.B.D. 449; 47 L.J.M.C. 115; 39 L.T. 118; 42 J.P. 550; 26 W.R. 814; 25 Digest 83, 113.

D *Gage v. Elsey* (1883), 10 Q.B.D. 518; 52 L.J.M.C. 44; 48 L.T. 226; 47 J.P. 391; 31 W.R. 500, D.C.; 25 Digest 86, 136.

Morris v. Johnson (1890), 54 J.P. 612; 6 T.L.R. 171, D.C.; 25 Digest 86, 137.

Webb v. Knight (1877), 2 Q.B.D. 530; 46 L.J.M.C. 264; 36 L.T. 791; 41 J.P. 726; 26 W.R. 14, D.C.; 25 Digest 88, 146.

E *Morris v. Askew* (1893), 57 J.P.Jo. 724, D.C.; 25 Digest 86, 136.

Stevens v. Midland Counties Rail. Co. (1854), 10 Exch. 352; 23 L.J.Ex. 328; 18 J.P. 713; 18 Jur. 932; 2 C.L.R. 1300; 156 E.R. 480; 13 Digest (Repl.) 322, 1290.

Abrath v. North Eastern Rail. Co. (1886), 11 App. Cas. 247; 55 L.J.Q.B. 457; 55 L.T. 63; 50 J.P. 659; 2 T.L.R. 416, H.L.; 13 Digest (Repl.) 322, 1292.

F *Cornford v. Carlton Bank*, [1899] 1 Q.B. 392; 68 L.J.Q.B. 196; 80 L.T. 121; 15 T.L.R. 156; affirmed [1900] 1 Q.B. 22; 81 L.T. 415; 68 L.J.Q.B. 1020; 16 T.L.R. 12, C.A.; 13 Digest (Repl.) 324, 1311.

Mason v. Cowdary, [1900] 2 Q.B. 419; 69 L.J.Q.B. 667; 82 L.T. 802; 64 J.P. 662; 49 W.R. 28; 16 T.L.R. 434; 44 Sol. Jo. 531; 19 Cox, C.C. 536, D.C.; 25 Digest 74, 43.

G *Brown v. Foot* (1892), 61 L.J.M.C. 110; 66 L.T. 649; 56 J.P. 581; 8 T.L.R. 268; 17 Cox, C.C. 509, D.C.; 25 Digest 82, 104.

Hotchin v. Hindmarsh, [1891] 2 Q.B. 181; 60 L.J.M.C. 146; 65 L.T. 149; 55 J.P. 775; 39 W.R. 607; 7 T.L.R. 513, D.C.; 25 Digest 98, 222.

Case Stated by justices of Richmond, Surrey, on informations preferred by the respondent against the appellants under s. 6 of the Sale of Food and Drugs Act, 1875, charging them with having sold to the prejudice of the purchaser, butter which was not of the nature, substance, and quality of the article demanded, the same having had water added thereto to the extent respectively of 8·7, 7·3, and 4·4 per cent. beyond the usual limit of 16 per cent. natural to butter.

I The appellants were a limited joint stock company incorporated under the Companies Acts, 1862 to 1898, and carried on business as grocers and provision merchants, among other places in the borough of Richmond, Surrey, their registered office being 16, Bayer Street, Golden Lane, London. The respondent was an agent of the Butter Association, 79, Mark Lane, London. On April 30, 1901, the respondent caused one Annie White to purchase on his behalf at the appellants' shop at Richmond $\frac{1}{2}$ lb. of 1s. fresh butter, $\frac{1}{2}$ lb. of 10d. fresh butter, and $\frac{1}{2}$ lb. of 10d. salt butter, for the purpose of analysis. Immediately after the purchase Annie White handed the butter as she received it to the respondent, who divided it into three parts, and marked each part of the 1s. fresh butter, No. 50; the 10d. fresh

butter, No. 51; and the salt butter, No. 52; and fastened up each part in a grease-proof envelope. The other requirements of s. 14 of the Sale of Food and Drugs Act, 1875, were duly complied with, and a sample of each part was sent to the public analyst to be analysed. The public analyst certified that sample No. 50, 50 contained 24.7 per cent. of water; sample No. 51, 23.7 per cent. of water; and sample No. 52, 20.4 per cent. of water. There was no fixed standard as to the amount of water natural to butter, but it was generally understood that 16 per cent. should be the extreme limit.

At the outset of the hearing by the justices objection was taken by the appellants to the summons, on the ground that the appellants, being an incorporated company, were not liable to the penalties imposed upon "a person" offending against s. 6 of the Sale of Food and Drugs Act, 1875, and that the actual seller was the person liable and should have been the person summoned, although he was the servant of the appellants and assisting in carrying on their business. The justices overruled the appellants' contention, being of opinion that the appellants were, by virtue of s. 2 (1) of the Interpretation Act, 1889, included in the word "person" used in s. 6 of the Act of 1875. The case proceeding, Annie White admitted in evidence that at the time of the purchase she could see the butter was moist. It was contended by the appellants that there was no sale to the prejudice of the purchaser within the Act of 1875, on the ground that at the time of purchase the purchaser knew what she was in fact buying, and knew that the appellants' butter contained more moisture than other butter, and was different from other butter.

Macmorran, K.C., and *Ricardo* for the appellants.

Morton Smith for the respondent.

LORD ALVERSTONE, C.J.—In this case there was a prosecution under s. 6 of the Sale of Food and Drugs Act, 1875, with regard to the sale of butter. It was alleged that a summons could not be maintained where the defendants were a limited company, and that is the main point on which I have to give judgment. Another point raised was that on the facts of the case there was no sale to the prejudice of the purchaser under s. 6, because the purchaser knew that the butter was moist, and the persons for whom she acted knew that it was moist.

To deal first with that point, it seems to me that we have not to deal with the actual knowledge of the purchaser except so far as it is derived from what the seller informs him, either by notice, by the nature of the article itself, or by what passes at the time, because, of course, the person who buys on behalf of the inspector for analysis, buys Pearks's butter, and expects to get Pearks's butter, that is, the milk and butter mixture. We have to consider what would be the position of an ordinary purchaser. To say that, because the purchaser stated that she knew the butter was moist, which meant that the butter had more water in it than pure butter would have had, that is sufficient to show that there was no sale to the prejudice of the purchaser, seems to me to say something which it is impossible to maintain.

The next point raised is on s. 14. The sample of butter was divided, and was put into grease-proof envelopes, and it is found that nothing happened which would prejudice the defendants—that, in fact, if anything, water would have escaped. The words of the section provide that each part shall be marked and sealed or fastened up in such manner as its nature will permit. The magistrates have found that there was a sufficient compliance with s. 14, and I think it was a matter entirely for them.

As to the important point whether or not these proceedings can be taken against a limited company, it seems to me to be very much the same question as arises in a civil action, whether or not a master was responsible for the act of his servant, because a corporation ought to be within these provisions unless mens rea is necessary as an element of the offence. The words of s. 6 are, "No person shall sell to

A "to the prejudice of the purchaser any article of food." By s. 2 (1) of the Interpretation Act:

"In the construction of every enactment relating to offences punishable on indictment or on summary conviction whether contained in an Act passed before or after the commencement of this Act, the expression 'person' shall, unless the contrary intention appears, include a body corporate."

B I cannot see in s. 6 of the Act of 1875, or in any of the circumstances contemplated, any contrary intention. This was a sale of an article which was not of the nature, substance, and quality of the article demanded by the purchaser. The description of the article came from the vendor, and the sale by a limited company was just as much a sale as a sale by an individual. Therefore, unless it comes within the class of cases discussed in *Pharmaceutical Society v. London and Provincial Supply Association* (1), unless it clearly appears from s. 6 that no person can sell the article unless he has some particular personal qualification, as, for instance, a licensed chemist or a qualified surgeon, or anything of that kind, I cannot see any contrary intention. In dealing with ss. 3 and 5 of the Act of 1875 different considerations may arise, and also in reference to some sections in the Sale of Food and Drugs Act, 1899, to which our attention has been called.

D This point has never been raised before, although there have been many proceedings under these Acts, but, as was pointed out in the course of argument, it may well be that inasmuch as proceedings might have been taken against the managers, and the limited company would no doubt have protected their managers, there was not much object in taking the point. When one remembers that it was decided in *Bells v. Armistead* (2) that want of guilty knowledge is no defence under this section, and that proceedings could be taken against a master for a sale by his servant, it seems to me that any ground for a distinction is cut away. Therefore, both the protective object of the section and the necessary ingredients in the offence all seem to point to putting a corporation in the same position as a private individual, provided the sale is made on its behalf. There is a case which came before F CAVE, J., (*Kearley v. Tylor* (3)), where there was an express prohibition by the master, so that the servant was not acting within the scope of his authority, and where it was held the master was not liable. That again shows the analogy between this offence and the ordinary case of civil responsibility. I am of opinion that a corporation can be made responsible if they have in fact sold the article. G There is nothing which points to a contrary intention, and I can see no argument which shows why a corporation should be exempt from the provisions of s. 6.

DARLING, J.—I am of the same opinion. As to the point that a corporation or a limited company would not be liable, by s. 2 (1) of the Interpretation Act, "person" includes a corporation unless there is something in the statute to show H that "person" does not bear that meaning. I cannot see here anything to exclude a limited company from the operation of the word "person."

The other point raised has been constantly alluded to in cases which have come before the court, where it has been contended that there was no sale to the prejudice of the purchaser within the meaning of s. 6. It is said there is no sale to the prejudice of the purchaser here because she knew there was some moisture in the butter, though how much did not appear. It is constantly argued in these cases I that the prosecution must prove that there was a sale to the prejudice of the person who bought the article. I do not think that is the meaning of the statute. I think the words are used in the sense of being to the prejudice of a purchaser in the abstract, not merely the actual purchaser. The words were probably used for the reason that the goods might be sold with a false description, and might not inflict any kind of harm or injury, because they might be of a better quality than the goods demanded. But when one comes to consider who the purchaser is, and whether the section means the actual purchaser of the particular article, one must

notice that provision is made by s. 13 that any medical officer of health, inspector of nuisances or of weights and measures, or any police-magistrate, under the direction and at the cost of the local authority, may buy a sample of food or drugs. Applying those words as it has been attempted to apply them in many cases, to mean that the prejudice of the particular purchaser must be proved, it is apparent that it could never be proved in the case of a purchaser by such a person as that. The person under that section, in all probability, goes with money which is not his own, money provided out of public funds; and, however bad the article which he gets may be, he is none the worse. He has got an article which, whether good or bad, he is not going to use; he is going to divide it into three parts and have it analysed, and then throw it away; and whether it is good or bad makes no difference to him. A person like that cannot in the nature of things be prejudiced by what is done.

With regard to the protection given to the seller, it seems to me that a plea which is now exhibited with regard to some of these things is important—not in showing what was in the mind of the purchaser, because in the case of an inspector, he knows what he is going to get, but as bringing to the knowledge of the purchaser, either the abstract or actual purchaser, that what is being sold is properly described as a mixture of this, that, or the other thing. If that is done, there is not a sale to the prejudice of the purchaser, either the actual purchaser or the purchaser in the abstract, because the seller has taken care to affect with knowledge of what he is doing the person who is buying.

CHANNELL, J.—I agree. With reference to the last point mentioned, there is this additional reason for making clear, if possible, what “to the prejudice of the purchaser” means, because it is not understood. We seldom have the cases which come before us directed to the correct point, which is whether another person who has not the special knowledge of the inspector, but who purchases under the same circumstances in other respects, would be prejudiced. Very often the magistrates do not find the facts which are necessary to determine that, which is the real question.

As to the other point, which is of importance, whether a corporation can be liable under this Act, I agree with what has been already said, but on account of its importance will add a few words. By the general principles of criminal law, if any matter is made a criminal offence, there is imported into it that there must be something in the nature of *mens rea*. Therefore, in ordinary cases a corporation cannot be guilty of a criminal offence, nor can a master be liable criminally for an offence committed by his servant. But there are exceptions to that in the case of quasi-criminal offences, as they may be termed—acts forbidden by law under a penalty, possibly even under the penalty of imprisonment, at any rate in default of payment of a fine—because the legislature thought it so important to prevent the act being committed that it forbade it absolutely to be done in any case. If that is done—whether the person charged has any *mens rea* or not, whether he intended to commit a breach of the law (if he knew the law) or not—if he does that forbidden thing he is liable to the penalty. Where the act is of this character, then a master who in fact does that forbidden thing through his servant, is responsible and liable to the penalty; and there is no reason why he should not be, because the very object of the legislature was to forbid the thing absolutely. It seems to me that exactly the same principles apply to a corporation doing such a thing. If it does an act which is absolutely forbidden it is liable for a penalty. Therefore, when such a question as this arises one has to see whether the thing is absolutely forbidden or whether it is merely a new offence to which the ordinary principles of the criminal law as to *mens rea* would apply. Applying this to s. 6 of the Food and Drugs Act, 1875, I think it is quite clear, and it has already been decided in at least two cases, that there is an absolute prohibition of the particular sale mentioned in the section, and consequently there is no reason why it should not apply to a corporation. As to s. 3 there is a slight difference.

A because, putting ss. 3 and 5 together, it seems to be analogous to that which has been held to be the true construction of the Merchandise Marks Act, that mens rea is involved in the offence but need not be proved by the prosecution, as it must in ordinary criminal cases. It is so far an element in the offence, that if the defendant succeeds in proving that he had no mens rea he is acquitted, the burden of proof having been altered in such cases. That was done in cases where the legislature desired to prevent the act being done, but recognised that there might be cases where it might be done innocently, and, therefore, the person charged ought not to be convicted, but the legislature also saw that while the innocent person could prove his innocence, it was not quite so easy for the prosecution if the burden were left in the ordinary way upon them to show mens rea. Consequently, with the object of preventing the act being done, but at the same time of not punishing persons who were blameless, the enactment was framed in that particular way. In those cases there may be more difficulty than there is under s. 6 in applying the Act to a corporation. Personally, I am inclined to think that a corporation would come under s. 3 as well as under s. 6, but it is not quite so clear, and it may have to be argued later, and the decision of the present cases does not necessarily involve a decision on that point. I agree that s. 17 of the Act of 1899, which provided for the imprisonment of offenders in certain cases, is in his favour rather than otherwise, because it requires something more to be proved than is necessary under s. 6—some wilful act before imprisonment could be inflicted. If there had been simply a provision that imprisonment should follow a breach of s. 6 there might have been some difficulty about it.

Judgment accordingly.

Solicitors: *H. Nelson, Paisley; W. T. Ricketts & Sons; Prior, Church & Adams, for Linthorne, Southampton.*

[*Reported by W. DE B. HERBERT, ESQ., Barrister-at-Law.*]

UNION LIGHTERAGE CO. v. LONDON GRAVING DOCK CO.

[COURT OF APPEAL (Vaughan Williams, Russell and Stirling, L.J.J.), JUNE 15, 16, JULY 21, 1902]

[Reported [1902] 2 Ch. 357; 71 L.J.Ch. 701, 81 L.T. 391, 18 T.L.R. 764]

Easement—Support—Implied reservation of right—Construction of conveyance—Necessity—User by which prescriptive right obtained—Need for enjoyment of right to be open—'Open'—Reasonable opportunity for diligent owner of servient tenement to become aware of enjoyment.

In 1860 the sides of a dock were, with the consent of the occupiers of an adjoining wharf and also of the owners of the freehold of both dock and wharf, supported by tie-rods which passed into the soil of the wharf and were fastened by nuts to piles. In 1877 the wharf was sold to the plaintiffs, but the conveyance contained no reservation of any right of support for the dock by the tie-rods. In 1886 the dock was sold to the predecessors in title of the defendants. In 1900 the plaintiffs, on making some excavations on their wharf, came across a number of the tie-rods and claimed the right to remove them, though they still supported the dock. No part of any of the rods was visible, except two nuts on the outside of certain piles on the plaintiffs' wharf. In an action by the plaintiffs for a declaration that the defendants were not entitled to retain the tie-rods in the plaintiffs' land,

Held (VAUGHAN WILLIAMS, L.J., dissenting): on construction of the conveyance of 1877 the tie-rods on the plaintiffs' land supporting the dock could not be treated as a corporeal part of the dock and as not being conveyed, and so no reservation of a right of support could be implied in favour of the predecessors of the defendants; on the facts proved no right of support by necessity could be implied; a prescriptive right to an easement over another person's land could only be acquired where the enjoyment of the right had been open, i.e., of such a character that an ordinary owner of the servient tenement, diligent in the protection of his interests, would have, or must be taken to have, a reasonable opportunity of becoming aware of that enjoyment; in the present case on the evidence the enjoyment by the defendants had not been open; and, therefore, the plaintiffs were entitled to the declaration they sought.

Per STIRLING, L.J.: The "easements of necessity" referred to in the judgments in *Wheeldon v. Burrows* (1) (1879), 12 Ch.D. 31, as reserved by implication in favour of a grantor of land are easements without which the property retained cannot be used at all, and not those merely necessary to the reasonable enjoyment of the property.

Decision of COZENS-HARDY, J., [1901] 2 Ch. 300, affirmed.

Notes. Applied: *Ry v. Haeckling*, [1904] 2 Ch. 17. Referred to: *Schoeman v. Cotton*, [1916] 2 Ch. 120; *Selby v. Whitbread*, [1917] 1 K.B. 736; *Liverpool Outpost v. Coghill*, [1918] 1 Ch. 307; *Aldridge v. Wright*, [1929] 2 K.B. 117; *Ging v. Planque*, [1935] All E.R. Rep. 237; *Lloyds Bank, Ltd., v. Dalton*, [1942] 2 All E.R. 352; *Davies v. Du Paver*, [1952] 2 All E.R. 991.

As to the reservation of an easement in a conveyance, an implied grant, and acquirement by prescription, see 12 HALSEURY'S LAWS (3rd Edn.) 586-590, and as to the easement of support, see *ibid.*, pp. 603-611. For cases see 19 DIGEST (Repl.) 25, 26, 40-83, 178 et seq.

Cases referred to:

- (1) *Wheeldon v. Burrows* (1879), 12 Ch.D. 31; 48 L.J.Ch. 853; 41 L.T. 327; 28 W.R. 196, C.A.; 19 Digest (Repl.) 48, 269.
- (2) *Suffield v. Brown* (1864), 4 De G.J. & Sm. 185; 3 New Rep. 340; 33 L.J.Ch. 249; 9 L.T. 627; 10 Jur.N.S. 111; 12 W.R. 356; 46 E.R. 888, I.C.; 19 Digest (Repl.) 45, 238.

- A (10) *Richard v. Rose* (1853), 9 Exch. 218; 2 C.L.R. 341; 23 L.J.Ex. 3; 22 L.T.O.S. 104; 18 J.P. 56; 17 Jur. 1036; 156 E.R. 93; 19 Digest (Repl.) 44, 235.
- (11) *Nichols v. Chamberlain* (1606), Cro. Jac. 121; 79 E.R. 105; 19 Digest (Repl.) 33, 162.
- B (12) *Crossley & Sons, Ltd. v. Lightowler* (1867), 2 Ch. App. 478; 36 L.J.Ch. 584; 16 L.T. 438; 15 W.R. 801, L.C.; 19 Digest (Repl.) 90, 521.
- (13) *Taylor v. Shafto* (1867), 8 B. & S. 228; 16 L.T. 205, Ex. Ch.; 34 Digest 706, 936.
- (14) *Solomon v. Vintners' Co.* (1859), 5 H. & N. 585; 28 L.J.Ex. 370; 33 L.T.O.S. 224; 23 J.P. 424; 5 Jur.N.S. 1177; 7 W.R. 613; 157 E.R. 970; 19 Digest (Repl.) 62, 345.
- C (15) *Dalton v. Angus* (1881), 6 App. Cas. 740; 46 J.P. 132; 30 W.R. 191, H.L.; 19 Digest (Repl.) 6, 4.
- (16) *Dugdale v. Robertson* (1857), 3 K. & J. 695; 30 L.T.O.S. 52; 3 Jur.N.S. 687; 69 E.R. 1289; 19 Digest (Repl.) 44, 234.
- (17) *Hervey v. Smith* (1856), 22 Beav. 299; 52 E.R. 1123; 19 Digest (Repl.) 197, 1379.
- D (18) *Phillipson v. Gibbon* (1871), 6 Ch. App. 428; 40 L.J.Ch. 406; 24 L.T. 602; 35 J.P. 676; 19 W.R. 661, L.J.J.; 42 Digest 501, 674.

Also referred to in argument:

- Pyer v. Carter* (1857), 1 H. & N. 916; 26 L.J.Ex. 258; 28 L.T.O.S. 371; 21 J.P. 247; 5 W.R. 371; 156 E.R. 1472; 19 Digest (Repl.) 43, 228.
- E *Pinnington v. Gulland* (1853), 9 Exch. 1; 1 C.L.R. 819; 22 L.J.Ex. 348; 22 L.T.O.S. 41; 156 E.R. 1; 19 Digest (Repl.) 33, 166.
- Ewart v. Cochrane* (1861), 5 L.T. 1; 25 J.P. 612; 7 Jur.N.S. 925; 10 W.R. 3; 4 Macq. 117, H.L.; 19 Digest (Repl.) 47, 262.
- Palmer v. Fletcher* (1663), 1 Lev. 122; 1 Keb. 553, 625; 1 Sid. 167; 83 E.R. 329; 19 Digest (Repl.) 54, 293.
- F *Caledonian Rail. Co. v. Sprot* (1856), 27 L.T.O.S. 264; 2 Jur.N.S. 623; 4 W.R. 659; 2 Macq. 449, H.L.; 19 Digest (Repl.) 49, 272.
- North-Eastern Rail. Co. v. Elliott* (1860), 1 J. & H. 145; 29 L.J.Ch. 808; 6 Jur. N.S. 817; affirmed 2 De G.F. & J. 423; 30 L.J.Ch. 160; 3 L.T. 520; 7 Jur.N.S. 6, L.C.; on appeal sub nom. *Elliot v. North-Eastern Rail. Co.* (1863), 10 H.L.Cas. 333; 2 New Rep. 87; 32 L.J.Ch. 402; 8 L.T. 337; 27 J.P. 564; 9 Jur.N.S. 555; 11 W.R. 604; 11 E.R. 1055, H.L.; 19 Digest (Repl.) 179, 1202.
- G *Gayford v. Nicholls* (1854), 9 Exch. 702; 2 C.L.R. 1066; 23 L.J.Ex. 205; 18 J.P. 441; 156 E.R. 301; sub nom. *Nicholls v. Gayford*, Saund. & M. 30; 23 L.T.O.S. 96; 2 W.R. 453; 19 Digest (Repl.) 183, 1235.
- H *Murchie v. Black* (1865), 19 C.B.N.S. 190; 34 L.J.C.P. 337; 12 L.T. 735; 11 Jur.N.S. 608; 13 W.R. 896; 144 E.R. 759; 19 Digest (Repl.) 185, 1245.
- Phillips v. Low*, [1892] 1 Ch. 47; 61 L.J.Ch. 44; 65 L.T. 552; 8 T.L.R. 23; 19 Digest (Repl.) 56, 309.
- Rigby v. Bennett* (1882), 21 Ch.D. 559; 48 L.T. 47; 47 J.P. 217; 31 W.R. 222, C.A.; 19 Digest (Repl.) 50, 275.
- I *Partridge v. Scott* (1838), 3 M. & W. 220; 1 Horn. & H. 31; 7 L.J.Ex. 101; 150 E.R. 1124; 19 Digest (Repl.) 74, 420.
- Sturges v. Bridgman* (1879), 11 Ch.D. 852; 48 L.J.Ch. 785; 41 L.T. 219; 43 J.P. 716; 28 W.R. 200, C.A.; 19 Digest (Repl.) 18, 57.
- Tickle v. Brown* (1836), 4 Ad. & El. 369; 1 Har. & W. 769; 6 Nev. & M.K.B. 230; 5 L.J.K.B. 119; 111 E.R. 826; 19 Digest (Repl.) 76, 429.
- Gately v. Martin*, [1900] 2 I.R. 269; 19 Digest (Repl.) 188, 4553.

Appeal by the defendants from a decision of Cozens Hardy, J., declaring that the defendants were not entitled to retain in or under the land of the plaintiffs certain rods or ties for the purpose of supporting or upholding their dry dock.

In 1860 Messrs. Green, who were then the occupiers of certain land of which the East and West India Docks Co. were the freeholders, employed contractors to construct a graving dock on the land occupied by them. It was constructed with timber sides. These timber sides proving too weak to maintain a perpendicular position, Messrs. Green found it necessary to pass tie-rods through the western side of their dry dock onwards through the boundary separating the property in which the dry dock was constructed, until the tie-rods reached the front of the eastern side of a wharf occupied by Messrs. Freeman, under the East and West India Docks Co. The tie-rods were braced by nuts or plates, which were fastened on the ends of the tie-rods at the points where they passed through piles on the side of Messrs. Freeman's wharf. It was inferred from this that Messrs. Green, at the time when they strengthened their dry dock with these tie-rods, must have obtained the consent of the East and West India Docks Co., as the freeholders of both properties, and also of Messrs. Freeman, as the occupiers of the wharf. At this time both Messrs. Green and Messrs. Freeman would seem to have been tenants from year to year of the East and West India Docks Co. In 1873 the East and West India Docks Co. granted a lease of the wharf to Messrs. Freeman as tenants from year to year, and in 1874, while that lease was still current, the East and West India Docks Co. sold and conveyed to Messrs. Green the whole of their estate, which included both the dry dock occupied by Messrs. Green and the wharf occupied by Messrs. Freeman under the lease of 1873. The conveyance also included the river frontage, which the East and West India Docks Co. had purchased from the Thames Conservators, and which formed part of the land occupied by Messrs. Green and Messrs. Freeman as tenants. On June 5, 1877, the Union Lighterage Co. agreed to purchase from Messrs. Freeman the premises held by them as tenants from year to year of Messrs. Green, and on June 12, took possession under that agreement. The agreement for the purchase of the wharf by the Union Lighterage Co. included the purchase of the barges and stock of Messrs. Freeman, which was duly taken over and paid for. On July 10, 1877, Messrs. Green offered the freehold of the wharf, of which they had become reversioners by the conveyance of 1874, to the Union Lighterage Co. On July 12 this offer was accepted, but there was no conveyance until November, 1877. The conveyance made no reservation of any right of support by the tie-rods in question, but the contract of purchase was subject to the tenancy of John Freeman, and all easements, if any. In 1886 Messrs. Green sold the dock premises to a company, who subsequently sold to the defendants, who had carried on business there ever since. This conveyance was in common form, and was silent as to support. In 1892 the defendants concreted the bottom and a small part of the side of their dock, but with this exception the timber remained as before. In 1900 the Union Lighterage Co., in the course of excavations with a view to improving their property, came across a number of rods and ties, which were those which were placed there by Messrs. Green in 1861. This action was then brought, claiming a declaration that the defendants were not entitled to retain the rods, ties, and supports in or under the plaintiffs' land for the purpose of supporting their dock.

COZENS-HARDY, J., held that there was no implied reservation in favour of the vendors of a right to the existing support when the wharf was conveyed to the plaintiffs in 1877. A right to an easement of support could be acquired by the defendants either under the Prescription Act or under the common law doctrine of a lost grant unless the easement had been enjoyed, not openly, but clam, in the sense that it had not come to the knowledge of the plaintiffs and was not of such a nature that their attention ought reasonably to have been drawn to it. His Lordship came to the conclusion that the plaintiffs did not know of the artificial supports to the defendants' dock, which extended under the plaintiffs' land,

A and that they ought not to be held to have known that the dock must have been thus supported. In his opinion, there had been no open and visible enjoyment of the easement claimed by the defendants. He, accordingly, gave judgment declaring that the defendants were not entitled to retain any of the rods, ties, or supports in or under the plaintiffs' land for the purpose of upholding or supporting the dry dock, and were not entitled to interfere with the removal by the plaintiffs of all or

B any of such rods, ties, or supports. The defendants appealed.

Eve, K.C., and A. F. Peterson for the defendants.

Macnaghten, K.C., and Bryan Farrer for the plaintiffs.

Cur. adv. vult.

July 21, 1902. The following judgments were read.

C **VAUGHAN WILLIAMS, L.J.**, stated the facts and continued: I will now deal with the two legal questions in succession. First, was there, under these circumstances, any reservation by Messrs. Green of the right of support by these tie-rods? Secondly, have Messrs. Green, by enjoyment since 1877, acquired, by

D prescription or presumed lost grant, any right to this support?

As to the question of reservation, *Wheelton v. Burrows* (1) puts beyond doubt the general rule, that, if a grantor upon a conveyance intends to reserve any right over the tenement granted, he must do so by an express reservation in the grant. So far *Wheelton v. Burrows* (1) is a mere affirmation of the law as laid down by LORD WESTBURY in *Suffield v. Brown* (2), where he says (4 De G.J. & Sm. at p. 191):

E "But I cannot agree that the grantor can derogate from his own absolute grant, so as to claim rights over the thing granted, even if they were at the time of the grant continuous and apparent easements, enjoyed by an adjoining tenement which remains the property of him the grantor. Consider the easements as if they were rights, members, or appurtenances of the adjoining tenement. they still admit of being aliened or released, and the absolute sale and grant

F of the land, on or over which they are claimed, is inconsistent with the continuance of anything abridging the complete enjoyment of the thing granted, which is separable from the tenement retained, and can be aliened or released by the owner."

But both THESIGER, L.J., in *Wheelton v. Burrows* (1) and LORD WESTBURY in *Suffield v. Brown* (2) recognise that there are some exceptions to this general

G rule. One exception is the case of necessity, of which a way of necessity is the most familiar instance. Another case of exception is the case of reciprocity, in which houses or other buildings are so constructed as to be mutually subservient to and dependent on each other, neither being capable of standing or being enjoyed without the support it derives from its neighbour. This exception is recognised

H by LORD WESTBURY in *Suffield v. Brown* (2), and by THESIGER, L.J., in *Wheelton v. Burrows* (1), the judgment of BRAMWELL, B., in *Richards v. Rose* (3) being generally the authority quoted for this exception of reciprocal or mutual easements. A third exception is where that which is claimed to be reserved is not an incorporeal easement, but part and parcel of a house or other building belonging to the conveyancing party, but not included in the conveyance. This exception is clearly recognised

I by JAMES, L.J., in a short supplementary judgment which he delivered in *Wheelton v. Burrows* (1). He says (12 Ch.D. at pp. 60, 61):

"I only want to say something in addition, that in the case of *Nicholas v. Chamberlain* (4) the court seems to have really proceeded on the ground that it was not an incorporeal easement, but that the whole of the conduit through which the water ran, was a corporeal part of the house, just as in an old city there are cellars projecting under other houses. They thought it was not merely the right to the passage of water, but that the conduit itself passed as part of the house, just like a flue passing through another man's house."

THURSTON, J.J., also recognises the same exception, but gives *Nicholson v. Chamberlain* (4) as an instance of an easement of necessity. Lord WESTBURY seems also to recognise this exception, for, speaking of *Nicholson v. Chamberlain* (4) he says (5) *De G.J. & Sm. at p. 197*) this decision

"merely amounts to this, that the reservation, like the grant of a house, is the reservation or grant of it with its appurtenances."

The present case is on the border line, but there is a great deal to be said in favour of the contention of the defendants that these tie-rods remained to the piles constitute a corporeal part of the dry dock, which was reserved, and, being essential to the maintenance of the dry dock, as it stood before and at the time of the conveyance, fall within the view of THURSTON, J.J., of that which I have called the third exception, by being easements of necessity. On the whole, I think that the defendants are entitled to keep these tie-rods in the position in which they were originally placed, and always have been maintained, for the necessary purpose of the maintenance of the dry dock as built with its wooden sides. The tie-rods, in my opinion, are a corporeal part of the dry dock, just like the scullery or the cellar, or the flue mentioned by JAMES, L.J. The tie-rods, were, I think, reserved with the dry dock as appurtenances thereof, as Lord WESTBURY expressed it.

I have only to add that I do not assert that the authorities uniformly recognise the exceptions which I have specified to the general rule laid down by Lord WESTBURY in *Suffield v. Brown* (2)—namely, the rule that it seems more reasonable and just to hold that, if the grantor intends to reserve any right over property granted, it is his duty to reserve it expressly in the grant, rather than to limit and cut down the operation of a plain grant (which is not pretended to be otherwise than in conformity with the contract between the parties) by a fiction of an implied reservation. For instance, there is the statement of Lord CHILMSFORD, L.C., in *Crosley & Sons, Ltd. v. Lightowler* (5), which runs thus (2 Ch. App. at p. 486):

"It appears to me to be an immaterial circumstance that the easement should be apparent and continuous, for non constat that the grantor does not intend to relinquish it, unless he shows the contrary by expressly reserving it."

But against this dictum one has to put all those cases in which a reservation is implied for a right of support by way of reservation in favour of the grantor. These cases will be found set out in the judgment of WOOD, V.-C., in the case of *Taylour v. Shafto* (6) (8 B. & S. at p. 252), which show generally that the implication in favour of an existing support is easily made on the ground of necessity.

It seems to me impossible to say that the result of the judgments in either *Wheelton v. Burrows* (1) or *Suffield v. Brown* (2) is that it is impossible to presume a reservation from the state of things existing at the moment of severance of ownership of adjoining houses originally belonging to one owner. *Richards v. Rase* (3) was the case of two houses originally built together and belonging to the same owner, and there the court presumed that, upon severance of ownership, there was a grant and reservation of a reciprocal right of support. It is, of course, true that the reciprocity is an important consideration in the inference, but the inference is not from user; it is based upon the fact of the state of things existing at the moment of severance. It may be that the presumption will more readily arise where there is reciprocity than where there is no reciprocity, but the principle is the same in either case. In each case there is an exception from the rule that a man shall not derogate from his own express grant. The grantor is allowed by implication to derogate from his own express grant. Why? Because of the state of things at the moment of severance.

As to the question about the prescriptive right, the only question is whether the enjoyment has been clam. It is said by BRAMWELL, B., in *Salomon v. Farnham Co.* (7) that the enjoyment must be of right, which it cannot be unless it was openly and visibly enjoyed. BRAMWELL, B., is speaking of a yearly built house gradually

A coming to lean against some adjacent house. Such support is manifestly not visible in the sense in which the support is upon some structure or some part of an adjacent house which is intentionally appropriated as a means of support. Such a case seems, whatever may be the case where the support is by one house coming in course of time to lean against another, clearly to fall within the Prescription Act, 1833. In the case of an artificial support, such as there is in the present case, I shall assume, notwithstanding the observations of LORD BLACKBURN in *Dalton v. Angus* (8), that acquiescence, and, therefore, knowledge or means of knowledge, is the basis of the easement, whether the right of support is based on the Prescription Act or on the fiction of lost grant. I agree, speaking of easements generally, that mere enjoyment is not sufficient to create the prescriptive right. This is only true in respect of the right to light. In order to gain for the owner of land by enjoyment a title to some advantage from or upon his neighbour's close greater than would naturally belong to him, the advantage must be one the enjoyment of which is, or ought to be, known to the neighbour, and could without destruction or serious injury to his own close be interrupted by him: see the summary of the first argument in the House of Lords mentioned by LORD BLACKBURN in his speech in *Dalton v. Angus* (8).

D In the case, however, of easements of support by artificial means, expressly adapted for the purpose, which encroach upon adjacent land by buildings or by structures of any sort, such as the wharf and dock respectively in the present case, I think that the interest of the community, and especially of the inhabitants of large towns, requires that those who occupy adjacent buildings or structures should be taken to be warned of the inherent probability of one building or structure being connected with and supported by some adjacent structure or building, and that this is especially so in a case where the owner of the alleged servient tenement is aware that such tenement, as well as the alleged dominant tenement, at the time of the construction of the structure on the dominant tenement belonged to one and the same owner. In such a case it seems to me that a very little ought to put the owner of such a tenement upon inquiry, and that if he makes no inquiry knowledge ought to be imputed to him. He is at least in the possession of knowledge which ought to have put him on inquiry. Indeed, it appears both from the passage about the relation of acquiescence to prescription which I have quoted from LORD BLACKBURN's speech, and from the summary which I have quoted, that proof of actual knowledge is not essential to acquiescence. It is sufficient if the owner of the servient tenement ought to have known. It is sufficient if he had means of knowledge. This makes the user open. The law of prescription, like the Statute of Limitations, is based on the convenience of the community, and not on natural justice. It would be very inconvenient if actual knowledge had to be proved as a condition of that acquiescence, which is the basis alike of the common law theory of lost grant and the Prescription Act. Means of knowledge is sufficient to make the user open.

H In the present case you have plenty of evidence that the nuts or the piles were visible, and the evidence of Mr. Jaffray, the expert, whose evidence everyone accepts, shows plainly that the nuts and washers were obvious to sight, and I do not think that evidence with reference to what is apparent acquiescence is negatived, because the plaintiffs' directors did not notice these nuts, or because a man ignorant of waterside structures would not know what the nuts and washers at the ends of the ties indicated. Moreover, in this case the plaintiffs were for a short time lessees of this property subject to this so-called easement—see *Dugdale v. Robertson* (9)—and this seems some reason for imputing to them, when they purchased the reversion, the knowledge of their predecessors in title, Messrs. Freeman, who clearly consented to the tie-rods for support of the dock. I do not think, assuming, as I, of course, do assume, that the defendants' predecessors in title, the East and West India Docks Co., knew of the tie-rods, and that the Mr. Green, who was owner in 1877, the date of the conveyance to the plaintiffs, also knew, that

this affects in any way the question of acquiescence by the plaintiffs for the purpose of prescription. Nor do I think that it negatives the presumption arising on the necessity to maintain the tie-rods as they were at the time of the severance and conveyance, if the adjoining structure reserved or excepted by the grantor was to continue to stand as it stood at that date.

ROMER, L.J.—In my opinion, this appeal fails. In the first place, I think that when the vendors, through whom the defendants claim, conveyed the plaintiffs' land to the plaintiffs, no reservation can be implied in favour of the vendors of a right of support in respect of the defendants' dock. When the conveyance is looked at, it appears to me that the ties supporting the dock, so far as they are on the plaintiffs' land, cannot be treated as part of the dock and as not being conveyed. The land conveyed is clearly described, and, in my opinion, must cover the place occupied by the ties. Nor is this one of those cases of difficulty, referred to in *Wheeldon v. Burrows* (1) and other authorities, where at the date of conveyance reciprocal rights as between the property conveyed on the one hand and the property retained by the vendors on the other might be inferred. That being so, then, following *Wheeldon v. Burrows* (1), by which we are bound, it is clear that a reservation of a right of support in the present case could only be implied if it were one of necessity. All I need say on this part of the case is that the facts do not lead me to the conclusion that there was any such necessity proved, or to be inferred, as would require, or would justify the court in holding, that the reservation should be implied.

That being so, the only remaining question is whether an easement has been acquired as against the plaintiffs under the Prescription Act. On principle, it appears to me that a prescriptive right to an easement over a man's land should only be acquired where the enjoyment has been open—that is to say, of such a character that an ordinary owner of the land, diligent in the protection of his interests, would have, or must be taken to have, a reasonable opportunity of becoming aware of that enjoyment. I think on the balance of authority that this principle has been recognised as the law, and ought to be followed by us. In support of this statement I do not think it necessary to do more than refer to those parts which deal with this point of the speeches made by LORD SELBORNE and LORD PINZANCE, in the House of Lords in *Dalton v. Angus* (8), and I gather that their views as there expressed on this point were not dissented from by the other members of the House who took part in the hearing of that case. Indeed, LORD BLACKBURN said (6 App. Cas. at p. 827) that no prescriptive right could be acquired where there was any concealment, "and probably none where the enjoyment had not been open." Under these circumstances it appears to me only necessary to consider whether in the present case the enjoyment since the date of the conveyance to the plaintiffs has been open. In my opinion, it has not. It is not established on behalf of the defendants that the plaintiffs were informed by their vendors at the time of the conveyance, or ever ascertained in fact by any of their agents until quite recently, that the defendants' dock was being supported by the plaintiffs' land. Nor can I see any circumstances in this case sufficient to justify the court in holding that the plaintiffs ought to have such knowledge attributed to them, or were put on inquiry. In particular, it does not appear to me that the existence of the two nuts on the plaintiffs' premises about which so much has been said, gave the plaintiffs or their agents a reasonable opportunity of becoming aware of the enjoyment by the defendants of the support of their dock by the plaintiffs' land, or put the plaintiffs on inquiry. I think, therefore, that the appeal should be dismissed.

STIRLING, L.J.—The first point decided by COZENS-HARDY, J., was that there was no implied reservation to the vendors of the easement claimed by the defendants on the conveyance to the plaintiffs of the property of which they became owners in 1877. On this point the governing authority is *Wheeldon v. Burrows* (1), decided

by the Court of Appeal consisting of JAMES, BAGGALLAY, and THESIGER, L.J.J., by the last of whom the judgment of the court was delivered. In it two rules are laid down in the following terms (12 Ch.D. at p. 49):

"The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean quasi easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted. The second proposition is, that if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. Those are the general rules governing cases of this kind, but the second of those rules is subject to certain exceptions. One of these exceptions is the well-known exception which attaches to cases of what are called ways of necessity."

After reviewing certain cases the learned judge says (*ibid.* at p. 58):

"These cases in no way support the proposition for which the appellant in this case contends; but on the contrary, support the proposition that in a case of a grant you may imply a grant of such continuous and apparent easements, or such easements as are necessary to the reasonable enjoyment of the property conveyed, and have in fact been enjoyed during the unity of ownership, but that, with the exception which I have referred to of easements of necessity, you cannot imply a similar reservation in favour of the grantor of the land."

The defendants in the present case did not dispute that there is no express reservation in the conveyance to the plaintiffs; they contended that the easement claimed by them, the defendants, was an "easement of necessity" within the recognised exception of the second rule.

In the passages cited the expressions "ways of necessity" and "easements of necessity" are used in contact with the other expressions "easements which are necessary to the reasonable enjoyment of the property granted," and "easements . . . necessary to the reasonable enjoyment of the property conveyed"; and the word necessity in the former expressions has plainly a narrower meaning than the word necessary in the latter. In my opinion, an easement of necessity, such as is referred to, means an easement without which the property retained cannot be used at all, and not one merely necessary to the reasonable enjoyment of such property. In *Wheeldon v. Burrows* (1) the lights which were the subject of decision were certainly reasonably necessary to the enjoyment of the property retained, which was a workshop, yet there was held to be no reservation of it. So here it may be that the tie-rods which pass through the plaintiffs' property are reasonably necessary to the enjoyment of the defendants' dock in its present condition, but the dock is capable of use without them, and I think that there cannot be implied any reservation in respect of them. Some other exceptions to the general rule are mentioned in *Wheeldon v. Burrows* (1), and in particular reciprocal easements; but it was not contended, and it does not appear to me that this case falls within any of them. Nor do I think that the rods here form part of the corporeal structure of the dock which can be held not to have passed by the conveyance of the adjoining property.

On the second point, the learned judge decided that no right had been acquired by the defendants by reason of the continuance of the rods and ties under the plaintiffs' lands for upwards of twenty years, either under the Prescription Act or under the common law doctrine of a lost grant, because the enjoyment of the defendants had not been open, in this sense that it had not come to the plaintiffs' knowledge, and was not of such a nature that their attention ought reasonably to

have been drawn to it. In *Dutton v. Tegen* (8) much discussion took place as to the nature and extent of the knowledge or means of knowledge which ought to be shown to be possessed by a person against whom there is claimed a right of support for the building of another. LORD SELBORNE, L.C., said (6 App. Cas. at p. 801), that a man "cannot resist or interrupt that of which he is wholly ignorant." LORD BLACKBURN says (*ibid.* at p. 827):

"The edict of the Prætor that possession must not be *vi vel clam*, as I think, is so far adopted in English law that no prescriptive right can be acquired where there is any concealment, and probably none where the enjoyment has not been open."

Both noble Lords came to the conclusion that in this case before them sufficient knowledge or means of knowledge on the part of the adjoining proprietor had been proved; and with them LORD WATSON agreed. I think that case establishes that there must be some knowledge or means of knowledge on the part of the person against whom the right is claimed. The present case seems to me to stand on the same footing as if the rods and ties had been placed in the land which now belongs to the plaintiffs while that land, as well as the land now belonging to the defendants, was in the hands of their common predecessor in title, Henry Green. His executors in 1877 sold to the plaintiffs, without reserving any right in respect of the ties and rods, the existence of which is not shown to have become actually known to any agent of the plaintiffs until a recent date. The ties and rods are between twenty and thirty in number, and there are only two of which any visible signs appear upon an inspection of the exterior of the plaintiffs' property. Even as regards these two, the traces might, as it seems to me, be reasonably regarded as forming merely part of the camp-leathering of the plaintiffs' own property. There are, no doubt, cases in which the owners of property have been held to be affected with notice of that which might have been discovered by the exercise of reasonable diligence: see, for example, *Hervey v. Smith* (10); *Phillipson v. Gibbon* (11); but the learned judge came to the conclusion that in this case such a notice ought not to be attributed to the plaintiffs, and I am unable to differ. I think, therefore, that the appeal should be dismissed.

Solicitors : *Drake, Son & Parton ; Renshaw, Kekewich & Smith.*

[*Reported by W. C. Briss, Esq., Barrister-at-Law.*]

JONES v. DAVIES

QUEEN'S BENCH DIVISION (Lawrance and Kennedy, JJ.), October 30, 31, 1900]

[Reported [1901] 1 K.B. 118; 70 L.J.Q.B. 38; 83 L.T. 412; 65 J.P. 33;
49 W.R. 136]

Bastardy—"Single woman"—Married woman living with husband—Subsequent colourable separation—Relevant date for separation to exist—Date of application for summons.

By s. 3 of the Bastardy Laws Amendment Act, 1872 [see now s. 1 of the Affiliation Proceedings Act, 1957 (37 HALSBURY'S STATUTES (2nd Edn.) 37) by which Act the Act of 1872 was repealed]: "Any single woman who may be with child or who may be delivered of a bastard child" may apply to a justice of the peace for a summons to be served on the putative father with a view to her obtaining an affiliation order against him. It is well-established by authority that a widow or a married woman living apart from her husband is included in the term "single woman" in s. 3, but a married woman living with her husband is not so included. Nor will a merely colourable separation of a woman from her husband suffice to bring her within the term. The time at which a married woman is to be regarded as "single" for this purpose is that at which she applies for a summons, not that of the conception of the child.

Notes. Considered and Applied: *Marshall v. Malcolm*, [1916-17] All E.R. Rep. 365. Referred to: *Jones v. Evans*, [1945] 1 All E.R. 19; *Taylor v. Parry*, [1951] 1 All E.R. 355.

As to affiliation proceedings, see 3 HALSBURY'S LAWS (3rd Edn.) 110, and for cases see 3 DIGEST (Repl.) 442.

Cases referred to:

- (1) *Stacey v. Lintell* (1879), 4 Q.B.D. 291; 48 L.J.M.C. 108; 40 L.T. 553; 43 J.P. 510; 27 W.R. 551, D.C.; 3 Digest (Repl.) 442, 342.
- (2) *R. v. Flintan* (1830), 1 B. & Ad. 227; 9 L.J.O.S.M.C. 33; 109 E.R. 771; 37 Digest 233, 255.
- (3) *R. v. Luffe* (1807), 8 East, 193; 103 E.R. 316; 3 Digest (Repl.) 443, 348.
- (4) *R. v. Collingwood* (1848), 12 Q.B. 681; 3 New Mag. Cas. 53; 3 New Sess. Cas. 252; 17 L.J.M.C. 168; 12 L.T.O.S. 105; 12 Jur. 750; 12 J.P.Jo. 309, 454; 116 E.R. 1025; 3 Digest (Repl.) 443, 349.
- (5) *R. v. Pilkington* (1853), 2 E. & B. 546; 21 L.T.O.S. 165; 17 Jur. 554; 1 W.R. 410; 17 J.P.Jo. 388; 1 C.L.R. 945; 118 E.R. 872; sub nom. *Ex parte Grimes*, 22 L.J.M.C. 153; 3 Digest (Repl.) 443, 350.

Also referred to in argument:

- Tower v. Lake* (1879), 4 C.P.D. 322; 41 L.T. 280; 43 J.P. 656; 3 Digest (Repl.) 443, 344.
- Peatfield v. Childs* (1899), 63 J.P. 117; 3 Digest (Repl.) 443, 346.
- The Aylesford Peccage* (1885), 11 App. Cas. 1, H.L.; 3 Digest (Repl.) 407, 75.
- Burnaby v. Baillie* (1889), 42 Ch.D. 282; 58 L.J.Ch. 842; 61 L.T. 634; 38 W.R. 125; 5 T.L.R. 556; 3 Digest (Repl.) 407, 76.
- Hardy v. Atherton* (1881), 7 Q.B.D. 264; 50 L.J.M.C. 105; 44 L.T. 776; 45 J.P. 683; 29 W.R. 788; 3 Digest (Repl.) 466, 489.
- Gardner v. Gardner* (1877), 2 App. Cas. 723, H.L.; 3 Digest (Repl.) 398, 9.
- Boxeile v. A.-G.* (1887), 12 P.D. 177; 56 L.J.P. 97; 57 L.T. 88; 36 W.R. 79; 3 T.L.R. 726, D.C.; 3 Digest (Repl.) 398, 3.

Case Stated by justices upon the hearing of an information preferred by the appellant against the respondent under s. 3 of the Bastardy Laws Amendment Act, 1872.

Upon the hearing it was proved that the appellant at the time of the birth of the child mentioned in the information was, and for some years previously had been, a married woman, the wife of Benjamin Jones (hereinafter called the husband), who is still alive. The appellant deposed that the respondent was the father of the child, which was born on Dec. 3, 1899. Some evidence (other than the appellant's or her husband's evidence) was called to show that the husband, who was a seafaring man, was from home from Feb. 23, 1899, to July 6, 1899. It was proved that the husband became aware of the appellant's pregnancy about four months after conception, and, notwithstanding that fact, he returned to his wife, who had throughout remained at his home, in July, 1899, and he stayed thereat for about three weeks, and again went to sea. He returned in September, 1899, to his wife, and remained for some time, and again left to go to sea. On each of these occasions the husband and wife lived and cohabited together.

The next time the husband returned to his wife at his home was on Jan. 27, 1900 (which was after the birth of the child), and continued to cohabit as husband and wife, though the husband alleged he did not sleep in the same house with the appellant during this visit. On Jan. 31, 1900, while the husband and wife so cohabited together, the appellant, accompanied by her husband, laid an information in which she described herself as a "single woman," and applied to a justice for a summons under s. 3 of the Bastardy Laws Amendment Act, 1872, to be served on the respondent as putative father of the child, and such summons was issued and served. On Feb. 7, 1900, while the husband and wife still cohabited together as husband and wife, the appellant, accompanied by her husband, attended upon the solicitor who appeared for the appellant at the hearing. On that day she, after being advised by her solicitor that it was necessary for her and her husband to separate, then left the office, and immediately afterwards and on the same day she laid an information in which she described herself as "a single woman," and applied for another summons under s. 3 of the Act of 1872 to be served on the respondent as putative father of the said child, and such summons was duly issued and served. At the hearing on Feb. 28, 1900, the summons issued on Jan. 31, 1900, was withdrawn, and the matter proceeded on the second summons, issued on Feb. 7, 1900. The solicitor who appeared for the appellant at the hearing admitted that he had advised the appellant that she could not obtain an order upon the respondent unless she and her husband lived apart, and that thereupon the appellant and her husband, it was said in evidence, separated, the appellant returning to her husband's home at a village called Aberarth, and the husband going to the appellant's father's house, at New Quay, both in the county of Cardigan, and about seven miles apart. The husband and wife alleged that from the time the appellant and her husband said they had separated on Feb. 7, 1900, to Feb. 28 they had not again seen each other, but on the latter date they both attended the hearing of the application, and the husband at such hearing sat by and instructed the solicitor who appeared for the appellant. Afterwards the wife went to the union workhouse at Aberayon, and the husband returned to his home at Aberarth. The husband in his evidence admitted that on the occasion when the second summons was issued, namely, Feb. 7, 1900, he was told by the appellant's solicitor that he (the husband) and his wife should live apart, and that he thereafter lived apart for the purpose of the affiliation proceedings. The following question was put to the husband by the chairman of the justices: "It has been stated here that you mean to live with your wife after these proceedings are over." The husband in reply stated: "Yes, I think I will; that is according as she behaves, and she gets her rights." Immediately after he added, "No, I don't think I will."

It was contended on behalf of the respondent that the appellant was not a single woman within the meaning of s. 3 of the Act of 1872, and that an order to affiliate the child could not be made on her application. The justices found as facts (i) that the husband became aware of the pregnancy of his wife in about four months after conception; (ii) that with such knowledge he lived and cohabited with her for

lengthened periods in July and September, 1899, and January and February, 1900; (iii) that the summons applied for and issued on Jan. 31, 1900, was withdrawn because at the time the husband and wife lived and cohabited together; (iv) that the alleged separation on Feb. 7 was not a bona fide separation, but was colourable and for the purpose of the proceedings, and that the parties intended to and did cohabit together. They considered that the words "single woman" did not apply to a married woman living with her husband at the time the information was laid, the summons issued, and the application made under the circumstances before stated. They, therefore, dismissed the information without going into further evidence as to the respondent being the father of the child or deciding upon the sufficiency of the evidence tendered of non-access by the husband.

S. T. Evans for the appellant.

Bryn Roberts for the respondent.

LAWRANCE, J.—In this case I think that the magistrates were right, and on this short ground. In no case that has been cited to us has it been shown that a married woman was looked upon as a single woman when living with her husband. No doubt a single woman was within the Bastardy Acts. A difficulty arose with regard to certain married women, but the courts got over it by holding that a woman living apart from her husband might be considered as a single woman within these Acts. But in no case has a woman living with her husband been considered a single woman. In *Stacey v. Lintell* (1) MELLOR, J., says (4 Q.B.D. at p. 294):

"It is unnecessary for us to discuss the cases that have been decided upon the construction of the earlier bastardy statutes, that the term 'single woman' is not restricted to a woman who has never married, for in the present case the mother at the time of the application was not living separate from her husband as in those cases, so that the ground on which they proceeded—that there would otherwise be no provision for the child—is removed from our consideration."

LUSH, J., also says (*ibid.* at p. 295):

"It is another question whether the applicant was a 'single woman' qualified to apply for the order, and I think that having married and living with her husband she cannot be considered as a single woman within any construction that has been put upon the term."

The ground, therefore, of my decision is that no case has been cited showing a married woman living with her husband has been considered as a single woman. As a matter of fact, the case that I have cited is a direct authority to the contrary.

KENNEDY, J.—This case raises a question of some difficulty. The point is whether, when justices have found conclusively that a husband and wife are living together, the woman can obtain a bastardy order against another man who, she alleges, is the father of her child, if it is proved that the child was the child of such person. The section of the Act in terms relates to a single woman, and *prima facie* a married woman would not be able to maintain an application under the section, because she was not within that category. But there are a number of authorities, by which we are bound, that "single woman" may apply to a married woman, and that in some circumstances there may be a successful application by a married woman under s. 3, she being regarded as a "single woman" within the section. In *Stacey v. Lintell* (1) the woman was not separate from her husband when the application was made. She might have said that she had forfeited her right to her husband's protection. With regard to the liability to maintain an adulterous wife, there is no distinction between the parish and an individual applying: see LITTLEDALE, J., in *R. v. Flinlan* (2). That is as to maintenance. *R. v. Luffe* (3) was an application by the poor law authorities, and the woman was in the position of being

separate from her husband, although married. *R. v. Collingwood* (4) was also a case where an order was obtained while the married woman was living apart from her husband. The order provided that 1s. 6d. per week shall be paid by the putative father until "... the said George Bates shall again live and cohabit with his said wife." The fact that they were living apart was relied on. Lord Denman, C.J., in giving judgment, says (12 Q.B. at p. 686) :

"The single question is whether a married woman, bearing the mother of an illegitimate child, is within the [Poor Law Amendment Act, 1834], which authorises the justices to make an order in bastardy. The language of the statute applies only to single women; so did the language of the Statute 6 Geo. 2, c. 31 [relating to bastard children], yet Lord Fitzgibbon and the whole court in *R. v. Luffe* (3) held that an order might be made on the putative father of the bastard child of a married woman, who was to be considered single under the existing circumstances and for that purpose."

The words "under the existing circumstances," meant when away from her husband.

The next case to consider is *Ex parte Grimes* (5). There it is stated (22 L.J.M.C. at p. 153) :

"At the time of the making of this order Elizabeth Grimes, in fact, was a married woman, but her husband then was, and had been for several years before, absent from her, and residing as a convict under sentence of transportation in Van Diemen's Land."

The husband came back, and the justices put an end to the order, taking the view that the putative father was discharged from the order by reason of the husband of the mother having returned and cohabited with her. The court held that this was not so, and Lord Campbell, C.J., in dealing with *R. v. Luffe* (3) and *R. v. Collingwood* (4), said (*ibid.* at p. 154) :

"I think that decision [*R. v. Collingwood* (4)] is quite right, for the reason given in *R. v. Luffe* (3), that in contemplation of law a married woman living separate from her husband may be within the meaning of the Act, which was passed for the purpose of providing for the support of the child, which, according to the present argument, would otherwise be altogether unprovided for."

It is suggested that the meaning of single woman should be applied at the time of conception. The authorities are against it, and Mellor, J., says that the time is the time of the application. It seems to me that there is no authority that a married woman living with her husband can be treated as a single woman for the purposes of the Bastardy Acts. I do not think that we ought to extend the decisions that have been given in any way. In my opinion, the justices were right.

Appeal dismissed.

Solicitors: J. T. Lewis, for D. Pennant Jones, Aberystwyth; Owen, Aberystwyth.

[Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.]

GAGE v. WREN

KING'S BENCH DIVISION (Lord Alverstone, C.J., Darling and Channell, JJ.), June 23, 1902]

[Reported 87 L.T. 271; 67 J.P. 32; 18 T.L.R. 699]

Notes.—Rateable occupation—Seaside lodging-house used during summer season—Empty during winter months—Intention to resume use in following summer—Public Health Act, 1875 (38 & 39 Vict., c. 55), s. 211 (2).

The respondent took a house on lease and furnished it as a lodging-house for boarders during the summer season. She did not reside in the house, and on Dec. 22, 1900, she removed all her furniture from the house, leaving only certain fixtures, fittings, and the usual things which, as an incoming tenant, she had taken over. She intended to return to the house in the following summer, and did so on May 17, 1901, when she re-furnished the house. From Dec. 22 till May 17, the house remained empty except for the fittings, etc., left therein and the respondent claimed that during this period the house was "unoccupied" within s. 211 (2) of the Public Health Act, 1875, and exempt from rates.

Held: the respondent had the beneficial occupation of the house during the whole of the period in question, and therefore, was not entitled to the exemption in favour of unoccupied premises within s. 211 (2), but was liable to the rate for the full period.

Notes. Section 211 of the Public Health Act, 1875, was repealed by the Public Health Act, 1936, s. 346 and Sched. 3, Part I. See now s. 4 (4) (a) of the Rating and Valuation Act, 1925 (20 HALSBURY'S STATUTES (2nd Edn.) 110).

Applied: *R. v. Melladew*, [1904-7] All E.R. Rep. 339. Considered: *L.C.C. v. Hackney Borough Council*, [1928] All E.R. Rep. 614. Referred to: *Shepherd's Bush Improvements v. Hammersmith Borough Council* (1910), 102 L.T. 819; *Bagliss v. Chatters*, [1940] 1 All E.R. 620; *Associated Cinema Properties, Ltd. v. Hampstead Borough Council*, [1943] 2 All E.R. 696; *Hewson, Chapman & Co., Ltd. v. Rating Authority for the Borough of Grimsby* (1953), 51 L.G.R. 649.

As to rateable occupation in the case of premises necessarily left empty or unentered, see 32 HALSBURY'S LAWS (3rd Edn.) 16, 17, and for cases see 38 DIGEST (Repl.) 487, 488.

Cases referred to:

- (1) *Bootle Overseers v. Liverpool Warehousing Co., Same v. Webster* (1901), ante p. 262; 85 L.T. 45; 65 J.P. 740; 17 T.L.R. 550, D.C.; 38 Digest (Repl.) 477, 14.
- (2) *Southend-on-Sea Corp'n. v. White* (1900), 83 L.T. 408; 65 J.P. 7; 17 T.L.R. 5, D.C.; 38 Digest (Repl.) 488, 93.

Also referred to in argument:

- Harter v. Salford Overseers* (1865), 6 B. & S. 591; 34 L.J.M.C. 206; 29 J.P. 647; 11 Jur.N.S. 1036; 13 W.R. 861; 122 E.R. 1313; 38 Digest (Repl.) 619, 877.
- Tyne Coal Co. v. Wallsend Parish Overseers* (1877), 46 L.J.M.C. 185; 35 L.T. 854; 41 J.P. 375; 38 Digest (Repl.) 674, 1247.
- R. v. Bedworth (Inhabitants)* (1807), 8 East, 387; 103 E.R. 391; 38 Digest (Repl.) 558, 469.
- R. v. St. Pancras Assessment Committee* (1877), 2 Q.B.D. 581; 46 L.J.M.C. 243; 25 W.R. 827; sub nom. *Willing v. St. Pancras Assessment Committee*, 37 L.T. 126; 41 J.P. 662; Ryde, Rat. App. (1871-85) 188; 38 Digest (Repl.) 469, 5.

Smith v. New Forest Union Assessment Committee (1889), 60 L.T. 927; 53 J.P. 661, D.C.; affirmed, 61 L.T. 870; 54 J.P. 324; 6 T.L.R. 31; sub nom. *Crowther-Smith v. New Forest Union*, Ryde, Rat. App. (1886-90) 311, C.A.; 38 Digest (Repl.) 480, 39.

Staley v. Castleton Overseers (1864), 5 B. & S. 505; 4 New Rep. 361; 33 L.J.M.C. 178; 28 J.P. 710; 10 Jur.N.S. 1147; 12 W.R. 911; 122 E.R. 920; sub nom. *R. v. Castleton Overseers*, 10 L.T. 606; 38 Digest (Repl.) 619, 876.

Case Stated by justices of the peace for the borough of Lowestoft.

At a court of summary jurisdiction in Lowestoft on Nov. 1, 1901, Mrs. Wren, the respondent, appeared in answer to a summons issued upon the complaint of Frederick Gage, rate collector, the appellant, under the Public Health Act, 1875, for that she being a person duly rated and assessed by a certain urban sanitary and general district rate for the borough of Lowestoft, dated Mar. 12, 1901, in respect of certain premises known as Tremelling, in Cliff Road, Lowestoft, for £12 9s. 2d., had not paid it, and had refused to do so. The justices dismissed the complaint.

Upon the hearing the following facts were proved or admitted. An urban sanitary and general district rate for the borough of Lowestoft was duly made on Mar. 12, 1901, for the period from Jan. 1, 1901 to June 30, 1901, and the respondent was rated thereby in respect of her dwelling-house at 2s. 2d. in the pound on the annual value of £115, for £12 9s. 2d. The respondent lived at the Esplanade, Lowestoft, and rented the house on a three years' tenancy from June 24, 1900, at a rent of £100 for the first year, and £130 for the second and third years, and furnished it to use as a house for receiving boarders or lodgers. Previous to the respondent renting the house it was occupied by another tenant, who left a quantity of fixtures and fittings in the house, and these, as set out in a schedule, the respondent agreed to hire from the previous tenant during the respondent's three years' tenancy of the house at a rental of £3 10s. per annum, and undertook to repair any damage at the expiration of the tenancy, reasonable wear and tear excepted. On Dec. 22, 1900, the respondent removed all her furniture and effects from the house, selling some and storing the rest. She also removed the doormat in the hall included in the schedule of fixtures hired of the previous tenant. All the other fixtures, fittings, and things hired of the previous tenant were left in the house. These fixtures, etc., were described in the schedule as being the property of the previous tenant, and were stated to be of the value of £63. The respondent admitted that she did not have the water supply of the house cut off, and that she intended to return to the house the next summer; that she did not put up a notice in the house "To be let," and that she told the rate collector, the appellant, when the rate was demanded, that she had removed her furniture in order to escape liability for the rate.

On May 17, 1901 the respondent returned to the house and re-furnished it, but, with the exception of the fixtures and fittings referred to, the house was absolutely empty from Dec. 22, 1900 to May 17, 1901.

On the part of the appellant it was contended that the respondent removed her furniture to avoid her liability to pay the rates and intending to return, and that the respondent was in occupation of the premises during the whole of the period for which the rate was made and was not within the exemption contained in s. 211 (2) of the Public Health Act, 1875, and was liable to pay the whole rate. On the part of the respondent it was contended that she only left upon the premises such things as are usually taken by an incoming tenant from an outgoing tenant, things which she was not entitled to remove; and also that the fixtures and fittings were part of those things and were not things like furniture, with which occupation is constituted, and that, under the circumstances, the premises were unoccupied from Dec. 22, 1900, to May 17, 1901, and that she was only liable to pay the portion of the rate for the period between May 18, 1901, and June 30, 1901, and that it was quite immaterial whether the respondent left the house unoccupied intentionally and for the purpose of escaping the rates.

The justices found as a fact that the premises were unoccupied from Dec. 22, 1900, to May 17, 1901, and that the respondent was not liable to pay the rate for that period, and dismissed the complaint.

The question for the opinion of the court was whether the justices upon the facts came to a correct determination and decision in point of law, and, if not, what should be done in the premises.

By the Public Health Act, 1875, s. 211 :

“(1) General district rates shall be made and levied on the occupier of all kinds of property for the time being by law assessable to any rate for the relief of the poor, and shall be assessed on the full net annual value of such property. . . . (2) If at the time of making any general district rate any premises in respect of which the rate may be made are unoccupied, such premises shall be included in the rate, but the rate shall not be charged on any person in respect of the same while they continue to be unoccupied; and if any such premises are afterwards occupied during any part of the period for which the rate was made and before the same has been fully paid, the name of the incoming tenant shall be inserted in the rate, and thereupon so much of the rate as at the commencement of his tenancy may be in proportion to the remainder of the said period, shall be collected, recovered, and paid in the same manner in all respects as if the premises had been occupied at the time when the rate was made.”

C. A. Russell, K.C., and W. Wills and J. G. Pease for the appellant, the rate collector.

A. P. Longstaffe for the respondent, the ratepayer.

LORD ALVERSTONE, C.J.—The respondent conceived the idea of leaving this house unoccupied for part of the time out of the six months during which this rate was made, and she claims to say that she was in the position of an incoming tenant within the last part of s. 211 (2) of the Public Health Act, 1875. I think she was not, though probably it would not be enough for the appellant to rely upon that. I think the cases have laid down a perfectly clear line in the matter, and the only difficulty is one of application of the principle to the particular case. My brothers RIDLEY and BIGHAM in *Boothle Overseers v. Liverpool Warehousing Co.* (1) decided that where persons go out of the occupation of a warehouse and have no intention to come back and use it, there was not occupation within the section. *Southend-on-Sea Corp. v. White* (2) decided that, where a shopkeeper went out of possession, when the season was not on, and left behind more things than the tenant in this case left—things which clearly indicated that he was coming back—there was occupation. The question here is under which of these two classes of principles this case falls. If the magistrates had stated this question and found it as a question of fact, and had not left it as a matter of law, we might have been in a difficulty; but I do not think that they intended to do that. I think they very properly stated all the evidence, and have asked us to say whether they have drawn a right conclusion on the evidence, dealing with it as a matter of law.

The respondent was a tenant for three years; she paid £100 as rent for the first year, and then £130 a year for the remaining years, and she took the house for the purpose of receiving boarders or lodgers. She removed her furniture, and I will take it for the present purpose that she removed everything except such things as an incoming tenant would have to take, such as fixtures, blinds, meters, floorcloth, and things of that kind. I quite agree that if those things were left in the house, and if the evidence before the magistrates was that they were only left with a view of finding a purchaser or an incoming tenant, the inference of law to be drawn from that would not be that there was any evidence of occupation. But the case goes on to say that the respondent left all the fixtures and fittings she had hired from the previous tenant, and I will assume that they were things which might all have

been taken by an incoming tenant. She admitted she did not have the water supply cut off, that she intended to return to the house the following summer, and that she did not put up any notice in the house "To be let." I exclude from consideration the statement that she did it with the intention of not paying the rate, because I think that a great deal too much is said about possible creating such liabilities. If persons are not within the charging Act, then they do not create the liabilities; they simply are not liable for them. Therefore, if the respondent thought she would not be within the charging Act by going out of possession, she was quite entitled to do it.

I think that the proper inference of law to be drawn from the facts is that the respondent had the beneficial occupation of this house during the whole time. She intended to come back to the house, and she might come back, and she made no attempt whatever to dispose of it, nor is there any evidence at all that she meant to go out of the beneficial occupation of the house during the year. Therefore, I think on these facts the magistrates ought to have come to the conclusion that the respondent did beneficially occupy this house during the whole of the rateable period, and not merely during the period, some six weeks, when she purported to have come back as an incoming tenant. I will say as a matter of fact she was not an incoming tenant; and therefore, if that is to be the standard of occupation, contemplated in the earlier part of sub-s. (2), it is clear that she would not have been exempt. I think the magistrates ought to have found that she was in occupation and liable for the whole period.

DARLING, J.—I am of the same opinion. It seems to me that if we want to find out whether the respondent was in beneficial occupation or not, we are entitled to consider what is the natural use of this house in the hands of the respondent. This case does not seem to me to be in the least like the case of a manufactory which, owing to depression in trade or some such reason, is for a certain time useless as a factory. The intention of persons who rent houses of this kind is to do exactly what the respondent in this case did. She wanted to carry on the business of a lodging-house keeper at a seaside place which has a summer season. It is a place which is profitable during certain seasons, and unprofitable during the rest of the year. The manner of occupation and of carrying on the business which was contemplated by the respondent was that the business would best and most profitably be carried on if she were there during the busy season, and if she went away and shut the house up and thereby diminished the expense in every way during the rest of the time. To my mind there was a beneficial occupation of the house all the time, and she was the tenant with an intention to use the house in the profitable season, and to reduce the expenses in this way during the unprofitable season. It seems to me that the case is very like the case of a fruit tree which belongs to a person all the time. It would be absurd to say that the person does not occupy it except when the fruit is on the branches. One contemplates by the entire use of a thing that for a long time it will give no return, and one will then treat it in a way which makes it the cheapest thing to him during the time it is idle, and will then make the most out of it while he can get profit out of it. I think the whole system the respondent had laid out for herself was to contemplate this house as a business to be carried on from year to year, but treating it at one period as not being a profitable occupation, and taking all the profit which resulted in the year within a very short period of the yearly use of the house. I think, therefore, there was a beneficial occupation all the time.

CHANNELL, J.—I am of the same opinion. I wish to point out, in addition to what has been pointed out by my brothers, with whose judgments I entirely agree, that here the articles left in the house, which in the case are called fixtures

and fittings, are most clearly chattels and not fixtures in the sense of articles which would pass with the property attached to them. They are fitted articles, mere chattels, and for the purpose of the present case they were let to the respondent, but they were the property of this respondent, and they were kept there during the winter, and she was just as much in occupation of that house as a person who has got a larger amount of furniture in the house, subject only to the question that during the winter months, if she had not intended to come back to the house during the summer, it is possible that the rating of the premises ought only to have been at a value for warehouse purposes in keeping this place. Two observations may be made with regard to that point. In the first place, the question would not be capable of being raised in the way it is raised here; and in the next place, if such were the case, the consequence would be that the house would be rated at double the value during the summer months, so that nobody could gain anything by that. But, in the summons for payment of the rate, the question could not be raised that the place was not rated at the proper value. Consequently, there is here quite sufficient evidence of the occupation.

Appeal allowed.

Solicitors: Sharpe, Parker & Co., for R. B. Nicholson, Town Clerk, Lowestoft; Rowcliffes, Rawle & Co.

[Reported by W. W. ORR, Esq., Barrister-at-Law.]

Re TANCRED'S SETTLEMENT. SOMMERVILLE v. TANCRED Re SELBY. CHURCH v. TANCRED

[CHANCERY DIVISION (Buckley, J.), February 11, 12, 13, 1903]

[Reported [1903] 1 Ch. 715; 72 L.J.Ch. 324; 88 L.T. 164; 51 W.R. 510; 47 Sol. Jo. 319]

Power of Appointment—Election—Successive appointments in different instruments.

A husband and wife having a joint power of appointment by deed over a fund in favour of their children, after the marriage of one of their daughters, H., appointed one-seventh to her, and upon the marriage of another daughter, S., appointed another one-seventh to her. After the death of the husband, the wife, as survivor having a power of appointment by deed or will, and having forgotten the previous appointments, appointed by deed poll one-sixth of the whole fund to each of her six children, including H. and S.

Held: the appointments to H. and S. did not raise a case of election, but as a matter of construction, all the children should take equally.

England v. Lavors (1) (1866), L.R. 3 Eq. 63, followed and explained.

Re Ashton (2), [1897] 2 Ch. 574, distinguished.

Trust—Protective trust—Forfeiture—Assignment of fund by principal beneficiary to trustees of settlement—Cestui que trust entitled to whole life interest under settlement.

The appointor, in exercise of a power given to her by her father's will, appointed a share of a fund to her son for life until he should assign, charge, or

otherwise dispose of, or attempt to dispose of, the same. The son, on the occasion of his marriage, assigned his life interest together with other property to the trustees of his marriage settlement, whom he appointed his attorneys to receive the same, and he declared that during the marriage he should be entitled to the whole income of the trust premises. The trust then provided for the payment of the income of the trust, and on the death of either spouse the payment of the whole income to the survivor. The settlement contained a power of sale.

Held: as the son took the whole beneficial interest in the life interest under his marriage settlement, there had been no disposition or attempt to dispose of his protected life interest, and, therefore, there was no forfeiture.

Re Porter (3), [1892] 3 Ch. 481, distinguished.

Notes. Protective trusts, may now be incorporated under the Trustee Act, 1925, s. 33, without being set out fully.

Applied: *Re Eardley's Will, Simeon v. Freemantle*, [1920] 1 Ch. 397. Considered: *Re Baring's Settlement Trusts, Baring Bros. & Co., Ltd. v. Liddell*, [1940] 1 All E.R. 20; *Re Westby's Settlement, Westby v. Westby*, [1950] 1 All E.R. 479. Distinguished: *Re Custance, Keepe v. Douglas*, [1945] 2 All E.R. 411.

As to election under the exercise of a power, see 14 HALSBURY'S LAWS (3rd Edn.) 590-591 and 30 HALSBURY'S LAWS (3rd Edn.) 281-282. For cases see 20 Digest (Repl.) 450-452. For the Trustee Act, 1925, s. 33, see 26 HALSBURY'S STATUTES (2nd Edn.) 102-103.

Cases referred to:

- (1) *England v. Lavers* (1866), L.R. 3 Eq. 63; 15 W.R. 51; 20 Digest (Repl.) 451, 1642.
- (2) *Re Ashton, Ingram v. Papillon*, [1897] 2 Ch. 574; 66 L.J.Ch. 731; 77 L.T. 49; 46 W.R. 138; 41 Sol. Jo. 677; reversed, [1898] 1 Ch. 142; 67 L.J.Ch. 84; 77 L.T. 582; 46 W.R. 231, C.A.; 20 Digest (Repl.) 486, 1946.
- (3) *Re Porter, Coulson v. Capper*, [1892] 3 Ch. 481; 61 L.J.Ch. 688; 67 L.T. 823; 41 W.R. 38; 36 Sol. Jo. 626; 3 R. 19; 40 Digest (Repl.) 605, 1055.
- (4) *Fry v. Capper* (1853), Kay, 163; 2 W.R. 136; 69 E.R. 70; 37 Digest 119, 518.
- (5) *Re Wheatley, Smith v. Spence* (1884), 27 Ch.D. 306; 54 L.J.Ch. 201; 51 L.T. 681; 33 W.R. 275; 20 Digest (Repl.) 448, 1612.
- (6) *Re Vardon's Trusts* (1885), 31 Ch.D. 275; 55 L.J.Ch. 259; 53 L.T. 895; 34 W.R. 185; 2 T.L.R. 204, C.A.; 20 Digest (Repl.) 429, 1492.
- (7) *Re Lord Chesham, Cavendish v. Ducre* (1886), 31 Ch.D. 466; 55 L.J.Ch. 401; 54 L.T. 154; 34 W.R. 321; 2 T.L.R. 265; 20 Digest (Repl.) 446, 1597.
- (8) *Hague v. Foster*, [1901] 1 Ch. 361; 70 L.J.Ch. 302; 84 L.T. 139; 49 W.R. 327; 45 Sol. Jo. 257; 20 Digest (Repl.) 449, 1614.

Two Summonses which were heard together.

By a settlement dated April 15, 1839, and executed on the marriage of Sir Thomas Tancred and Lady Tancred, a sum of £7,000 was settled upon trust to pay the income thereof to Sir Thomas Tancred during his life, and after his death to pay the same income to Lady Tancred during her life, and after the death of the survivor of them to hold the capital upon trust for such of the children of the marriage other than the eldest son as Sir Thomas and Lady Tancred should by deed appoint, and in default of such appointment as the survivor by deed or will should appoint, and subject thereto upon trust for the children of the marriage (except the eldest son) who being sons should attain the age of twenty-one years, or being daughters should attain that age or marry as tenants in common. The settlement contained the usual hotchpot clause. There were ten children of the marriage, of whom six other than the eldest son were living at the date of the deed of appointment of 1891, three others having died before 1891.

By his will, dated Oct. 22, 1860, Pridaux John Selby, the father of Lady Tancred, devised his residuary real estate to his trustees upon trust that they should

land raised thereon upon trust to pay the income of two equal undivided fifth shares thereof to Lady Tancred for life, and after her decease he directed that the two fifth shares should be held upon such trusts as Lady Tancred should by deed or will appoint amongst her children who should attain or had attained twenty-one, or should marry or had married under that age, or among her grandchildren with a gift over in default of appointment. Mr. Selby died on Mar. 28, 1867, Lady Tancred's six children, in whose favour the appointment of 1891 was subsequently made, being then born. One of the daughters married a Mr. Hawkins in 1867, and her marriage settlement contained a covenant to settle after-acquired property. On Sept. 10, 1872, Sir Thomas and Lady Tancred executed a joint deed of appointment by which (so far as it related to the sum of £7,000) they irrevocably appointed that one-seventh of the sum of £7,000 should, subject to their life interests therein, go, remain, and be to such uses as Mrs. Hawkins should by deed or will appoint, and in default of appointment to Mrs. Hawkins absolutely. It was admitted that Mrs. Hawkins' share was caught by the covenant to settle after-acquired property in her marriage settlement, and as such became settled on the trusts of such settlement. On Oct. 14, 1878, Sir Thomas and Lady Tancred concurred in another appointment by which they irrevocably appointed another one-seventh of the £7,000 in favour of another daughter upon the solemnisation of her intended marriage with the defendant Mr. Somerville. By the marriage settlement made on the marriage of Mr. and Mrs. Somerville, the latter's one-seventh so appointed was assigned to trustees on the usual trusts.

Sir Thomas Tancred died on Nov. 7, 1880. On April 17, 1891, Lady Tancred executed another deed of appointment, but forgot the deeds of appointment executed in 1872 and 1878, and treated herself as being in a position to appoint the whole £7,000. The deed recited the settlement of 1839, and that by the trusts thereof and in the events that had happened Lady Tancred had a power of appointment subject to her life interest therein over the sum of £7,000 among her six surviving younger children, and it also recited the will of her father Mr. Selby, and she thereby appointed that the sum of £7,000 and the corpus of the two-fifth shares of the real estate devised by her father's will the securities for the same should be conveyed and assigned to trustees in trust to invest the same as therein mentioned, and she then in effect settled one-sixth of the trust premises on each of her three daughters, Lucy Sybil Hawkins, Edith Jane Williams, and Bertha Evelyne Somerville, for life, the life interests to the daughters being without power of anticipation, and one-sixth on each of her three sons, Prideaux Francis Tancred, Seymer Mitford Tancred, and Harry George Tancred, for life, but subject as to each son's one-sixth to a proviso which was as follows:

"My trustees shall only pay the share of income of any of my sons to him until he shall assign, charge, or otherwise dispose of, or attempt to dispose of, the share of income or any part thereof, or become bankrupt, or do or suffer something whereby the income if belonging absolutely to him, or some part thereof, would become payable to or vested in some other person which of the events shall first happen."

And if such event should happen then the trustees were given a discretionary power to apply the income of the share of any son whose interest had determined for his maintenance during his life, and subject to such life interests the trustees were to hold the corpus as to each one-sixth for such of the respective children of the sons and daughters as they respectively should appoint, and in default of appointment each one-sixth was to go to the child or children of the appointees, with an ultimate gift over.

In 1892 Lady Tancred discovered the mistake which had been made and by a deed of appointment dated Feb. 3, 1893, which was expressed to be supplemental to the settlement of 1839 and the deed of appointment of 1891, whereby she affected

to appoint the £7,000 among her children, after reciting that she was advised that so far as she had by the principal appointment affected to restrain her children from anticipating or releasing their several life interests, and also so far as she had affected to appoint the capital of each such child's share after his or her death to his or her child or children, the principal appointment was invalid, and that the same was only effectual to give to each daughter and son therein named an unqualified interest during his or her life in the income of one-sixth of the sum of £7,000 and the investments thereof, and that after the death of each son or daughter one-sixth of the capital of the sum would go as in default of appointment, a result which would be contrary to her wishes, and reciting that she desired to exercise her power of appointment so far as the same remained unexercised over the capital of the £7,000 she appointed that after the death of each of her daughters and sons one-sixth of the £7,000 should be in trust for each of her sons and daughters, his and her executors, administrators, and assigns respectively, "my intention being that by virtue of the principal appointment and these presents each of my children shall take a vested interest in one-sixth of the capital income of the sum of £7,000 subject only to my own life interest therein under the settlement."

The defendant Seymer Mitford Tancred married in 1896, and by a settlement dated June 3, 1896, in Scottish form he assigned to trustees, together with other property, all right, share, and interest then belonging to and vested in him, or which might thereafter come to, belong to, and be vested in him under the will dated Oct. 22, 1860, of Pridaux John Selby, and he appointed the trustees his lawful attorneys to demand, sue for, recover, receive, and discharge his right share and interest thereby assigned and declared, that all moneys received by the trustees in virtue of such assignation should be held upon the trusts therein set forth, and, further, that during the subsistence of the intended marriage he should be entitled to receive the whole annual income, and it was declared that the settlement was mutually granted upon the trusts following—viz., inter alia (i) for payment of all necessary charges and expenses attending the execution of the trust thereby constituted and management of the trust funds and estate falling under the same, and (ii) on the dissolution of the marriage by the death of either spouse whether with or without issue, the trustees should pay to the surviving spouse during his or her lifetime the free annual income and revenue of the trust funds. The settlement contained a power of sale. Lady Tancred died on Nov. 13, 1901, and the trust funds thereupon became divisible. Doubts having arisen as to the effects of the several deeds of appointment the plaintiffs as trustees took out two summonses, one in the matter of the trusts of the settlement of 1839, and the other in the matter of the estate of P. J. Selby, which came on together to be heard.

Asbury, K.C., and *J. Henderson* for the plaintiffs the trustees of the settlement of 1839.

Backmaster, K.C., and *H. B. Howard* for the defendants Pridaux Francois Tancred, Harry George Tancred, and Mr. and Mrs. Williams.

J. K. Darley for Seymer Mitford Tancred and the trustees of his marriage settlement.

Ingger, K.C., and *L. W. Byrne*, for the trustees of Mrs. Hawkins' settlement.

Ashton Cross for the trustees of Mrs. Somerville's marriage settlement.

Birrell, K.C., and *G. S. Fryer* for Mrs. Somerville.

Terrell, K.C., and *W. M. Cann* for an infant child of Mrs. Hawkins.

RE TANCRED'S SETTLEMENT, SOMERVILLE v. TANCRED.

BUCKLEY, J. (having stated the facts substantially as above and decided that the deed of 1891 was in excess of the power in so far as it attempted to impose a restraint on anticipation in respect of the daughters' shares in the sum of £7,000 under the settlement in accordance with the principle laid down in *Pry v. Pryce* (14), and also in so far as it provided that the sons' shares in such sums should go over on

in disposing or attempting to dispose of the same, the children of Lady Tancred not being in esse at the date of the settlement creating the power, and having also limited that, so far as the interest under Mr. Selby's will was concerned, the deed of 1841 was not in excess of the power, all Lady Tancred's children being in esse at the date of the death of Mr. Selby, continued:— The question which has been argued before me is whether these instruments raised a case of election or not. It is said that in the case, for example, of *Mrs. Hawkins*, who had, under the deed poll of 1872, become entitled to one one-seventh of the £7,000, and under the deeds of 1891 and 1893 had become entitled to another and different share of the £7,000, she can take both without being called on to give compensation, and that inasmuch as she is restrained from anticipation she cannot elect. In support of this proposition *Re Wheatley* (5), *Re Vardon's Trusts* (6), *Re Lord Chesham* (7), and *Haynes v. Foster* (8) were cited. On the other hand, it was contended that this is not a possible state of things, and that she must elect under which instrument she will take; that she cannot take both interests without making compensation to her brothers and sisters; and *England v. Lavers* (1) was relied on. Without going so far as to say that she could not be called upon to give compensation, I do not think that the question turns on election. To my mind the case is not one of election at all.

The determination of the question depends upon what was the effect of the deeds of 1891 and 1893, having regard to what had been previously done under the deeds of 1872 and 1878. When power is given to a person to dispose of property, if all the formalities have been observed, it must be ascertained what it was which the donee intended to divide amongst the objects of the power. I ought, therefore, to read these four deeds of appointment and say what the donee of the power intended to do. At the outset this is obvious, that after the deeds of 1872 and 1878, Mrs. Hawkins and Mrs. Somerville could not take less than one-seventh, and that the donee of the power had no power to undo what had been effected by the appointments, but she could, under the circumstances, substitute another interest for the one she had given. By substitution I do not mean that after 1872 and 1878 she or anybody else could undo what had been done; nor did LORD ROMILLY mean that in *England v. Lavers* (1). But it is quite another matter to see what further interests they took under the deeds of 1891 and 1893. It is impossible to read the deed of 1893 without seeing that Lady Tancred thought she still had power to deal with the whole £7,000, and that she thought she had given it to the children in equal shares. By the deed of 1891 she did partially dispose of it. In 1893 she disposed of it finally, and the closing words of that deed disposes of it absolutely. She concludes by saying

"my intention being that by virtue of the principal appointment and these presents each of my said six children shall take a vested interest in one-sixth of the capital and income of the said sum of £7,000 and the investments thereof, subject to my own life interest therein."

That is what she meant to do, and, even without the deed of 1893, I should construe the deed of 1891 in the same way.

How then, am I to give effect to her wishes after allowing for the deeds of 1872 and 1878? There remained, after providing for the deeds of 1872 and 1878, enough of the £7,000 to give the children who had not had a share of it one-seventh and a little more, and I read this as an appointment to them of one-seventh, and, in addition, enough to bring their share up to one-sixth, and an appointment to Mrs. Hawkins and Mrs. Somerville of enough to bring their shares up to one-sixth each.

In *England v. Lavers* (1) the facts were singularly like those in the present case. LORD ROMILLY there said (L.R. 3 Eq. at p. 69):

"My opinion is that the deed poll is in substitution for the former appointments. Of course, the donee of the power could not interfere with these, but I

think that when he executed the deed poll he meant to give to each of his daughters one-sixth of the fund, not in addition to the one-seventh he had already given them, but in substitution for it."

LORD ROMILLY is obviously pointing out that by substitution he did not mean that the donee of the power could undo the former appointments and put the deed poll in their place, but that it was substituted for them in the sense that by dividing the fund into fewer shares it had increased the value of the shares given by the previous appointments, and to that extent altered them. It would have been more accurate to say "in addition to the former appointments so as to equalise the shares taken by the children in the same manner as if the deed poll had been substituted for the former appointments." I am not sure that I could follow LORD ROMILLY in holding that this would raise a question as to election; but I need not do that, as the basis of his judgment was that the donee of the power intended to provide by the deed poll that his children should take equal shares in the whole fund.

It is said that the decision of STIRLING, J., in *Re Ashton* (2) must be taken as derogating from the authority of LORD ROMILLY's decision. I do not think so. In *Re Ashton* (2) the donee of a power to appoint £10,000 made her will, and thereby appointed the £10,000 equally between her three children. After the will had been signed she executed a deed appointing one-third of the fund to one of the children. Subsequently she died without having altered her will, and STIRLING, J., held that the child to whom the appointment was made by deed was entitled to take another third under the will. That is obviously not this case. The will written before the deed described the sum as £10,000, and subsequently when the deed was executed one-third of the fund was taken away. This will must be read as at the death of the testatrix, and if it had been executed then the amount of the fund would have had to be altered. *Re Ashton* (2) has no bearing on this case.

I decide this point upon the ground that upon the true construction of these deeds Lady Tancred intended each child to take one-sixth of the whole fund. *England v. Lavers* (1), when properly understood, governs this case, and the whole of the fund passes in sixths.

RE SELBY, CHURCH v. TANCRED.

The question then arose whether Seymour Mitford Tancred had forfeited his life interest in the share under the will of Mr. Selby, which had been appointed to him under the deed of 1891, by having assigned such life interest to the trustees of his marriage settlement.

BUCKLEY, J., referred to the settlement of 1896, and proceeded:—The whole of Seymour Mitford Tancred's life interest, which has been assigned to the trustees of the settlement, is by the terms of the trusts payable to him alone. He has disposed of it to trustees, and he is the only cestui que trust. It did not become "payable to or vested in some other person" except upon trust to pay it to him. So far I do not think there is any forfeiture. It is said that under the clause which authorises payment of the charges and expenses of the trust the trustees would have a right to look to this fund for recompment of their expenses, and that that is a disposition or attempted disposition of the income whereby it would become "payable to or vested in some other person." In my opinion it is not. The clause is intended so as to lose the enjoyment of it himself, or if he should become bankrupt, his life estate should cease and be given over to others. This has not happened. Seymour Mitford Tancred remained after the settlement the only person entitled to the income. The mere fact that the trustees may be entitled to have their expenses recompensed to them out of the income does not make it a disposition within the clause. It is parallel to the case of a person who is going abroad and appoints somebody to collect his rents on the terms that he should be paid by deducting a commission. Neither is the appointment of the trustees to be his attorneys to recover the income an

assignment. He only appointed them to act as his agents, retaining the beneficial interest himself. I should have thought that the words "dispose or attempt to dispose," meant that where an interest is offered for sale which comes to an end the moment the owner tries to dispose of it, he cannot be said to dispose of it, because if he does so the interest itself vanishes, and that the words "attempt to dispose of" were addressed to a disposition which would have been valid had there been no forfeiture clause. It is said, however, that NORTH, J., in *Re Porter* (3) held that the words "attempt to dispose" related to a disposition which, by reason of its having no legal effect, failed independently of the clause. Even if that were so it would not cover this case, for this was neither a disposition nor an attempted disposition, and there was no forfeiture.

Solicitors: *Payne, Shaw-Mackenzie & Lake; Flower & Flower; Gray, Mounsey & Fuller.*

[*Reported by P. S. OSWALD, Esq., Barrister-at-Law.*]

Re VIMBOS, LTD.

CHANCERY DIVISION (Cozens-Hardy, J., for Wright, J.), January 24, 1900.

[Reported [1900] 1 Ch. 470; 69 L.J.Ch. 209; 82 L.T. 597; 48 W.R. 520; 8 Mans. 101]

Company—Debenture—Receiver—Appointment by debenture holders—Sale of company's assets—Liability of receiver to pay balance to liquidator.

A receiver of a company was appointed under a debenture which did not expressly state that he was to be the agent of the company. After selling the assets of the company and paying the debenture holders, the receiver had a surplus, part of which he retained for his own remuneration. The liquidator in a winding-up under supervision applied by summons for an order that the amount of the remuneration to which the receiver was entitled might be assessed and the balance paid over to the liquidator.

Held: the court had no jurisdiction to make such an order on the summons, since (i) in the absence of an express provision to the contrary, the receiver was the agent of the debenture-holders and not of the company, and (ii) even if the receiver had been the agent of the company, the liquidator would have had to bring an action against the receiver.

Notes. The court now has power, on an application by the liquidator, to fix the amount of remuneration to be paid to a receiver (see the Companies Act, 1948, s. 371). This case is, therefore, only of interest now for the observations as to when a receiver will be the agent of the company.

Considered: *Robinson Printing Co. v. Chic, Ltd.*, [1905] 2 Ch. 123. Followed: *Deyes v. Wood*, [1911] 1 K.B. 806. Referred to: *Cully v. Parsons*, [1923] 2 Ch. 512; *I.R. Comrs. v. Thompson*, [1936] 2 All E.R. 651; *Central London Electricity, Ltd. v. Berners*, [1945] 1 All E.R. 160.

As to the position of a receiver, see 6 HALSBURY'S LAWS (3rd Edn.) 502-503; as to applications to fix a receiver's remuneration, see *ibid.* 504. For cases see 10 DIGEST (Repl.) 821-822. For the Companies Act, 1948, s. 371, see 3 HALSBURY'S STATUTES (2nd Edn.) 737-738.

Cases referred to in argument :

Gaskell v. Gosling, [1896] 1 Q.B. 669; 65 L.J.Q.B. 135; 71 L.T. 674; 44 W.R. Dig. 132; 12 T.L.R. 335, C.A.; reversed sub nom. *Gosling v. Gaskell*, [1897] A.C. 575; 66 L.J.Q.B. 848; 77 L.T. 314; 46 W.R. 208; 13 T.L.R. 544, H.L.; 10 Digest (Repl.) 822, 5367.

Jefferys v. Dickson (1866), 1 Ch. App. 183; 35 L.J.Ch. 376; 14 L.T. 208; 12 Jur. N.S. 281; 14 W.R. 322, L.C.; 35 Digest 372, 1156.

Summons by the liquidator of the company, *Vinchem, Ltd.*, for an order that the amount of the remuneration payable to the receiver for debenture-holders of the company might be fixed, and that he might be ordered to pay the applicant any balance remaining in his hands. The mortgage debentures had no covering deed, but each was a separate mortgage by which the company, as beneficial owner, charged, by way of floating security, all the present and future property of the company. Condition 4 of the conditions endorsed on the debenture, which stated that all the debentures of the series, of which this was one, ranked *pari passu*, ran as follows :

"The registered holder of this debenture may, with the consent in writing of the holders of not less than three-fourths in value of the debentures of this series for the time being outstanding, appoint by writing any person or persons to be a receiver or receivers of the property charged by the debentures, and such appointment may be made at any time after the principal moneys hereby secured become payable, and shall be effective as if all the holders of debentures of this series concurred in such appointment, and a receiver so appointed shall have power (1) to take possession of the property charged by the debentures; (2) to carry on, or concur in carrying on, the business of the company; (3) to sell, or concur in selling, any of the property charged by the debentures; (4) to make any arrangements or compromise which they or he shall think expedient in the interest of the debenture-holders of this series."

On Nov. 30, 1898, Mr. Meadowcroft was duly appointed receiver of the property for the debenture-holders under this power. In March, 1899, the company went into voluntary liquidation, which was subsequently continued under supervision. The business and assets of the company were sold by the receiver, and in the result, after the debenture-holders had been paid in full, a sum of over £10,400 was paid by the receiver to the liquidator on behalf of the debenture-holders, and he claimed to retain a sum of over £1,600 as remuneration.

Kirby for the liquidator.

Stewart Smith for the receiver.

COZENS-HARDY, J.—This case resolves itself into a question of jurisdiction. It is an application by the liquidator of a company that the amount of remuneration payable to a Mr. Meadowcroft, as receiver of debenture-holders, may be fixed, and that he be ordered to pay the applicant any balance in his hands. I thought it was coming on by arrangement to assess a quantum meruit, but the receiver's counsel takes the objection, which he has perfect liberty to take, that I have no jurisdiction to make the order, and it is, therefore, necessary for me to consider what is the position of the receiver.

The mortgage debentures in this case were in a somewhat peculiar form. There was no covering deed; each debenture-holder had a separate debenture charging, in the most general terms, the present and future property of the company with the debenture, and by the fourth condition of the debenture indorsed it was stated: [His LORDSHIP read condition 4 as above set out, and continued:] It is remarkable that that power differs in almost every material respect from the ordinary power which is given to mortgagees. There is nothing to say that the receiver is to be the agent of the mortgagor, who is solely to be responsible for his

acts and defaults, as in the Conveyancing Act. There is nothing whatever to say what he is to do with moneys which he receives. There is no direction to him to keep down the interest on the mortgage, or pay any arrears or surplus over to the mortgagor. There are none of those provisions one finds in an ordinary receivership deed, and it does seem to me that the receiver in these circumstances was the agent of the persons who appointed him, not the agent of the mortgagor; and it follows from that, of course, that the debenture-holders themselves would be answerable for all the faults and omissions of the receiver.

If that be so, it seems quite plain that the liquidator has no right at all in these proceedings to get the remuneration of the agent, not of the company, but of the debenture-holders, assessed by the court. The receiver does not come here asking for remuneration. He has got some money in his hands which the liquidator thinks is more than he is entitled to. The liquidator says the debenture-holders have been paid off, and that the receiver has money in his hands which he ought not to keep. I think, on that footing—viz., that the receiver is agent for the mortgagees, and that this is the money of the mortgagees, and not of the company—this application must fail.

But suppose I am wrong in that view; suppose that the true view be this, that, although it is not expressed, it is implied that the receiver is the agent of the mortgagor, the company, and that the company alone would be responsible for his acts and defaults—I cannot conceive that the liquidator is in any better position. It is not the law that the liquidator can get any claim made by any agent employed by the company assessed in a proceeding like this. Suppose it had been an auctioneer or a stockbroker who had undoubtedly been employed by the company and who had some money in his hands, I cannot find any authority whatever for the proposition that I could, in this summary manner and in winding-up jurisdiction, direct that the proper remuneration of the auctioneer or stockbroker should be ascertained, and order him to pay over the balance. It seems to me that the ordinary course of law would have to be followed—viz., an action commenced by the liquidator against the alleged agent—the auctioneer or stockbroker in the case I put—claiming this money as the money of the company, and then the auctioneer or stockbroker, as the case might be, would have to raise his contention that he was entitled to retain, out of the money in his hands, the remuneration which he claims. I, therefore, without going at all into the merits of this case, am bound to find that I have no jurisdiction, and that I must dismiss the summons.

Solicitors: *Murray, Hutchins, Stirling & Murray; Sutton, Ommanney & Rendall.*

[Reported by H. M. CHARTERS MACPHERSON, Esq., Barrister-at-Law.]

CHESSUM & SONS v. GORDON

[COURT OF APPEAL (Sir A. L. Smith, M.R., Henn Collins and Romer, L.JJ.),
February 11, 12, 1901]

[Reported 1901 1 K.B. 694; 70 L.J.K.B. 394; 84 L.T. 137; 49 W.R. 309;
45 Sol. Jo. 293]

B

Judgment—Correction of error.—“Slip rule”—Item of costs accidentally omitted from taxed bill.

The solicitor of a party who had been awarded judgment and costs in an action accidentally omitted to include an item in his bill of costs. After the taxing master had given his certificate and the amount of the judgment and the taxed costs had been paid, the error was discovered. The judge in chambers having directed that the item omitted should be taxed and the taxing master's certificate be amended if necessary,

C

Held: the court had power either under Ord. 28, r. 11, or under its inherent jurisdiction to correct the error at any time without an appeal, and, therefore, the judge had acted rightly.

D

Notes. Referred to: *Re Incheape, Craigmyle v. Incheape*, [1942] 2 All E.R. 157; *In the Estate of Segalov (deceased)*, [1952] 2 All E.R. 107.

As to amendment of clerical or accidental mistakes in judgments or orders, see 22 HALSBURY'S LAWS (3rd Edn.) 786-788, and for cases see DIGEST (Practice) 472 et seq.

E

Cases referred to:

(1) *Preston Banking Co. v. William Allsup & Sons*, [1895] 1 Ch. 141; 64 L.J.Ch. 196; 71 L.T. 708; 43 W.R. 231; 39 Sol. Jo. 113; 12 R. 51, C.A.; Digest (Practice) 815, 3764.

(2) *Fritz v. Hobson* (1880), 14 Ch.D. 542; 49 L.J.Ch. 321; 42 L.T. 225; 28 W.R. 459; 24 Sol. Jo. 366; Digest (Practice) 474, 1546.

F

(3) *Barker v. Purvis* (1888), 56 L.T. 131, C.A.; Digest (Practice) 474, 1549.

Appeal by the defendant from an order of DAY, J., at chambers.

The action came on for trial before LORD RUSSELL, C.J., and a special jury, when the jury found a verdict in favour of the plaintiffs. The learned Lord Chief Justice directed that judgment should be entered for the plaintiffs on the claim for an amount to be ascertained by a special referee, with costs; and that judgment should be entered for the plaintiffs on part of the counter-claim, and that the rest of the counter-claim should be remitted to the special referee. The referee by his award determined that the amount payable to the plaintiffs by the defendant under the judgment was £3,863, and further awarded and directed that judgment be entered for the plaintiffs with costs upon the counter-claim. Judgment was entered for the plaintiffs for £3,863, with costs on the claim and counter-claim, to be taxed. On May 15, 1899, the referee's solicitors sent notice to the plaintiffs' and the defendant's solicitors that the referee's award was ready, and could be taken up on payment of £160, the amount of his fees. The plaintiffs' solicitors took up the award, paying the sum of £160 by means of a cheque given to them for the purpose by the plaintiffs, and in consequence no entry of this amount appeared in the ledger of the plaintiffs' solicitors. The bill of costs was prepared by the bill clerk of the plaintiffs' solicitors, whose duty it was to refer to the ledger to see what payments had to be added to the bill, and, as no entry appeared in the ledger, he omitted to include in the bill the amount paid to the referee. The plaintiffs' costs were taxed and allowed at £516, and the taxing master gave his certificate for that amount, dated Aug. 24, 1900. The amount of the judgment and of the taxed costs was paid by the defendant.

G

H

I

Towards the end of September the plaintiffs' solicitors discovered that this sum of £160 had not been paid by the defendant, or included in the bill of costs. They thereupon applied to the defendant for payment of that amount. The defendant refused to pay upon the ground that the judgment against him had been wholly satisfied.

By R.S.C. Ord. 28, r. 11:

"Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court or a judge on motion or summons without an appeal."

Upon the application of the plaintiffs, DAY, J., at chambers, on Nov. 27, 1900, made an order that the referee's fees, amounting to £160, be referred to the taxing master for taxation, and that his certificate be amended if necessary, upon the ground that there had been a mistake in not including the referee's fees in the bill of costs lodged for taxation by the plaintiffs. The defendant appealed, with leave, upon the ground that the judge had no jurisdiction, and that the taxing master's certificate was conclusive.

Eustace Hills for the defendant.

R. B. D. Acland for the plaintiffs.

SIR A. L. SMITH, M.R.—This is an appeal by the defendant from an order of DAY, J., made at chambers. I must say that I am thankful in this case to be able to do justice by upholding the order of the learned judge, and that we are not hampered by any technical rule.

This action was brought by the plaintiffs who, at the trial, obtained judgment against the defendant, for an amount to be ascertained by a special referee, with costs. The reference was held, and the referee awarded the plaintiffs the sum of £3,863, and judgment was entered for them for that amount, with costs to be taxed. The plaintiffs paid the sum of £160 to the referee upon taking up his award. By a slip or blunder that sum of £160 was not included in the bill of costs lodged for taxation by the plaintiffs. The bill of costs which was lodged was taxed and the costs were allowed at £516, and the taxing master gave his certificate for that amount on Aug. 24, 1900. Shortly afterwards it was discovered that this slip had been made as to the £160. An application was then made by the plaintiffs to DAY, J., at chambers, and the learned judge made an order, on Nov. 27, 1900, that the referee's fees, amounting to £160, be referred to the taxing master for taxation, and that his certificate be amended if necessary, upon the ground that there had been a mistake in not including the referee's fees in the bill of costs lodged for taxation by the plaintiffs. The defendant has appealed against that order, with leave.

As to the justice of the matter there can be no doubt but that the plaintiffs ought to get this sum of £160. The question is whether there is any technical rule in the way. *Preston Banking Co. v. William Allsup & Sons* (1) does not touch this point at all. There was not, in that case, any question of an accidental slip or omission at all. It was an application to alter an order which had been passed and entered, and accurately expressed the intention of the court, and was in effect an application to re-hear the matter, and the court held that it had no jurisdiction to entertain it. It seems to me that, either under Ord. 28, r. 11, or under the inherent jurisdiction of the court, there is power to put right this blunder. Order 28, r. 11, says that

"clerical mistakes in judgments, or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court or a judge on motion or summons without an appeal."

This was without doubt an accidental slip or omission, and, therefore, it may be corrected "at any time." There are two authorities upon this point. There is *Leck v. Hobson* (2), which was referred to by ROMER, L.J., which seems to me to

entirely cover the present case. In that case the plaintiff, who succeeded at the trial, forgot to ask for the costs of an interlocutory motion. After the judgment had been passed and entered the plaintiff found out this omission, and application was made to Fry, J., to rectify this mistake, either under the inherent jurisdiction of the court or under Ord. 11A, which was the same as the present Ord. 23, and the learned judge made an order directing the taxation and payment of the plaintiff's costs of the motion. That case is not the only authority. There is *Barker v. Parris* (3), decided by the Court of Appeal, consisting of Cotton, Bowen, and Fry, L.JJ., who expressed the same view of the rule relating to accidental slips or omissions, that if there has been an accidental error or blunder the court may correct it at any time. I think, therefore, that the learned judge at chambers had jurisdiction to make this order, and that it was rightly made. This appeal, therefore, fails and must be dismissed.

HENN COLLINS, L.J.—I agree.

ROMER, L.J.—I agree.

Appeal dismissed.

Solicitors: Mellor, Smith & May; Mackrell, Maton, Godlee & Gainsey.

[Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.]

BOOTLE OVERSEERS v. LIVERPOOL WAREHOUSING CO. SAME v. WEBSTER AND ANOTHER

[King's Bench Division (Ridley and Bigham, J.J.), June 4, 1901]

[Reported 85 L.T. 45; 65 J.P. 740; 17 T.L.R. 550]

Rates—Rateable occupation—Empty premises—Intention not to occupy—Warehouses still advertised as to let.

From a date prior to the making of certain rates the ratepayers gave notice to the rating authority that they intended to keep some warehouses unoccupied during the current overseers' year, and to claim exemption from the rates in respect thereof. All goods had been removed before the making of the rate, and the warehouses had not been used since that date, though they were advertised in the list of warehouses to let belonging to the respondents. Each warehouse was one of a block, through which continuous shafting passed, and at the end of the block was a notice which had probably been in existence for a very long time: "For storage, apply to the L. W. Company." A warehouse in respect of which notice had been given to the rating authority was still advertised on the cards issued by the ratepayers, and they had tried to let it by notice affixed on the warehouse.

Held: as there was evidence of a bona fide intention not to use the warehouses during the year, the justices were justified in coming to the conclusion that there was no such occupation as would render the ratepayers liable to be rated in respect of them.

Per CURIAM: If the intention to leave the warehouses unused were to cease, there would there and then be an occupation.

Per RIDLEY, J.: In the same way, a house which contains nothing in the way of furniture may be treated as a vacant house, although there is a present intention to let it. In that case there would be a use and occupation if it was let to anybody.

Southend-on-Sea Corp'n. v. White (1) (1900), 83 L.T. 408, considered.

Notes. Applied: *Gage v. Wren*, ante p. 247. Distinguished: *R. v. Mallandur*, [1904-7] All E.R. Rep. 339; *Borwick v. Southwark Corp'n.*, [1909] 1 K.B. 78. Considered: *L.C.C. v. Haskney Borough Council*, [1928] All E.R. Rep. 314. Referred to: *Liverpool Corp'n. v. Chorley Assessment Committee and Withnell Overseers*, [1912] 1 K.B. 270; *Baylis v. Chatters*, [1940] 1 All E.R. 620. As to rateable occupation, see 32 HALSBURY'S LAWS (3rd Edn.) 16 et seq., and for cases see 38 DIGEST (Repl.) 477-478.

Cases referred to:

- (1) *Southend-on-Sea Corp'n. v. White* (1900), 83 L.T. 408; 65 J.P. 7; 17 T.L.R. 5, D.C.; 38 Digest (Repl.) 488, 93.
- (2) *R. v. St. Pancras Assessment Committee* (1877), 2 Q.B.D. 581; 46 L.J.M.C. 243; 25 W.R. 827; sub nom. *Willing v. St. Pancras Assessment Committee*, 37 L.T. 126; 41 J.P. 662; Ryde, Rat. App. (1871-85) 188; 38 Digest (Repl.) 469, 5.

Also referred to in argument:

- Tyne Coal Co. v. Wallsend Parish Overseers* (1877), 46 L.J.M.C. 185; 35 L.T. 854; 41 J.P. 375; 38 Digest (Repl.) 674, 1247.
- Holywell Union and Halkyn Parish v. Halkyn Drainage Co.*, [1895] A.C. 117; 64 L.J.M.C. 113; 71 L.T. 818; 59 J.P. 566; 11 T.L.R. 132; 11 R. 98, H.L.; 38 Digest (Repl.) 470, 7.

BOOTLE OVERSEERS v. LIVERPOOL WAREHOUSING Co.

Case Stated upon a complaint preferred on behalf of the rating authority against the ratepayers for that they, being duly rated and assessed to the relief of the poor of the borough of Bootle and to the maintenance of the police in that borough by certain rates made Mar. 26, 1900, had not paid the same, but had neglected or refused to do so.

Upon the hearing of the complaint it was admitted that the ratepayers carried on the business of warehouse owners and warehouse keepers at (among other places) five warehouses in Bedford Place, fourteen warehouses in Effingham Street, four warehouses in Princes Street, and six warehouses in Globe Road, all in the borough. The rate-book showing the rating of the ratepayers in respect of all the premises and the allowance by the justices was duly produced, and the allowance and the due publication of the rate and the demand for and nonpayment of the rates were duly proved. Each warehouse was separately assessed. It was admitted that on Mar. 26, 1900, when the rate was made, the ratepayers were in occupation of all the warehouses with the exception of the three which were described as follows: Warehouse "L." in Globe Road; warehouse "E." in Bedford Place; and warehouse "D," in Bedford Place, in the borough.

In June, 1900, the ratepayers gave notice by two letters to the rating authority that it was the intention of the ratepayers to keep the three warehouses above referred to unoccupied during the whole of the current overseers' year, and to claim exemption from all rates in respect thereof. The following are copies of the letters:

"The Liverpool Warehousing Co., Ltd., 19, Brunswick Street, Liverpool, June 15, 1900—The Collector, Poor Rate Office, Bootle.—Dear Sir,—On behalf of the Liverpool Warehousing Co., Ltd., I beg to give you notice that the warehouses as enumerated below have not been occupied from the end of March last, and, owing to the present state of the warehousing business, it

is our intention to keep these warehouses out of occupation for the whole of the current year, and to claim exemption from all rates and taxes.—'J, K, and L,' three warehouses, Globe Road; 'R, S, T, and U,' four warehouses, Effingham Street; 'C and D,' two warehouses, Princes Street.—Yours faithfully, A. SLEE."

"The Liverpool Warehousing Co., Ltd., 19, Brunswick Street, Liverpool, June 19, 1900.—The Collector Poor Rates, Bootle.—Dear Sir.—Referring to my letter of June 15, I find that 'C' warehouse, Princes Street, was put on the list in error, and would be obliged if you would kindly correct my list as follows: 'D,' one warehouse, Princes Street; 'D and E,' two warehouses, Bedford Place; these having been empty from the beginning of April.—Yours truly, A SLEE."

It was proved to the satisfaction of the justices that warehouse 'L' had been empty since Mar. 14, 1900, that warehouse 'D' had been empty since October, 1899, and warehouse 'E' since Mar. 20, 1900, and it was also proved that all goods of every description had been removed therefrom at the dates respectively, and that from the dates respectively the three warehouses had been locked up and had not been used by the ratepayers for the purposes of their business. It was also proved that each of the warehouses was one of a block of warehouses belonging to the ratepayers in which they carried on their business as aforesaid, and at the end of each block there was a notice to this effect: "For storage, apply to the Liverpool Warehousing Co."; that in their business the ratepayers issued lists of their warehouses, that the lists included the three warehouses "L," "D," and "E," and that no alteration was made in the lists at or since the time when the warehouses became empty as aforesaid. It was also proved that the warehouses contained shafting and hoists for use in the warehousing business, the shafting being continuous throughout each block of warehouses. That there was nothing to prevent goods being moved from one warehouse to another, but that there was no internal connection between the warehouses in each block. That the warehouse "L," in Globe Road, was insured, and that since it became empty it had been inspected by the insurance company's agent who was accompanied by a man in the employ of the respondents.

It was contended on behalf of the rating authority that the proved and admitted facts showed that the ratepayers were liable to be rated as occupiers of each of the three warehouses on Mar. 26, 1900. On behalf of the ratepayers it was contended that the facts did not show any occupation of the three warehouses, or any of them, by the ratepayers on the date such as would make them liable for the rates. The justices were of opinion that no occupation of the warehouses "L," "E," and "D" by the ratepayers had been proved, and that they were not liable to be rated therefor, and, in so far as the complaint applied thereto, they dismissed the same.

The question for the court to decide was whether, under the circumstances, there was such occupation of the warehouses "L," "E," and "D" by the ratepayers proved as to make them properly rateable to the relief of the poor and for the maintenance of the borough police in respect thereof.

Pickford, K.C. (Greer with him) for the rating authority.

Danckwerts, K.C. (Tobin with him) for the ratepayers.

RIDLEY, J.—In this case we come to the conclusion that the decision of the magistrates was the correct one. The question seems to shape itself in the following way: Certain facts are set out in the Case, from which facts, which are not in dispute, the magistrates came to the conclusion that there was not any occupation of these three warehouses. Then they ask us to decide whether under the circumstances there was such an occupation of the warehouses as to make the respondents properly rateable to the relief of the poor. I think that means, "Is there a principle of law according to which we were compelled to find in the opposite way from what we do find and what we did find? That is to say, upon

these facts we came to the conclusion that there was not an occupation; but if the law says that upon these facts legally and as a matter of law there was, why then the decision must be reversed." So far as it is a finding of fact, it is not for us to interfere with them. If there be a principle of law which says that upon such facts as the present the warehouses were still in occupation for the purpose of the poor rate, we should reverse their decision, but not otherwise. It lies on the rating authority to make out that there was this principle of law, and also it lies upon them to show that there was occupation. Upon both the grounds it lies upon counsel for the rating authority to make out this matter. I do not think he has succeeded in doing so.

Perhaps it is unnecessary for me to run through the facts which are stated in this case, but shortly stated it comes to this, that three of the warehouses had been empty for a considerable period, one from Mar. 14, 1900, the other from October, 1899, and the third from Mar. 20, 1900. In June, 1900, a notice was given that there was no intention of using these three warehouses for the full year to elapse from the end of March, 1900. It seems that upon the days in question which I have now mentioned, all the goods of every description had been removed from the warehouses, and that from those dates they had been locked up and not used. It is true that there had been a notice which had been there before, which had been left at the end of each block of warehouses, which was this: "For storage, apply to the Liverpool Warehousing Co."; that there was but one pile of buildings, of which these three warehouses were portions; and upon that fact reliance is placed by the rating authority in seeking to make out that there was an occupation; but I think, as a matter of fact, the proper inference from these facts is that from the date at which the goods had been removed there was a *bonâ fide* intention by the warehousing company not to use these three particular warehouses during the year. A difficulty may arise upon that part of the case in this way, that I think we ought to infer that, if the trade had required it, they would have resumed the occupation and use of these warehouses. But that is an indefinite date. What we have to see is what the state of things was at that time, and I think the proper inference is that then and at that time there was an intention to abandon and not to use these three warehouses for that particular time.

A distinction may be drawn, perhaps, in that respect between this case and that of *Southend-on-Sea Corp. v. White* (1), but that case is distinguishable also upon another ground, not only that at the return of the season it was certain that the shopkeeper would return, but also that he had left in that shop sundry articles which were necessary for the purpose of carrying on his trade and which were not fixtures. I cannot help thinking, on looking at that decision, there may have been good reason for supposing that, if nothing had been left in the shop except the bare fixtures, there might, although I do not say there would, have been a decision the other way.

Upon these facts is there any principle of law which makes it necessary for us to say that a warehouse so left intentionally empty and unused is in occupation for the purpose of the poor rate? I do not think that there is. No case exactly in point has been quoted, the nearest being that of *Southend-on-Sea Corp. v. White* (1), but the principle has been quoted from a judgment of LUSH, J., in *R. v. St. Pancras Assessment Committee* (2), from which it would appear, so far as I can apply that case to the present case, that that principle would not apply, and that this may be treated as vacant premises in the same way as a house which contains nothing in the way of furniture may be treated as a vacant house although there is a present intention to let it, and although there be a notice upon the door that it would be let, if persons applied to take it. In that case there would be a use and occupation if it was let to anybody. So in this case, if the intention to leave the warehouses unused were to cease upon the occasion arising, there would then and there be an occupation. That is apparently a similar condition of things to that which would arise if the vacant house was let. Under the circumstances I

do not see why we should not apply it here as far as we can, and, judging from the facts found in this case, I think we ought to say there is no principle of law which on such a state of facts compels us to say the warehouses were in occupation. For three years, I think, the justices were right in finding that there was none, and that there is no occasion to send the Case back.

BIGHAM, J.—I agree. The question is whether upon Mar. 26 these warehouses were occupied so as to make them rateable—that is to say, were they occupied by the ratepayers for the purpose of their business? That is, in my opinion, a question of intention—of course a bona fide intention—to be answered with reference to the circumstances of the case; in other words, it is a question of fact. What are the facts here? The facts here are found in the Case. I need not read them. There are facts which point to an intention not to occupy, not to carry on the business of the ratepayers in those particular premises. It is said that there are some facts which point the other way—namely, that a board which probably had been in existence for a very long time upon the block of warehouses in which these particular warehouses formed part, stating that application might be made to the ratepayers for warehouse room, was still up. Another fact is that these particular warehouses were still left in the list on the circular issued by the ratepayers; and another fact is that apparently there was some shafting running through these warehouses, connected with other warehouses which were in use, used for the purpose of the hoisting gear in the warehouses, and that this shafting revolved in the curved warehouses when the shafting was being used for the purpose of the warehouses where the work was going on. But all that amounts merely to this, that there were facts on the one hand and facts on the other hand. It was for the magistrates to say what conclusion of fact they drew from all these particular circumstances. They came to the conclusion that the facts did not justify them in finding that there was any occupation of these warehouses on Mar. 26. For my own part, although it is not necessary that I should say anything about it, I agree with them. I think there was no occupation in point of fact upon Mar. 26, and that, therefore, the ratepayers were entitled as a matter of fact to succeed before the magistrates. But, as I say, I do not think that is a matter for us to decide. The question we have to decide is whether there were facts before the magistrates which could justify them in coming to the conclusion to which they did. In my opinion there were. There was ample evidence in the facts to show that there was in fact no occupation of these premises upon Mar. 26, by the ratepayers for the purpose of their business, and, therefore, I agree with my brother that this appeal must be dismissed.

BOOTLE OVERSEERS v. WEBSTER AND ANOTHER.

Case Stated by justices upon a complaint claiming poor and police rates.

The ratepayers were the lessees of six warehouses in Bootle, the lease of which expired at the end of the year 1900, and the ratepayers did not at the time of the rate intend to apply for a renewal. They were rated and assessed separately in respect of each of the warehouses. The rate was made on Mar. 26, 1900. On Jan. 5, 1900, the ratepayers gave notice to the rating authority that one of the warehouses was empty and untenanted, and that they claimed to be exempt from rates in respect thereof. In the course of the ratepayers' business the warehouses in question were let sometimes by space and sometimes by single tenancies for separate warehouses, and the amount of space vacant varied with the amount of storage. The ratepayers carried on their usual business in the other five warehouses. They issued cards in connection with their business, and the empty warehouse was advertised on such cards. The warehouse had been empty since Jan. 5, 1900, on which day the last of the goods stored therein had been removed.

A the ordinary course of business, and no goods had been stored therein since, but the ratepayers had tried to let it by notice on the warehouse, but owing, however, to the state of trade they had not succeeded in doing so.

B It was contended by the rating authority that by reason of the above facts, which were proved and admitted, the ratepayers were in occupation of the warehouse, and were properly rated in respect thereof, as well as the remaining five warehouses. On behalf of the ratepayers it was contended that, inasmuch as they had closed the warehouse and had given notice to the rating authority thereof before Mar. 26, 1900, when the rate was made, and as the warehouse remained closed and untenanted, they were not liable to be rated in respect thereof. The C justices were of opinion that these facts did not afford evidence of such occupation as would make the ratepayers liable in respect of this warehouse, and they dismissed the complaint so far as it referred to the same.

Pickford, K.C., and Greer for the rating authority.

Danckwerts, K.C., and Tobin for the ratepayers.

D **RIDLEY, J.**—I think this case is the same as the other. I do not find anything to distinguish it from the former decision. Therefore, the judgment must be to the same effect.

BIGHAM, J.—Perhaps it is not so strong as the other one, but the same reasoning applies.

Appeals dismissed.

Solicitors: *Sharpe, Parker & Co., for Cleaver, Holden & Co., Liverpool; Hill, Dickinson & Co., Liverpool; Layton, Melly & Layton, Liverpool.*

[*Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.*]

EARL GREY v. ATTORNEY-GENERAL

HOUSE OF LORDS (The Earl of Halsbury, L.C., Lord Macnaghten, Lord Morris, Lord Shand, Lord James of Hereford, and Lord Brampton), February 13, 1900]

[Reported [1900] A.C. 124; 69 L.J.Q.B. 308; 82 L.T. 62; 48 W.R. 383; 16 T.L.R. 202]

Estate Duty—Property passing on death—Property deemed to pass—Gift inter vivos—Rentcharge on property reserved to donor—Donor not excluded from possession and enjoyment—Power of revocation reserved—Customs and Inland Revenue Act, 1881 (44 & 45 Vict., c. 12), s. 38 (2) (a) (c)—Customs and Inland Revenue Act, 1889 (52 & 53 Vict., c. 7), s. 11—Finance Act, 1894 (57 & 58 Vict., c. 30), s. 2 (1) (c).

By the Finance Act, 1894, s. 2 (1): "Property passing on the death of the deceased shall be deemed to include . . . (c) Property which would be required on the death of the deceased to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to 'volunteer' were omitted therefrom." By a deed made in 1885 the tenant for life of real and personal property conveyed it to the appellant (the remainderman) in fee in consideration of an annual rentcharge of £4,000 payable to the tenant for life out of the estates so given. The remainderman covenanted (inter alia) that he would pay certain annuities charged on the estates, and pay the interest on a mortgage debt, and keep up the principal mansion-house and grounds, and pay the debts and funeral and testamentary expenses of the donor. The deed contained a declaration of trust to permit the tenant for life to occupy the mansion and appurtenances during his life, and a power of revocation in case of the non-performance of any of the covenants by the donee. In 1894, after the passing of the Finance Act of that year, in consideration of a lump sum, the tenant for life by deed released to the remainderman the rentcharge, and released the premises from the power of revocation. Shortly after the execution of the last-mentioned deed he died.

Held: the deed of 1885 reserved a benefit within the meaning of the Customs and Inland Revenue Act, 1889, s. 11 (1), and estate duty was, therefore, payable under the Finance Act, 1894, s. 2 (1) (c) on all the property existing at the death of the donor.

Notes. Distinguished: *New South Wales Stamp Duties Comr. v. Perpetual Trustee Co.*, [1943] 1 All E.R. 525. Considered: *St. Aubyn v. A.-G.*, [1951] 2 All E.R. 473. Referred to: *A.-G. v. De Préville*, [1900] 1 Q.B. 223; *A.-G. v. Johnson*, [1903] 1 K.B. 617; *A.-G. v. Secombe*, [1911] 2 K.B. 688; *Oakes v. New South Wales Stamp Duties Comr.*, [1953] 2 All E.R. 1563.

As to estate duty on gifts, see 15 HALSBURY'S LAWS (3rd Edn.) 17-22; and for cases, see 21 DIGEST (Repl.) 22 et seq. For the Customs and Inland Revenue Act, 1881, s. 38 (2), see 9 HALSBURY'S STATUTES (2nd Edn.) 332; for the Customs and Inland Revenue Act, 1889, s. 11, see *ibid.* p. 344; and for the Finance Act, 1894, s. 2, see *ibid.* p. 350.

Appeal from a decision of the Court of Appeal (A. L. SMITH, RIGBY, and VAUGHAN WILLIAMS, L.J.J.), reported [1898] 2 Q.B. 534, affirming a decision of the Divisional Court (GRANTHAM and CHANNELL, J.J.), reported [1898] 1 Q.B. 318, in favour of the

A Crown upon an information filed by the Attorney-General claiming estate duty under the Finance Act, 1894.

The provisions of the deed upon which the question arose appear in the headnote above.

Haldane, Q.C., and Bremner for the appellant.

B *The Attorney-General (Sir R. Webster, Q.C.), the Solicitor-General (Sir R. Finlay, Q.C.), and Vaughan Hawkins for the respondent.*

C **THE EARL OF HALSBURY, L.C.**—There are some cases so extremely plain that it is difficult to give any better exposition of the question than that which the statute itself provides. In the present case I did not at first quite understand the argument presented to your Lordships, and I am not absolutely certain that I have got much further now; but, at all events, forming my own judgment upon the statute, nothing appears to me much more plain than this, that what the Act of Parliament intended to prevent was that what has been described as a gift inter vivos should nevertheless reserve to the settlor some benefit or some part of that which purported to be given inter vivos. In this case can anybody doubt that something has been reserved to the settlor? The settlement itself has reserved £4,000 a year, and has reserved a right also on the part of the settlor that all his debts up to the period of his death should be paid and the payment secured by the estate. It seems to me that it is burning daylight to say that is not within the express language of the statute, and I am really wholly unable to understand why these words are not as plain in the statute itself as any explanatory exposition could make them. That is really all that I have to say upon the subject. It seems to me that it is a particularly plain case, and I move your Lordships that this appeal be dismissed with costs.

LORD MACNAGHTEN.—I am of the same opinion.

F **LORD MORRIS.**—I concur.

LORD SHAND.—I also am of the same opinion. I think that the learned judges who have dealt with this case in the court below have expressed very fully and carefully the reasons upon which their judgment is founded.

G **LORD JAMES OF HEREFORD.** - I am of the same opinion.

LORD BRAMPTON.—I concur.

Appeal dismissed.

Solicitors: *E. Flax & Leadbitter; F. C. Gore, Solicitor of Inland Revenue.*

H [Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

BURROWS v. LANG

[CHANCERY DIVISION (Farwell, J.), May 10, 11, 13, 14, 15, 16, 1901]

[Reported [1901] 2 Ch. 502; 70 L.J.Ch. 607; 81 L.T. 623; 49 W.R. 545;
17 T.L.R. 514; 45 Sol. Jo. 536]

*Easement—Water—Pond under defendant's control fed by artificial watercourse—
Right of plaintiff to water cattle at pond—Conveyancing Act, 1881 (44 & 45
Vict., c. 41), s. 6.*

In 1886 the plaintiff bought C. farm and the defendant bought C. mill from the same vendor. The properties were adjoining, and, until that time, had been in the same ownership. The water from a brook flowed by an artificial watercourse into a pond on the defendant's land, which abutted on the plaintiff's land. The plaintiff's cattle had been in the habit of drinking at the pond. The defendant placed a fence on the boundary of his property round the pond. The plaintiff contended that there had been a watering place for cattle at the pond used for over a century by the owners of C. farm, that the watercourse was a continuous easement necessary and convenient for the use of his property, that the right of watering his cattle had passed to him by virtue of the general words in the Conveyancing Act, 1881, s. 6, and that the defendant must keep the pond full of water to enable him to enjoy his property. There was no mention in the plaintiff's conveyance of any right to water.

Held: there was no duty on the defendant to keep the pond full by a continuous flow of water in the watercourse, and, while the right of the plaintiff to use the water is and when it was there, would fulfil the first two conditions in the definition of an easement, which must be held *nee per vim, nec clam, nec precario*, it would depend on the will of another person, and, therefore, could not pass under the section of the Conveyancing Act.

Birmingham, Dudley and District Banking Co., v. Ross (1) (1888), 38 Ch.D. 295, applied.

Notes. The Conveyancing Act, 1881, s. 6, has been repealed and replaced by the Law of Property Act, 1925, s. 62, 20 HALSBURY'S STATUTES (2nd Edn.) 559.

Distinguished: *International Tea Stores Co. v. Hobbs*, post p. 303; *Key v. Neath R.D.C.* (1905), 95 L.T. 507; *Whitmores (Edenbridge) v. Stamford*, [1900] 1 Ch. 427; *Schwann v. Cotton*, [1916] 2 Ch. 120. Considered: *Beauchamp v. Frome R.D.C.*, [1937] 4 All E.R. 348. Distinguished: *Wright v. Macadam*, [1949] 2 All E.R. 565. Referred to: *Lewis v. Meredith*, [1913] 1 Ch. 571; *Burlatt v. Tottenham*, [1932] 1 Ch. 114; *Re Ellenborough Park*, *Re Davies*, *Parcell v. Maddison*, [1955] 3 All E.R. 667.

As to prescription at common law concerning easements, see 12 HALSBURY'S LAWS (3rd Edn.) 546-550, and for cases see 19 DIGEST (Repl.) 35-40.

Cases referred to:

- (1) *Birmingham, Dudley and District Banking Co. v. Ross* (1888), 38 Ch.D. 295; 57 L.J.Ch. 601; 59 L.T. 609; 36 W.R. 914; 4 T.L.R. 437, C.A.; 19 Digest (Repl.) 50, 277.
- (2) *Arkwright v. Gell* (1839), 5 M. & W. 203; 2 Horn & H. 17; 8 L.L.Ex. 261; 151 E.R. 87; 19 Digest (Repl.) 69, 383.
- (3) *M'Evoy v. Great Northern Rail. Co.*, [1900] 2 L.R. 325; 19 Digest (Repl.) 169, *485.

Also referred to in argument:

Halls v. Kelson (1871), 6 Ch. App. 166; 40 L.J.Ch. 126; 24 L.T. 209; 35 J.P. 422; 19 W.R. 338, L.J.J.; 19 Digest (Repl.) 48, 265.

Wood v. Wood (1849), 3 Exch. 748; 18 L.J.Ex. 305; 13 L.T.O.S. 212; 13 Jur. 472; 154 E.R. 1047; 19 Digest (Repl.) 167, 1109.

Ramshar Pershad Narain Singh v. Koonj Behari Pattuk (1878), 4 App. Cas. 121, P.C.; 19 Digest (Repl.) 166, 1102.

Hanna v. Pollack, [1898] 2 I.R. 532; [1900] 2 I.R. 664; 19 Digest (Repl.) 169, 1109.

Injunction to restrain interference with an easement by obstruction of a flow of water.

The Cwm Farm, in the parish of Shirenewton, Monmouthshire, and the Lower Cwm Mill and the adjacent lands had been held together in one and the same ownership and the land belonging to the mill adjoined the farm lands. The water from a stream known as the Castroggy Brook had been diverted and led through an open duct or watercourse into a pond (hereinafter called the pond at A), the duct and pond being on the land belonging to the mill. The pond abutted on the Cwm Farm lands for a distance of about 55 yards. In 1884 the contractor engaged in making the Severn Tunnel, with the consent of all parties interested, laid earthenware pipes in the course of the duct to within 50 yards of the pond, in which pipes the water had since run. There was a sluice at the point where the divergence of the water was made from the Castroggy Brook, and the water from the pond at A could be drawn off by means of a bye-wash before it reached the mill. If not so drawn off, the water ran through a pipe into the mill pond below, and thence over the waterwheel into the millrace, and then rejoined the main stream by means of a culvert.

In 1886 there was a sale of the property, the Cwm Farm being purchased by William Burrows, and the Cwm Mill by William Shaxson Lang. The conveyance to Burrows contained no express words relative to any easement. Lang erected a fence on the boundary of his land, thereby shutting off Burrows' cattle from drinking at the pond. Burrows alleged that the pond at A had, for over a century, been used by the occupiers of Cwm Farm for the purpose of watering cattle, and claimed that the watercourse was a continuous easement necessary and convenient for the use of his property, and that the right to have an uninterrupted flow of water down the watercourse and to water his cattle at the pond at A passed by the conveyance to him by virtue of the general words in s. 6 of the Conveyancing Act, 1881, and were now vested in him. Lang denied the existence of any such right, and also alleged that he had the right to obstruct the flow of water from the Castroggy Brook into the pond.

Burrows, therefore, brought an action claiming an injunction to restrain Lang from obstructing the flow of water from the Castroggy Brook into the watercourse and pond at A so as to interfere with the plaintiff's easement, or otherwise to interfere with the right of the plaintiff or his tenant of watering cattle in the pond and otherwise using the water for the purposes of the Cwm Farm, and for an order that the defendant should remove all obstructions placed by him or by his order in or across the watercourse which prevented water from the Castroggy Brook flowing into the pond. The plaintiff also alleged that he had no regular supply of water from any other source for the purposes of his farm.

Upjohn, K.C., and *F. H. Colt* for the defendants.

J. G. Butcher, K.C., and *Stewart Smith* for the plaintiff.

FARWELL, J.—In this case the plaintiff's conveyance contains no express words as to any right to water, but he relies on the general words in s. 6 of the Conveyancing Act, 1881. There has been a great deal of conflicting evidence as to the user of water by the occupier of the farm, but on consideration of the whole of the evidence I find that there was in fact a watering-place for cattle, but at the time of the conveyance to the plaintiff there was no actual watering-place on his side of the pond. I find that cattle did drink from the pond at times, being enabled

to do so by the natural formation of the ground. I find also that the pond from time to time required repairing and puddling to prevent the water being lost owing to the porous nature of the soil. There is also evidence to show that the cattle would injure the bottom of the pond. This, in my opinion, is material, because the right of the defendant to divert the water from the main stream for the purposes of the mill is subject to the right of the lower proprietors to have the water restored to the stream without substantial diminution.

Two main questions arise for consideration—(i) Has the plaintiff a right to compel a continuous flow of water into the pond; and (ii) if not, has he the right to use the water if, and so far as, there may be any water in the pond for the purposes of his cattle. It is a question of the construction of the general words of the Conveyancing Act. Was there anything existing at the time of the conveyance which could pass by those words—that is, any right at then enjoyed with the plaintiff's orchard, which abuts on the pond? In dealing with the first point, I am bound by the judgment of Cotton, L.J., in *Birmingham, Dudley and District Banking Co. v. Ross* (1) to consider all the facts and circumstances of the case. This is an artificial watercourse, flowing through a porous channel, and made entirely and solely for the use of the mill. I must ask whether I am to infer from this that there had been an intention to grant the right to send down water whether he wanted it or not. There is another question, which is whether the artificial watercourse was made for a temporary purpose or not. Counsel for the plaintiff argued that it was not temporary. He sought to distinguish this case from the case of water pumped over a man's land. To my mind this is a distinction which is against him. He sought to distinguish *Akerwright v. Gell* (2) on the ground that here the purpose was not temporary. But in that case the learned judge thought that the watercourse was "temporary" within the meaning of the authorities, i.e., that it was to be co-extensive with the carrying on of the mill. Following what was said in *M'Eroy v. Great Northern Rail. Co.* (3) (1900] 2 I.R. at p. 333), I must determine the question whether I can draw from the fact that the water abuts on the plaintiff's land any presumption that it was led there for his benefit. I must hold, therefore, that no right has been shown to compel a continuous flow of water into the pond. If I were to hold otherwise, very serious consequences would result for the defendant, not only in view of the plaintiff's right, but also owing to the defendant's liabilities towards the lower riparian owners. In my opinion, the plaintiff's first point fails.

Then comes the question of the right of the plaintiff to use the water if and when it is there. This is a right which in my opinion is inconsistent with the very idea of an easement of water. According to COKE's definition of an easement it must be held *nee per vim, nee clam, nee precario*. You cannot create a new right which is something short of an easement, a thing which is held *nee per vim, nee clam, sed precario*. That which depends on the will of another person in my opinion comes within the meaning of precarious. So far as I know such a right as that now claimed is unknown to the law, and, therefore, cannot pass under s. 6 of the Conveyancing Act. The plaintiff's claim, therefore, wholly fails, and I can do nothing but dismiss the action with costs.

Solicitors: *T. White & Sons*, for *J. C. Howellin*, Newport; *Warriner & Co.*, for *Davis, Lloyds & Wilson*, Newport.

[Reported by E. GREENWOOD, Esq., Barrister-at-Law.]

Re BEAUMONT. BEAUMONT v. EWBANK.

[CHANCERY DIVISION (Buckley, J.), February 26, 27, 1902]

[Reported [1902] 1 Ch. 889; 71 L.J.Ch. 478; 86 L.T. 410; 50 W.R. 389;
46 Sol. Jo. 317]

Gift—Donatio mortis causâ—Cheque—Drawn on overdrawn account—Presented, but not paid, before donor's death.

The handing over to a donee of a cheque drawn by a donor on an overdrawn bank account does not constitute a valid donatio mortis causâ where the cheque has been presented but not paid at the time of the donor's death.

Hewitt v. Kage (1) (1868), L.R. 6 Eq. 198 and *Re Beak's Estate, Beak v. Beak* (2) (1872), L.R. 13 Eq. 489, followed.

Bromley v. Brunton (3) (1868), L.R. 6 Eq. 275, explained.

Notes. Applied: *Re Leaper, Blythe v. Atkinson*, [1916] 1 Ch. 579. Considered: *Re Swinburne, Sutton v. Featherley* (1925), 70 Sol. Jo. 64. Applied: *Bank of Baroda, Ltd. v. Punjab National Bank, Ltd.*, [1944] All E.R. Rep. 83. Considered: *Birch v. Treasury Solicitor*, [1950] 2 All E.R. 1198. Referred to: *Re Owen, Owen v. I.R. Comrs.*, [1949] 1 All E.R. 901.

As to validity of a gift mortis causa, see 18 HALSBURY'S LAWS (3rd Edn.) 403-405; and for cases see 25 DIGEST 541-556.

Cases referred to:

- (1) *Hewitt v. Kage* (1868), L.R. 6 Eq. 198; 37 L.J.Ch. 633; 32 J.P. 776; 16 W.R. 835; 25 Digest 547, 327.
- (2) *Re Beak's Estate, Beak v. Beak* (1872), L.R. 13 Eq. 489; 41 L.J.Ch. 470; 26 L.T. 281; 36 J.P. 436; 25 Digest 548, 331.
- (3) *Bromley v. Brunton* (1868), L.R. 6 Eq. 275; 37 L.J.Ch. 902; 18 L.T. 628; 16 W.R. 1006; 25 Digest 533, 227.
- (4) *Gardner v. Parker* (1818), 3 Madd. 184; 56 E.R. 478; 25 Digest 544, 307.
- (5) *Duffield v. Elwes* (1823), 1 Sim. & St. 239; reversed (1827), 1 Bli.N.S. 497; 4 E.R. 959; sub nom. *Duffield v. Hicks*, 1 Dow. & Cl. 1, H.L.; 25 Digest 549, 351.
- (6) *Veal v. Veal* (1859), 27 Beav. 303; 6 Jur.N.S. 527; 8 W.R. 2; 54 E.R. 118; sub nom. *Re Veal, Veal v. Veal*, 29 L.J.Ch. 321; 2 L.T. 228; 25 Digest 546, 317.
- (7) *Rankin v. Weguelin* (1832), 27 Beav. 309; 29 L.J.Ch. 323, n.; 54 E.R. 121; 25 Digest 546, 316.
- (8) *Re Mead, Austin v. Mead* (1880), 15 Ch.D. 651; 50 L.J.Ch. 30; 43 L.T. 117; 28 W.R. 891; 25 Digest 546, 318.
- (9) *Clement v. Cheesman* (1884), 27 Ch.D. 631; 54 L.J.Ch. 158; 33 W.R. 40; 25 Digest 546, 319.
- (10) *Re Dillon, Duffin v. Duffin* (1890), 44 Ch.D. 76; 59 L.J.Ch. 420; 62 L.T. 614; 38 W.R. 369; 6 T.L.R. 204, C.A.; 25 Digest 543, 298.
- (11) *Hopkinson v. Forster* (1874), L.R. 19 Eq. 74; 23 W.R. 301; 3 Digest (Repl.) 187, 339.

Also referred to in argument:

- Cain v. Moon*, [1896] 2 Q.B. 283; 65 L.J.Q.B. 587; 74 L.T. 728; 40 Sol. Jo. 500, D.C.; 25 Digest 541, 286.
- Edwards v. Jones* (1836), 1 My. & Cr. 226; 5 L.J.Ch. 194; 40 E.R. 361, L.C.; 25 Digest 535, 248.
- Rolls v. Pearce* (1877), 5 Ch.D. 730; 46 L.J.Ch. 791; 36 L.T. 438; 25 W.R. 899; 25 Digest 548, 335.

Originating Summons to determine whether a testator shortly prior to his death made an effective donatio mortis causâ to his sister of the sum of £300 being the

amount of a cheque drawn by the testator in favour of and given by him to her A shortly before his death.

The Feb. 19, 1901, one Beaumont was very ill and in expectation of death. His niece was called to his room, and he told her he must draw a cheque in favour of his niece, Mrs. Ewbank, at once for fear he got worse and was unable to do it at all. The niece got his cheque-book, and by his directions filled up a cheque for £300 and he signed it. He did not hand the cheque himself to Mrs. Ewbank, although she was in the same house, but it was, at his request, handed by his niece to Mrs. Ewbank who, on the following day, sent the cheque to her bankers for collection, and they presented it for payment at the bank on which it was drawn on Feb. 20. Beaumont's account there was overdrawn, and the bank manager did not pay the cheque, but returned it and required Beaumont's signature on the cheque to be confirmed. On Feb. 25 Beaumont died, and the cheque was never cashed. B C

The executors of Beaumont took out an originating summons to determine whether there was a valid *donatio mortis causâ*.

P. Tindal-Robertson for the executors of Beaumont.

C. H. Sargant for Mrs. Ewbank.

A. H. Jessel for the residuary legatees. D

Cur. adv. vult.

BUCKLEY, J.—The question to be determined is whether the deceased made a valid *donatio mortis causâ* to his sister, Mrs. Eva Ewbank, of a sum of £300. Subject to a more accurate statement of the facts hereafter, it is sufficient for the moment to say that the act which the deceased did was to hand, or cause to be handed, to his sister a cheque for £300, which before his death was not paid. E

Donatio mortis causâ is a singular form of gift. It is, if I may use the expression, of an amphibious nature—neither a complete disposition *inter vivos* nor a testamentary gift. It is something done by which the donee is to have an absolute title if the donor dies, but not otherwise. If he dies, the donee's title becomes absolute, and becomes absolute not under but against the executor of the donor. In order F to constitute a valid *donatio mortis causâ* the gift must be one intended to take complete effect only in the event of the donor's death. The court must find as a fact that the donor did not intend the gift to be absolute if he did not die. It is not necessary to find that in express words, but that must be the true inference from the facts of the case. To read from the judgment of Sir JOHN LEACH, V.-C., in *Gardner v. Parker* (4) (3 Madd. at p. 185): G

"It was the intention of the donor that it should be held as a gift only in case of his death. If a gift is made in expectation of death, there is an implied condition that it is to be held only in the event of death."

That, therefore, is a question of fact to answer as best one can. Is it under the circumstances of the case to be inferred that the gift was not present and absolute, but was only to take effect in case of death? In *Duffield v. Elwes* (5) Sir JOHN LEACH, V.-C., held that a mortgage or bond given as a collateral security for money due on mortgage could not be made the subject of a *donatio mortis causâ*. That decision was reversed by Lord ELPHINSTONE, sitting in the House of Lords, who there pointed out that in a case of *donatio mortis causâ* the question is not similar to that which arises where a court of equity is asked to give complete effect to an incomplete voluntary conveyance, because it is of the very nature of a *donatio mortis causâ* that the title of the donee is not complete till the donor is dead. The question is not whether the donee has acquired a complete title, but whether he has acquired a right against the legal personal representative of the donor to have his title made complete—that is, whether the legal personal representative is a trustee for the donee. Lord ELPHINSTONE points that out, and concludes (1 Bl. N.S. at p. 548): H I

"The opinion which I have formed is, that this is a good *donatio mortis causâ*, raising by operation of law a trust."

A Accordingly, upon the principle of *Duffield v. Elwes* (5), the following have been held to be good donationes mortis causa: First, a promissory note payable to the order of the deceased, but not endorsed; *Veal v. Veal* (6); secondly, bills of exchange to the order of the deceased, which from the report I gather, though it is not distinctly stated, had been endorsed by the donor; but this, however, is unimportant; *Hankin v. Wiegulin* (7); thirdly, bills of exchange in favour of the deceased, or order, unendorsed; *Re Mead, Austin v. Mead* (8); fourthly, a cheque payable to the donor or order and unendorsed; *Clement v. Cheesman* (9); and, lastly, a deposit note of the London and Westminster Bank; *Re Dillon, Duffin v. Duffin* (10). In all these cases of mortgage debt, promissory note, bill of exchange, and deposit receipt, the donee had not got a complete title, but there had been handed over to him the indicia of property—that is, the property had been given to him on terms that it was to be his if the donor died—and against the legal personal representative of the donor he could say, in the case of a mortgage debt, “sue the mortgagor,” and in the case of a bill of exchange, “lend me your name so as to make effectual the trust in my favour.”

D But how does the matter stand as regards the deceased's own cheque? It is plain law that a donor's own cheque in favour of another and handed to that other, does not operate as an equitable assignment in favour of the donee of the donor's balance at his bankers; *Hopkinson v. Forster* (11). The cheque is no more than a revocable mandate which the drawer can at any time before payment revoke, and which in the event of his death is ipso facto revoked, and becomes inoperative. If before the donor's death the cheque is presented and paid, the donee receives money, and there is no question of a donatio mortis causa of a cheque. The only question, then, is whether the money was received on the terms that the donee should only keep it if the donor died. But if the cheque be not presented or paid before the donor's death, it is no more than an ineffectual revocable order which is revoked by the donor's death. For that proposition I refer to *Hewitt v. Kaye* (1) and *Re Beak's Estate* (2). In the latter case there was an additional feature which BACON, V.-C., held made no difference—viz., the delivery of a banker's pass book, which may be said to be the banker's acknowledgment of a debt. But the Vice-Chancellor held it was no further disposition of property than was effected by the delivery of the cheque. In *Re Dillon, Duffin v. Duffin* (10)—a case of a deposit note—LINDLEY, L.J., said (44 Ch.D. at p. 83):

G “It is said that here there was no good donatio mortis causa, because a man cannot make such a gift of his own cheque. I will assume that to be correct, though I think it may some day require consideration; but assuming it to be correct, I think it does not dispose of the present case.”

H If the doctrine of *Hewitt v. Kaye* (1) and *Re Beak's Estate* (2) is to be reconsidered, it must be in a higher court than this. Those are authorities binding on me, and I follow them. But, as the parties may wish to carry this case further, I desire to state my own view of the law. It appears to me that in all those cases of mortgage debt, promissory notes, etc., that which was handed over by the deceased to the donee, was property or indicia of property belonging to the donor. The donor's cheque is not property at all. It is a mere revocable mandate—it is not the handing of money. If the donee goes to the banker and the banker does an act, either by paying the cheque or by undertaking to hold the amount of it for the donee, there is a traditio thus constituted—a delivery of property. If the cheque is acted on thus, you may reach an equitable assignment of the amount to the credit of the donor, pro tanto, at the bank. But unless you get as far as that, there is no delivery of property at all, but only an order which, if acted upon, will lead to the passing of property. The decision of STUART, V.-C., in *Bromley v. Brunton* (3) at first puzzled me. There the deceased gave a cheque to the donee who presented it at the bank, the donor's account being in credit; but the banker was not sure about

the signature and wished to verify it, and refused payment on that ground. The donor died, and the cheque had not been paid. The Vice-Chancellor held that there was a complete gift *inter vivos* of the amount of the cheque. That decision must have been based on one of two grounds—either that the cheque was constructively paid when the banker received it, and substantially said: "I will pay this, but must see that the signature is all right," so that you get payment referred back to a time before the death of the donor; or the banker was to be taken to have said: "The account is in credit; I will hold the requisite amount for you to answer the cheque subject to my being satisfied as to the signature." That may have been by reason of the act of the banker a good equitable assignment. The Vice-Chancellor said (L.R. 6 Eq. at p. 277):

"The effect of the cheque was to appropriate so much of the donor's money, and my opinion is that the funds, the subject of the gift, are in the hands of the executors just as much liable to the payment of the cheque as they were in the hands of the bankers."

I cannot suppose that the Vice-Chancellor meant by that that a cheque is an equitable assignment. If you insert these words, and read it in this way, it is sound: "The effect of the cheque and of the banker's action in respect of it was to appropriate so much of the donor's money to meet the cheque." The bank there had in effect honoured the cheque. If so read *Bromley v. Branton* (3) does not seem in conflict with *Hewitt v. Kaye* (1) and *Re Beak's Estate* (2); and I think all the authorities are rightly to the effect that the donor's own cheque given and not acted on by payment, either actually or constructively made, will not constitute a valid *donatio mortis causa*.

With that statement of the law, I will state shortly what the facts are in this particular case. [HIS LORDSHIP then stated the facts as above, and continued:] The delivery by the niece to the sister was, for the purpose of a *donatio mortis causa*, as effectual as if the deceased had given it himself. The circumstances were such as that I infer he gave it in anticipation of his death, and to take effect as a *donatio mortis causa* if he died. But the legal result is, that in the first place there cannot have been, as in *Bromley v. Branton* (3), anything which, by coupling the deceased's act and the banker's act, constituted an equitable assignment of moneys in the banker's hands, because there were none such. Even if the banker was minded to lend, it was not binding on him, because there was no consideration moving at all. It would have been a purely voluntary promise; and if, when the cheque came back with the signature confirmed, he had said "I will not lend," he would have been within his rights. The donee acquired no rights, but a mere expectation. Even if the banker did not change his mind, but remained in the mind to lend, still an agreement to lend is not an enforceable agreement, and the donee acquired no right to property.

I hold, therefore, that there was no valid *donatio mortis causa* for two reasons—first, because the mere drawing by the deceased of a cheque and the handing over of the cheque to the drawee, coupled with the subsequent acts, did not amount to such a delivery or traditio as is required in order to give the donee a right to the cheque to become absolute in the event of the death of the donor; secondly, that even if it might have been enough if the account had been in credit, yet, inasmuch as it was in debit, there could not be any such right. Suppose the case of a cheque given by a person seriously ill, and the donee goes to the bank—say a small country branch—just before closing hours, and presents the cheque, and the cashier, who may be the only person in charge, says he is in a hurry to catch a train, and asks the drawee to call in the morning as a favour to him, and says he will pay the cheque then, and the drawee says he will, and the drawer dies during the night. If that is so, the bank, by undertaking to pay the next morning, may have appropriated a sufficient amount of the credit balance to meet the cheque. That might be a good *donatio mortis causa*, but here the facts do not come up to

A that. There was not any promise to pay, in fact, when the cheque was presented, and as this account was in debit, there could not have been a promise to pay, but only a promise to lend. On these grounds I hold that there is no valid donatio mortis causâ.

B Solicitors: *Lowndes & Son*, for *Griffith, Davie & Smith*, Brighton; *St. Barbe Sladen & Wing*.

[Reported by H. PROCTER, Esq., Barrister-at-Law.]

SPURRIER AND ANOTHER v. LA CLOCHE

[PRIVY COUNCIL (Lord Macnaghten, Lord Davey, Lord Robertson, Lord Lindley and Sir Ford North), April 16, 17, May 14, 1902]

[Reported [1902] A.C. 446; 71 L.J.P.C. 101; 86 L.T. 631; 51 W.R.1; 18 T.L.R. 606]

Conflict of Laws—Contract—Proper law—Intention of parties.

The intention of the parties to a contract is the true criterion by which to determine by what law it is to be governed.

Hamlyn & Co. v. Talisker Distillery (1), [1894] A.C. 202, applied.

Arbitration—Ouster of jurisdiction of court—Contract—Insurance policy—No right of action before determination of liability and amount payable by arbitrator.

Where a contract is framed so as to give no cause of action unless a certain condition is performed, e.g., the determination by an arbitrator of liability and the amount payable under the contract, no question of ousting the jurisdiction of the court arises.

Scott v. Avery (2) (1856), 5 H.L.Cas. 811, applied.

Notes. Referred to: *Cayzer Irvine & Co. v. Board of Trade* (1926), 95 L.J.K.B. 1054; *Kadel Chajkin and Ce De, Ltd., v. Mitchell Cotts & Co. (Middle East), Ltd., and A/S Motortramp*, [1947] 2 All E.R. 786.

As to means of ascertaining proper law of contract where intention of parties is not expressed, see 6 HALSBURY'S LAWS (3rd Edn.) 74-76; and for cases see 11 DIGEST (Repl.) 422-425.

Cases referred to:

(1) *Hamlyn & Co. v. Talisker Distillery*, [1894] A.C. 202; 71 L.T. 1; 58 J.P. 540; 10 T.L.R. 479; 6 R. 188, H.L.; 11 Digest (Repl.) 423, 724.

(2) *Scott v. Avery* (1853), 8 Exch. 487; 22 L.J.Ex. 157; reversed, 8 Exch. 497; 22 L.J.Ex. 287; 17 Jur. 810, Ex. Ch.; affirmed (1856), 5 H.L.Cas. 811; 25 L.J.Ex. 308; 28 L.T.O.S. 207; 2 Jur.N.S. 815; 4 W.R. 746; 10 E.R. 1121, H.L.; 2 Digest (Repl.) 465, 290.

(3) *Caledonian Insurance Co. v. Gilmour*, [1893] A.C. 85; 57 J.P. 228; 9 T.L.R. 146; 1 R. 110, H.L.; 2 Digest (Repl.) 473, 332.

(4) *Southern v. Voisin* (1892), July 5, unreported.

Also referred to in argument:

Mackay v. Dick (1881), 6 App. Cas. 251; 29 W.R. 541, H.L.; 39 Digest 647, 2424.

Elliott v. Royal Exchange Assurance Co. (1867), L.R. 2 Exch. 237; 36 L.J.Ex. 129; 16 L.T. 399; 15 W.R. 907; 2 Digest (Repl.) 472, 328.

Trainor v. Phoenix Fire Assurance Co. (1891), 65 L.T. 825; 8 T.L.R. 37; 2 Digest (Repl.) 471, 321.

East and West India Dock Co. v. Kirk and Randall (1887), 12 App. Cas. 732; 57 L.J.Q.B. 295; 58 L.T. 158; and nom. *Kirk v. East and West India Dock Co.*, 3 T.L.R. 821, H.L.; 2 Digest (Repl.) 511, 562.

Appeal against two judgments of the Superior Number of the Royal Court of Jersey, delivered respectively on Dec. 3, 1900, and Dec. 5, 1900, affirming two interlocutory judgments of the Inferior Number of the Royal Court given on Nov. 6 and 16, 1899, respectively, and a final judgment of the Inferior Number given on Nov. 6, 1900.

The appellants were agents in Jersey of the Sun Fire Office, which was a corporation carrying on the business of fire insurance. On Jan. 1, 1897, the respondent effected in the island of Jersey with the appellants as such agents a policy of insurance against fire on certain postage stamps for the sum of £1,000 at the annual premium of £2 5s. The policy was signed by both appellants. The respondent duly paid the premium and the policy was, on the date of the fire hereinafter mentioned, a valid and subsisting policy. On Dec. 17, 1898, the stamps were destroyed by fire at the house of the respondent in Jersey, and the respondent without delay gave notice of his loss to the appellants and claimed the sum of £1,000. The Sun Fire Office delayed to satisfy the respondent's claim from December, 1898, until May, 1899. On May 17, 1899, the respondent, acting under cl. 12 of the policy, appointed one Peter Philip Guiton, of Jersey, to be arbitrator, and notified the Sun Fire Office of such appointment. The Sun Fire Office thereupon appointed one Arthur Thwaites, of London, to be the second arbitrator under the said clause, and required the arbitrators to appoint an umpire. Arthur Thwaites submitted to Peter Philip Guiton the names of three English barristers, all practising in London, to which names Peter Philip Guiton objected, and required Arthur Thwaites to agree to the appointment as umpire of some local man, but Arthur Thwaites refused to agree to such an appointment. No umpire was ever appointed by the arbitrators. On Sept. 30, 1899, the respondent instituted proceedings against the appellants in the Royal Court of the Island of Jersey to recover (inter alia) the sum of £1,000 upon the policy. The appellants appeared and (reserving all other defences of law and of fact) admitted that the Royal Court had jurisdiction over the whole matter but objected that the respondent had no right to proceed with his suit until a preliminary condition had been fulfilled that is to say until the amount (if any) due under the policy had been fixed by arbitrators or umpire pursuant to cl. 12 of the policy. On Oct. 9, 1899, the Royal Court upon hearing the objection of the appellants ordered that the arbitrators should be summoned to appear before the Royal Court.

On Nov. 6, 1899, the arbitrators appeared before the Royal Court and Arthur Thwaites denied the jurisdiction of the Royal Court, and refused to acknowledge its competence to interfere with him as arbitrator appointed by the appellants. The Royal Court thereupon ordered the appellants to appoint in place of Arthur Thwaites another arbitrator who should in his capacity of arbitrator recognise the jurisdiction of the Royal Court and that in default of so doing the appellants should plead to the action. Leave was given to the appellants to appeal to the Superior Number of the Royal Court en fin de cause. The appellants declined to appoint another arbitrator in place of Arthur Thwaites, and on Nov. 16, 1899, Peter Philip Guiton and Arthur Thwaites were dismissed from the suit and the parties were sent before the Greffier, before whom evidence by both parties was received. On Nov. 6, 1900, the Inferior Number of the Royal Court by a final judgment condemned the appellants to pay to the respondent the sum of £1,000, and on Dec. 4, 1900, the Appeal Court of the Royal Court confirmed the two interlocutory judgments aforesaid and also the final judgment.

Cohen, K.C., and Wood Hill for the appellants.

R. Storry Deans for the respondent.

A May 14, 1902. **LORD LINDLEY.**—The question raised by this appeal is whether the Royal Court of Jersey has given due effect to an arbitration clause contained in a policy of assurance against loss by fire. The policy in question is dated Jan. 4, 1897. It is a fire policy for £1,000 issued by the Sun Fire Office in favour of a Jersey gentleman named La Cloche on a collection of foreign stamps. The policy is in the English language, but it was executed in Jersey by the agents of the company. By the terms of the policy the company agrees with the assured subject to the conditions indorsed to pay what may become due in case of loss out of its capital stock and funds. The witnessing part runs thus:

B "In witness whereof I for and on behalf of the said company have hereunto set my hand and seal this 4th day of January, 1897. Signed SPURRIER and J.E. CRONIER, agent to the Sun Fire Office. Signed and sealed at Jersey, where no stamps are in use, in the presence of Spurrier, Jersey."

C Then there was a seal. The conditions indorsed are fourteen in number. They are in the English language. The twelfth condition, which is the only material one, is as follows:

D "12. If any difference shall at any time arise between the company or the insured or any claimant under this policy as to the liability or the amount or extent of the liability of the company in respect of any claim for loss or damage by fire or as to any question, matter, or thing, concerning or arising out of any claim for loss or damage under this policy, every such difference as and when the same arises, shall be referred to the arbitration of some person to be appointed in writing by both parties, or two indifferent persons, one to be appointed in writing by the party claiming and the other by the company, within one calendar month after either party has been required so to do by the other party, and in case of disagreement between the arbitrators then to the decision of an umpire, who shall have been appointed in writing by the arbitrators before entering on the reference, and shall sit with the arbitrators and preside at their meetings during the reference, unless the arbitrators shall otherwise agree in writing, and the death of any of the parties shall not revoke or affect the authority or powers of any arbitrator or umpire, and each party shall bear or pay his own costs of the reference and a moiety of the costs of the award, and in all other respects the submission to arbitrators shall be subject to the provisions of the Arbitration Act, 1889, or any statutory modification thereof, and may be made a rule of Her Majesty's High Court of Justice in any division, upon the application of either of the parties. And it is hereby expressly declared to be a condition precedent to the liability of the company in respect of any claim under this policy that the claim shall if not admitted, be referred to and determined by such arbitrator, arbitrators, or umpire as aforesaid, and the claimant shall have no right of action against the company except for the amount of the claim if admitted, or the amount, if any, awarded by the award of such arbitrator, arbitrators, or umpire."

H The first question which arises is whether this is to be regarded as an English contract or as a Jersey contract. Their Lordships are of opinion that, although this policy was made in Jersey and any money payable under it would have to be paid to the assured in Jersey, the nature of the transaction, the language in which the policy is expressed, and the terms of the agreement and of the conditions, all show that the contract between the parties is an English contract, and that wherever sued upon its interpretation and effect ought as a matter of law to be governed by English and not by Jersey law. The intention of the parties is too plain to be mistaken; the contract to pay out of the funds of the company is of itself very significant; and the reference to the English Arbitration Acts shows that the arbitration proceedings were to be conducted according to English law and no other. That the intention of the parties to a contract is the true criterion by which to determine by what law it is to be governed is too clear for controversy:

see *Hendry & Co. v. Tatham Distillery* (1), and the intention here is unambiguous. A
It does not follow that the agents who signed the policy in Jersey were not liable to be sued in Jersey upon it as their principals were in this country. But whatever would be a defence by the law of England for the company on the merits to an action against the company on the policy would be a defence for the agents if sued in Jersey for the nonpayment of money payable under the policy by the company.

It follows from these observations that no action could be maintained in Jersey any B
more than in this country for any money payable under the policy unless and until the amount so payable had been settled by arbitration pursuant to the 12th condition: see *Scott v. Avery* (2); and *Caledonian Insurance Co. v. Gilbeour* (3). The contract is one on which no cause of action could accrue until the amount to be paid had been determined by arbitration, and by arbitration as provided by the contract. Counsel for the respondent contended that the arbitration clause was C
invalid by the law of Jersey because not only the amount payable, but also the liability to pay was to be decided by arbitration; and that this was an illegal attempt to oust the jurisdiction of the court, and went further than *Scott v. Avery* (2). But if a contract is so framed as to give no cause of action unless a certain condition is performed no question arises as to ousting the jurisdiction of any D
court. It was by not observing the difference between no cause of action and a defence which assumes a cause of action, but is based on the incompetence of a particular court to enforce it that the Court of Exchequer went wrong in *Scott v. Avery* (2). The oversight was pointed out and corrected in the Exchequer Chamber, and, again in the House of Lords. MAULE, J., put the matter in the true light in the Exchequer Chamber. He there said (8 Exch. at p. 499):

"There is no decision which prevents two persons from agreeing that a sum of money shall be payable on a contingency; but they cannot legally agree E
that when it is payable no action shall be maintained for it."

Counsel for the respondent cited no authority to show that by the law of Jersey such a condition as that which has to be considered in this case is invalid, and could be rejected even in a contract governed by the law of Jersey. Judging from the decision in *Southern v. Voisin* (4) it would seem that the law as laid down in *Scott v. Avery* (2) prevails in Jersey. But in those cases the question of liability was not left to the arbitrator. However, even if the law of Jersey had been shown to be what counsel contended it was, the answer to his argument would still be that this policy is governed by the law of this country, and not by the law of Jersey; F
and that the distinction he drew between arbitrations in which liability is left to arbitrators, and those in which the amount payable only is so left is immaterial where an award settling the amount is a condition precedent to the right to payment of anything. G

The foregoing observations really dispose of this appeal. What happened was as follows: In December, 1898, a fire occurred in the house of the assured, and his collection of stamps was damaged or destroyed. He gave notice of his loss and H
claimed £1,000. He appointed a Jersey gentleman (Guiton) his arbitrator. The Sun Fire Office appointed an English gentleman (Thwaites) their arbitrator. The arbitrators could not agree upon an umpire. Thwaites wanted an English barrister, Guiton wanted some gentleman resident in Jersey which would save expense. Neither can be blamed for not giving way to the other. No application was made I
under the English Acts to the courts of this country to appoint an umpire. The company could not proceed adversely to the assured, who was beyond the jurisdiction of the English courts, and the assured preferred to apply to the court in Jersey. Failure to agree upon an umpire brought the arbitration proceedings to a deadlock. On Sept. 30, 1899, the assured brought an action in the Royal Court in Jersey on the policy against the agents, who signed it, and he claimed £1,000. The defendants relied on the 12th condition and the absence of any award as a defence to the action. On Oct. 9, 1899, the Royal Court ordered that the arbitrators should be summoned

to appear. On Nov. 6 they did appear. Thwaites appeared by counsel and objected to the jurisdiction of the court over him. The court then ordered the defendants to appoint another arbitrator in his place. The defendants declined to do this, and the arbitrators were then dismissed from the action, which was remitted to the Greffier to assess the amount payable to the plaintiff. On Nov. 6, 1900, the plaintiff recovered judgment for £1,000, and on Dec. 4, 1900, the Appeal Court confirmed the preceding orders and judgment. The present appeal is from this judgment of the Appeal Court and from the orders and judgment thereby confirmed.

On the merits of the case their Lordships do not think it necessary to add to what has already been said. No reasons are given for the judgment appealed from, and their Lordships cannot make any observations upon them. The judgment appears to them erroneous in principle. The order of Nov. 6, 1899, requiring the defendants to appoint another arbitrator in the place of Mr. Thwaites appears to their Lordships to be erroneous for two reasons, viz., (i) because Mr. Thwaites had done nothing to justify his removal, and (ii) because, if he had, the court in Jersey was not the proper tribunal to remove him. The English Arbitration Act conferred no such power on any foreign court. Their Lordships will, therefore, humbly advise His Majesty that the appeal ought to be allowed, and that the judgment of the Royal Court of Jersey of Dec. 14, 1900, and the orders and judgment thereby affirmed, ought to be reversed, and that judgment ought to be given for the defendants with costs. The respondent having obtained leave to defend this appeal in forma pauperis, no order can be made as to the costs of the appeal.

Solicitors : *Dawes & Sons; Hargreaves & Joblin.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

ALMAN v. OPPERT

[COURT OF APPEAL (Henn Collins and Stirling, L.JJ.), June 21, 1901]

[Reported [1901] 2 K.B. 576; 70 L.J.K.B. 745; 84 L.T. 828; 17 T.L.R. 620;
45 Sol. Jo. 615; 8 Mans. 316]

Practice—Particulars—Company—Action against directors for untrue statements in prospectus—Defence of reasonable grounds of belief—Directors Liability Act, 1890 (53 & 54 Vict., c. 64.), s. 3.

Where in an action under s. 3 of the Directors Liability Act, 1890 [now s. 43 of the Companies Act, 1948] against company directors in respect of alleged untrue statements in a company prospectus the directors plead as a defence "reasonable grounds" for believing the statements to be true the plaintiffs are entitled to further and better particulars of such reasonable grounds.

Notes. The liability of directors for untrue statements in company prospectuses is now governed by the Companies Act, 1948, s. 43 (3 HALSBURY'S STATUTES (2nd Edn.) 493-496) which replaces s. 3 of the Directors Liability Act, 1890.

Referred to : *Liversidge v. Anderson*, [1941] 3 All E.R. 338.

As to occasions when particulars will be ordered of grounds of belief, see THE ANNUAL PRACTICE, Ord. 19, r. 6 and notes.

Appeal against the refusal by DAY, J., of an application by the plaintiffs for particulars.

The action was brought by the holders of some mortgage debentures issued by a company against the directors claiming compensation, under s. 3 of the Directors

Liability Act, 1890, in consequence of certain statements in the prospectus which the plaintiffs alleged were untrue, and on the faith of which the plaintiffs applied for the debentures. By their statement of defence the directors alleged that when the prospectus was issued they and each of them "bona fide believed, and still bona fide believe, the statements in the prospectus to be true, and the defendants had reasonable grounds for such belief." The plaintiff applied for an order directing the defendants to deliver particulars of the grounds of their belief. DAY, J., refused the application, and the plaintiffs appealed.

Montague Lush for the plaintiffs.

Bremner for the defendants.

HENN COLLINS, L.J.—In my opinion, having regard to the provisions of the Act, particulars ought to be given by the defendants. The cardinal question is, whether the directors had reasonable grounds for believing the statements in the prospectus to be true. That being the question, it would be very strange that the person whose business it will be at the trial to dispute the reasonableness of the grounds of belief should not be entitled to know beforehand what those grounds were. A person who sets up as his defence that he believed a statement, and had reasonable grounds for so doing, can hardly say that it would be an intolerable burden to state the grounds of his belief, and I do not think it would be unfair to impose that burden on him. I can quite understand that there may be difficulties in stating the grounds of belief, but I do not think the task is impossible. There are other cases in which particulars, addressed to the state of a person's mind, are ordered as a matter of course, i.e., in an action for malicious prosecution, particulars going to the question whether the defendant had reasonable and probable cause for what he did. Such cases can be dealt with in practice without a study of metaphysics. There is, of course, underlying the giving of particulars the cardinal principle that no one can be compelled to do that which is impossible, and if a defendant is unable to analyse the grounds of his belief he must say so. In my opinion the appeal should be allowed, and the defendants must pay the costs.

STIRLING, L.J.—I agree. I do not think the task of giving these particulars is so difficult as is alleged. The object of particulars is simply to enable the opposite party to know the case which he will have to meet at the trial. In the present case the question is whether the defendants had reasonable grounds for believing certain statements to be true. It appears to me perfectly possible for the defendants, without disclosing their evidence, to state in general terms the grounds of their belief. I think that, according to the ordinary rule, particulars are necessary beyond what is stated in the defence.

Appeal allowed.

Solicitors: *Haslam & Co.; Ashurst, Morris & Co.*

[*Reported by W. C. Biss, Esq., Barrister-at-Law.*]

Re WESTON. BARTHOLOMEW v. MENZIES

CHANCERY DIVISION (Byrne, J.), January 21, February 14, 1902]

[Reported [1902] 1 Ch. 680; 71 L.J.Ch. 343; 86 L.T. 551; 50 W.R. 294;
18 T.L.R. 326; 46 Sol. Jo. 281]

Gift—Donatio mortis causa—Delivery of subject-matter of gift—Key handed to donee of drawer containing certificates of building society shares and Post Office Savings Bank deposit book—Expression by donor of wish that donee should have all his property on his death.

T. W., when lying ill in hospital, gave to H. M., to whom he was engaged to be married, the key of a drawer in his bedroom in which the certificates for eight investment shares in a building society, and a Post Office Savings Bank book were kept, and told her to keep them. H. M. subsequently offered them with the key to T. W., who said he wished her to keep them, and later also stated that he wished, in the event of his death, all his property, with one small sum excepted, to be hers. On the death of T. W. letters of administration were taken out to his estate by B. H. M. claimed the shares and the money standing to the deceased's credit in the Post Office Savings Bank.

Held: the shares were not the proper subject-matter of a donatio mortis causa, but the Savings Bank book was capable of being given so as to create such a gift.

Re Dillon, Duffin v. Duffin (1) (1890), 44 Ch.D. 76, followed.

M'Gonnell v. Murray (2) (1869), 3 I.R.Eq. 460, distinguished.

Notes. Followed: *Darlow v. Sparks*, [1938] 2 All E.R. 235. Considered: *Delgoffe v. Fader*, [1939] 3 All E.R. 682; *Re Ward, Ward v. Warwick*, [1946] 2 All E.R. 206. Referred to: *Re Andrews, Andrews v. Andrews*, [1902] 2 Ch. 394; *Birch v. Treasury Solicitor*, [1950] 2 All E.R. 1198.

As to gifts mortis causa, see 18 HALSBURY'S LAWS (3rd Edn.) 400-406, and for cases see 25 DIGEST 541 et seq.

Cases referred to:

- (1) *Re Dillon, Duffin v. Duffin* (1890), 44 Ch.D. 76; 59 L.J.Ch. 420; 62 L.T. 614; 38 W.R. 369; 6 T.L.R. 204, C.A.; 25 Digest 543, 298.
- (2) *M'Gonnell v. Murray* (1869), 3 I.R.Eq. 460; 25 Digest 555, 399*vi*.
- (3) *Moore v. Moore* (1874), L.R. 18 Eq. 474; 43 L.J.Ch. 617; 30 L.T. 752; 38 J.P. 804; 22 W.R. 729; 25 Digest 531, 209.
- (4) *Cassidy v. Belfast Banking Co.* (1887), 22 L.R.Ir. 68; 25 Digest 545, 311*x*.
- (5) *Moore v. Darton* (1851), 4 De G. & Sm. 517; 20 L.J.Ch. 626; 18 L.T.O.S. 24; 64 E.R. 938; 25 Digest 541, 288.
- (6) *Duckworth v. Lee*, [1899] 1 I.R. 405; 25 Digest 547, *e*.
- (7) *Hewitt v. Kay* (1868), L.R. 6 Eq. 198; 37 L.J.Ch. 633; 32 J.P. 776; 16 W.R. 835; 25 Digest 547, 327.

Adjourned Summons to determine whether a gift was a valid donatio mortis causa.

Thomas Weston had been a butler in domestic service, and had for seven years before his death been engaged to the defendant, Helen Menzies, who at one time had been his fellow-servant, and it had been arranged that they should be married early in 1901. On Feb. 28, 1901, Weston, who had been taken ill, was visited in hospital by the defendant to whom he told that he was possessed of eight investment shares of £25 each in the Hearts of Oak Permanent Building Society, and about £130 in the Post Office Savings Bank, which was the whole of his property with the exception of his wearing apparel, and that, if anything should happen to him, he wished his uncle, the plaintiff, to have £100, and all the rest was for her, as he had saved it for her, and wished her to have it. On Mar. 7 the defendant saw Weston

again at the hospital, when he asked her to go to Duffield and get the building society shares, certificates and the Post Office Savings Bank book, gave her two keys of the drawer of the bedroom in which they were kept, and told her that she was to keep them. The defendant shortly after went down to Duffield, obtained the certificates and book, which she took the next day to the hospital, and offered them with the key to Weston, when he again told her she was to keep them. On Mar. 14 the defendant again visited Weston in the hospital in company with a friend in whose presence he again repeated his wish that all his property, with the exception of £100 to his uncle, should belong to the defendant in case of his death. On several subsequent occasions Weston repeated this to the defendant. On May 1, 1901, Weston died, and letters of administration to his estate were granted to his uncle, the plaintiff, by whom the present application was made to have it determined by the court whether under the circumstances there had been any valid donatio mortis causa of the building society shares and the money standing to the deceased's credit at the Post Office Savings Bank. The rules of the Hearts of Oak Permanent Building Society provided that any member holding an investment share might withdraw it on giving to the society one month's notice in writing of his intention so to do. Among the regulations in the Post Office Savings Bank book were:

"This book must be produced whenever any money is deposited or withdrawn. Every deposit in a Post Office Savings Bank must be immediately entered by the postmaster or other person receiving it in the depositor's book, and the postmaster or other person receiving the deposit must affix his signature and the stamp of the office to each entry."

It was also provided that upon a withdrawal the depositor's book must be presented by the depositor at the post-office together with the warrant for withdrawal.

J. A. Hay for the plaintiff.

Lyttelton Chubb for the defendant.

J. H. Jackson for the next of kin.

Cur. adv. vult.

Feb. 14, 1902. **BYRNE, J.**, read a judgment in which he stated the facts and, holding that in the circumstances of the case there had been a sufficient traditio to the defendant, continued:—Two questions have been argued, one as to the certificates of the building society shares, and the other as to the Post Office Savings Bank book. With reference to the building society shares, I am of opinion that they are not the proper subject-matter of a donatio mortis causa. I am not able to distinguish the subject-matter of this gift from that of an ordinary certificate of railway stock, like that which was dealt with in *Moore v. Moore* (3), and the mere fact that under the rules of the society there was power to withdraw these investment shares at any time and obtain the money for them is not sufficient to differentiate the present case from *Moore v. Moore* (3). With reference to the remaining question, as to the gift of the Savings Bank book, ever since the decision of the Court of Appeal in *Re Dillon, Duffin v. Duffin* (1), it is well established that a banker's deposit receipt in a form showing the terms of the contract and being more than an acknowledgment for the receipt of money is good subject for a donatio mortis causa. The question had not previously come before a Court of Appeal in England, although there had been, as stated by *Corrigan, L.J.*, in the last-mentioned case, a current of decisions in courts of first instance in England in favour of that view, and a decision of the Exchequer Division in Ireland (*Cassidy v. Belfast Banking Co.* (4)) to similar effect.

In the present case the question arises in reference to a Post Office Savings Bank deposit-book, and, in considering whether or not this is good subject of a donatio mortis causa, the test appears to be whether or not the document, besides acknowledging the receipt of the money, expresses the terms on which it is held, and how, what the contract between the parties is: see *Moore v. Parham* (5); and the

Judgment of CORROS, L.J., in *Re Dillon, Duffin v. Duffin* (1). An examination of the Savings Bank book in the present case appears to show a fulfilment of that test; and, although every rule regulating the contract is not set out in the book itself, all the essential rules are. The book is not a mere receipt. It must, as stated on the face of it, be produced whenever any money is deposited or withdrawn, and it contains the terms of the contract as to payment of interest and withdrawal, as well as the other material terms of the contract between the depositor and the Savings Bank Department. Apart from authority pointing the other way, I should have considered it impossible after comparing the terms of the deposit receipts in the cases of *Re Dillon, Duffin v. Duffin* (1) and *Moore v. Darton* (5) with the Savings Bank book, to hold that the latter is not a good subject for *donatio mortis causâ*.

The case in Ireland of *M'Gonnell v. Murray* (2) — the only reported case dealing with a Savings Bank book — was relied upon as an authority to the contrary, and since the argument I have referred also to the case of *Duckworth v. Lee* (6) in the Court of Appeal in Ireland. The latter case dealt with the gift of an IOU, and had no reference to a Savings Bank book, and, consequently, the actual decision in *M'Gonnell v. Murray* (2) did not come in question; but the general reasoning in *M'Gonnell v. Murray* (2), including an expression of disagreement with a dictum of LORD ROMILLY's in *Hewitt v. Kaye* (7) was treated with approval by some of the judges, and the Lord Chancellor of Ireland expressly states that he sees nothing in *Re Dillon, Duffin v. Duffin* (1) to shake the authority of *M'Gonnell v. Murray* (2). It is necessary, therefore, to consider what the decision in *M'Gonnell v. Murray* (2) was. It was not necessary to decide the point in the view the Master of the Rolls took of the facts; but it was, in fact, decided that the Savings Bank book in question in that case was not capable of being given *mortis causâ* so as to confer a right upon the donee to the amount of the deposit. The point there arose, not as to the book of a depositor under the Post Office Savings Bank Act, 1861, but as to the book of a depositor in a private savings bank governed by the provisions of the Trustee Savings Banks Act, 1863, Acts which differ considerably in their terms.

The only rules of the savings bank apparently relied on in *M'Gonnell v. Murray* (2) are those set out at p. 463 of the report (3 I.R. Eq.), and I do not find that it was part of the contract, as it was in the present case, that the book must be produced whenever any money is deposited or withdrawn, nor does it appear that there was any stipulation corresponding with that in the Post Office Savings Bank book to the effect that every deposit must be immediately entered by the postmaster or other person receiving it in the depositor's book, and that the postmaster or other person receiving the deposit must affix his signature and the stamp of his office to each entry. In *M'Gonnell v. Murray* (2) the Master of the Rolls says that he does not find in the Savings Bank Acts (meaning, according to the reference in the report, the Trustee Savings Banks Act, 1863) anything to distinguish a Savings Bank pass-book from an ordinary banker's pass-book; and he also takes the view that the book did not embody the terms of the contract between the depositor and the bank, and, further, that it was merely evidence of, or a voucher for, a debt. It appears that the book in *M'Gonnell v. Murray* (2) was, in the view taken of it by the court, of a different nature from that with which I have to deal. I am quite unable to say that the Post Office Savings Bank book is not distinguishable from an ordinary banker's pass-book, and I think it is clearly more than evidence of, or a voucher for, the debt, and I do not see how I can consistently with the cases of *Moore v. Darton* (5) and *Re Dillon, Duffin v. Duffin* (1) do otherwise than hold the book to be capable of being well given so as to create a *donatio mortis causâ*.

Solicitors: *Paterson, Candler & Sykes*, for *A. J. Ellis*, Maidstone; *W. W. Young, Son & Ward*.

[Reported by H. M. CHARTERS MACPIHERSON, ESQ., Barrister-at-Law.]

Re JOLLY. GATHERCOLE v. NORFOLK

COURT OF APPEAL (Lord Alverstone, M.R., Rigby and Heald, JJ.), July 16, 23, 1900]

[Reported [1900] 2 Ch. 616; 69 L.J.Ch. 661; 83 L.T. 118; 48 W.R. 657;
16 T.L.R. 521; 44 Sol. Jo. 642]

Will—Hotchpot clause—Premises let to beneficiary—Unpaid rent—Acquisition of title by beneficiary—Bequest to beneficiary—Deduction of amount of unpaid rent—Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), ss. 2, 34, 42—Real Property Limitation Act, 1874 (37 & 38 Vict., c. 57), s. 1.

A testatrix in 1868 let a farm to her son at the rent of £80 a year, which was paid till April, 1881. By her will, after giving her property upon trust for her four children in equal shares, the testatrix directed that all moneys owing to her at her death by any child for rent or otherwise should be brought into hotchpot in ascertaining the share of such child. It was admitted that the son had acquired a title under the Statute of Limitations, and the question now was whether the rent for twelve years from April, 1881, ought to be deducted from his share.

Held: it was inconsistent with the right acquired by the son, by virtue of the Real Property Limitation Act, 1874, that the rent which he ought to have paid should be deemed to be still owing, the effect of the Acts of 1833 and 1874 being that after the statutory period of twenty years and twelve years respectively all rights which the reversioner would have had in respect of the land came to an end, and, therefore, the deduction should not be made.

Decision of NORTH, J., [1900] 1 Ch. 292, reversed.

Notes. The Real Property Limitation Act, 1833, ss. 2, 34, 42, and the Real Property Limitation Act, 1874, s. 1, have been repealed. See now the Limitation Act, 1939, s. 4 (3) (limitation of actions to recover land), s. 16 (extinction of title after expiration of period), and s. 17 (limitation of actions to recover rent), 13 HALSBURY'S STATUTES (2nd Edn.), 1164, 1175, 1176, respectively.

Considered: *Moses v. Lovegrove*, [1952] 1 All E.R. 1279. Referred to: *Re Landi, Georgi v. Navani*, [1939] 3 All E.R. 569.

As to the effect of the expiration of the period of limitation, see 24 HALSBURY'S LAWS (3rd Edn.) 257-262, and for cases see 32 DIGEST 483-489.

Cases referred to in argument:

Tichborne v. Weir (1892), 67 L.T. 735; 8 T.L.R. 713; 4 R. 26, C.A.; 32 Digest 486, 1485.

Flight v. Bentley (1835), 7 Sim. 149; 4 L.J.Ch. 262; 58 E.R. 793; 31 Digest (Repl.) 258, 3939.

Nepean v. Doe d. Knight (1837), 2 M. & W. 894; Murp. & H. 292; 7 L.J.Ex. 355; 150 E.R. 1021, Ex. Ch.; 32 Digest 426, 1016.

Re Alison, Johnson v. Mounsey (1879), 11 Ch.D. 284; 40 L.T. 234; 27 W.R. 537, C.A.; 31 Digest 479, 1416.

Appeal from a decision of NORTH, J.

In 1860 Ann Jolly purchased the fee simple of a certain farm, and in 1868 let it to her son, R. T. Jolly, at a rent of £80 a year. There was no written agreement as to the holding. After April 22, 1881, no rent was paid by the son in respect of the farm, but he remained in possession down to the date of the death of his mother, and gave no acknowledgment of her title or his liability, so that his mother's title was extinguished in April, 1893. By her will, dated Aug. 5, 1891, she bequeathed all her real and personal estate to trustees upon trust to sell and

A convert the same and divide the net proceeds, after payment of her debts, funeral expenses, and legacies, among her four children: and the will proceeded:

B "I declare that all sums which I have already paid or advanced or which I shall hereafter pay or advance to or for the benefit of any child of mine, and that all moneys owing to me at my death by any child of mine, whether for rent or otherwise, shall be taken in or towards satisfaction of the share under my will of such child . . . and shall be brought into hotchpot and accounted for accordingly; and that no such child of mine . . . shall be entitled to receive any share under my will until such moneys so owing to me shall be paid to my executors."

C The testatrix died on Dec. 13, 1898.

D A summons was taken out by the trustees of the will asking if whether under the above hotchpot clause any and what sum ought to be deducted from the share of the son on account of the unpaid rent of the farm for the period of twelve years from April, 1881, to April 1893, it being admitted that he had acquired a title under the Real Property Limitation Act. The summons was adjourned into court, and came on to be heard before NORTH, J., in December, 1899, when his Lordship decided that the twelve years' rent in respect of the period previous to the extinguishment of the estate of the testatrix must be brought into account in fixing the amount of the son's share. From that decision the son now appealed.

Section 2 of the Real Property Limitation Act, 1833, provides:

E "That after the commencement of this Act [the 31st day of December, 1833] no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to the person making or bringing the same."

F Section 34 of the same Act provides:

G "That at the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land, rent, or advowson for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period shall be extinguished."

H Section 1 of the Real Property Limitation Act, 1874, provides:

I "After the commencement of this Act no person shall make an entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same."

Vernon Smith, Q.C., and A. H. Poyser for the son.

Terrell, Q.C., and T. B. Napier for the trustees.

Rolt, for another party, took no part in the argument.

Cur. adv. vult.

July 23, 1900. The following judgments were read.

LORD ALVERSTONE, M.R. The question in this case is whether the trustees of the will of Ann Jolly—who made her will in the year 1801 and died in December, 1898—are entitled in dividing the property between her four children to deduct from the share of the son R. T. Jolly any amount in respect of rent due for the farm occupied by him since 1868.

The MASTER OF THE ROLLS stated the facts, and continued: "North, J., has decided that the executors should deduct from the share of R. T. Jolly twelve years' rent of the farm for the period 1881 to 1893. I am unable to adopt this view. In the year 1893 R. T. Jolly obtained by virtue of the Real Property Limitation Act, 1874, s. 1, absolute title to the property. It is inconsistent with his right so acquired that the rent which he ought to have paid should be deemed to be still owing. The effect of the Acts of 1833 and 1874, in my opinion, is that after the expiration of the statutory period of twenty years and twelve years respectively all rights which the reversioner would have had in respect of the land have come to an end, and it would not be consistent with that position that rent, the nonpayment of which has given the occupier a title to the land, should still be deemed to be owing. I am, therefore, of opinion that the appeal should be allowed, and that the trustees are not entitled to deduct anything in respect of the arrears of rent."

RIGBY, L.J.—I am of the same opinion. It was said that the Real Property Limitation Acts applied only to land, and that you must go to the statute of James as to a contract for rent. Then it was said that although the Real Property Limitation Acts barred the remedy as to the recovery of the land, they did not bar the right to recover the twelve years' arrears of rent. It is a very curious point, and it is not the less curious because more than half a century has passed since the Real Property Limitation Act, 1833, came into operation. I do not speak of the Real Property Limitation Act, 1874, because that Act only changes the period from twenty to twelve years. And although more than half a century has passed and there must have been thousands of cases in which people have been bitterly disappointed, yet no one seems to have ever brought an action for rent in a case where the Real Property Limitation Acts have operated. Nevertheless, such an action must have lain in all cases if the view of the trustees is right. Let us consider, however, what the usual practice of the Profession has been. It seems that the day after twelve years are gone the right to bring an action plainly determines. The right of action can only last for twelve years, and in the case of a tenancy from year to year the right of action is to be held to have first accrued when the last payment of rent was made. You have a right of action if the rent is not paid. A landlord could not eject until the day after the rent becomes due. The assumption is that on the day after the twelve years have elapsed the tenant is to be taken to be no longer tenant. He is holding the land under a title which, according to the older law, would have been an adverse title. That is absolutely inconsistent with an agreement to pay, and so it was held that the tenant was no longer in possession as a tenant from year to year or as a tenant at all. That is absolutely inconsistent with a right to recover rent. The son in the present case, who has been tenant, was under no liability to pay rent after twelve years in the events which happened, he not having been tenant at all during twelve years, although if he had been sued before the twelve years, it would have been quite a different matter. After the twelve years a change of things arises.

HENN COLLINS, L.J.—I am of the same opinion. I think the crucial point was that put by counsel for the son—viz., that the effect of the statute of 1833 was to do away with non-adverse possession. It is incompetent for the landlord to say that he still retains the right to recover. That is emphasised when you compare the position of a tenant under a lease in writing with that of a tenant under a lease

from year to year. On these grounds the son was in possession during those years, not as tenant to the testatrix, but in respect of a right under which he had no obligation to pay rent. Therefore the decision of NORTH, J., must be reversed and the appeal allowed with costs.

Appeal allowed.

Solicitors: *Morris & Bristow*, for *Jackaman, Sons & Miller*, Ipswich; *Field, Roscoe & Co.*, for *Birkett & Ridley*, Ipswich.

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]

Re TRENCHARD. TRENCHARD v. TRENCHARD

[CHANCERY DIVISION (Buckley, J.), November 8, 9, 1901, January 21, 1902]

[Reported [1902] 1 Ch. 378; 71 L.J.Ch. 178; 86 L.T.196; 50 W.R. 266;
46 Sol. Jo. 231]

Settled Land—Tenant for life—Condition of residence—Compromise with tenant—Payment to tenant for life of fixed annual sum, the tenant surrendering benefits under settlement.

A testator gave his widow the use of his residence so long as she desired to make it her permanent place of residence and remained his widow, his estate to pay all rates, taxes and outgoings in respect thereof and to keep the house and grounds in tenantable repair.

Held: although the widow would forfeit her interest by voluntarily ceasing to reside, she was entitled to sell as tenant for life under the Settled Land Acts, and the trustees of the will had power, by way of compromise, to enter into an agreement whereby they agreed to pay the widow out of the estate a fixed annual sum during widowhood, being less than the estimated value of the yearly benefits conferred upon her by the will, she agreeing to release her rights in respect of the residence.

Notes. The Settled Land Act, 1882, s. 51, has been repealed. See now the Settled Land Act, 1925, s. 106 (1) (2). 23 HALSBURY'S STATUTES (2nd Edn.) 226.

Considered: *Re Simpson, Clarke v. Simpson*, [1911-13] All E.R. Rep. 301; *Re Patten, Westminster Bank v. Carlyon*, [1929] All E.R. Rep. 416. Explained and Applied: *Re Downshire's Settled Estates*, [1953] 1 All E.R. 103. Explained: *Chapman v. Chapman*, [1954] 1 All E.R. 798. Considered: *Re Forster's Settlement, Michelmore v. Byatt*, [1954] 3 All E.R. 714. Referred to: *Re Acklom, Oakeshott v. Hawkins*, [1929] 1 Ch. 195.

As to the general characteristics of the statutory powers under a settlement, see 34 HALSBURY'S LAWS (3rd Edn.) 528-534, and for cases see 40 DIGEST (Repl.) 808-813.

Cases referred to:

- (1) *Re Paget's Settled Estates* (1885), 30 Ch.D. 161; 55 L.J.Ch. 42; 53 L.T. 90; 33 W.R. 898; 1 T.L.R. 567; 40 Digest (Repl.) 811, 2906.
- (2) *Re Ames, Ames v. Ames*, [1893] 2 Ch. 479; 62 L.J.Ch. 685; 68 L.T. 787; 41 W.R. 505; 37 Sol. Jo. 423; 3 R. 558; 40 Digest (Repl.) 813, 2916.
- (3) *Re Smith, Grose-Smith v. Bridger*, [1899] 1 Ch. 331; 68 L.J.Ch. 198; 80 L.T. 218; 47 W.R. 357; 40 Digest (Repl.) 813, 2917.

- (4) *Re Haydock, Kemp v. Haynes* (1887), 31 Ch.D. 200; 37 L.J.Q.B. 519; 39 L.T. 14; 36 W.R. 321; 4 T.L.R. 168; 40 Digest (Repl.) 812, 2911.
 (5) *Re Eastman's Settled Estates* (1893), 63 L.J.Q.B. 322, n.7; 43 Sol. Jo. 114; 40 Digest (Repl.) 812, 2913.

Also referred to in argument :

- Re Carno's Settled Estates*, [1899] 1 Ch. 324; 68 L.J.Ch. 120; 47 W.R. 532; 40 Sol. Jo. 114; 40 Digest (Repl.) 812, 2911.
Re St. Donat's Settled Estate, 70 L.T. 542; 40 Digest (Repl.) 812, 2912.
Re New, Re Leavers, Re Morley, post; [1901] 2 Ch. 534; sub-sequ. *Re New's Settlement, Langham v. Langham, Re Leavers, Leavers v. Hall, Re Morley, Fraser v. Leavers*, 70 L.J.Ch. 710; 85 L.T. 174; 50 W.R. 17; 45 Sol. Jo. 706. C.A.; 43 Digest 840, 2866.

Originating Summons to determine whether a testator's conditional gift ought to be varied.

Edward Penny Trenchard, who died on April 3, 1899, by cl. 3 of his will, dated Nov. 20, 1897, gave to his wife Matilda the use of his residence Woodville, Honor Oak, in the county of Surrey, so long as she should desire to make it her permanent place of residence and should remain his widow, his estate to pay all rates, taxes, and outgoings, and to keep the house and grounds in tenable repair. The testator also bequeathed all his real and personal estate, not otherwise disposed of, unto his trustees upon trust for sale and conversion, but directed his trustees to postpone the sale and conversion of his Honor Oak estate until after the death or marriage again of his wife, which should first happen, and empowered them to develop the same estate, and to use all or such parts of his estate as they should deem advisable, and to raise, by way of mortgage of any part of his estate, any sum necessary for such development. The residuary estate was to be held upon trust for all his children equally, each daughter's share being settled upon trust for her for life without power of anticipation during any coverture, with remainder to her children equally. After the testator's death the widow continued to reside at Woodville. On July 26, 1900, BYRNE, J., declared that she had the powers of a tenant for life of Woodville under the Settled Land Acts, and that she would not forfeit the benefits conferred upon her by the direction in the will as to the payment of rates, taxes, and expenses by selling or leasing the residence under such powers. It was estimated that the benefits given to the widow by cl. 3 of the will, measured by the rental value of the residence, and rates, taxes, and outgoings in respect thereof, were worth £320 a year. The widow, who found the residence too large for her, was willing, in consideration of the payment to her of the sum of £275 per annum, during widowhood, to release the trustees and the estate from all her rights, claims, and demands under cl. 3 of the will, and under BYRNE, J.'s, order so far as it related to cl. 3. This was the hearing of an application by originating summons by the widow that it might be determined whether the trustees had power with the sanction of the court to enter into such an arrangement, and, if so, that it might be approved by the court, or that the house and grounds might be let or sold, for the benefit of the plaintiff and all other persons interested therein.

Asbury, K.C., and *J. Bradford* for the widow.

W. M. Hunt, for the testator's daughters and their infant children.

E. Clayton, for the four trustees, three of whom were the testator's sons.

BUCKLEY, J.—The testator in this case, by the third clause of his will dated Nov. 20, 1897, gave his widow the use of a certain residence so long as she should make it her residence and should remain his widow. The applicant upon this summons, who is his widow, has argued that the provision as to residence contained in this gift is, by s. 51 of the Settled Land Act, 1882, to be deemed void, and that she is entitled during widowhood whether she reside or not. In my opinion this is not so. Section 51 of the Settled Land Act, 1882, does not provide that a provision such as this shall be void, but that so far as it tends to reduce the tenant for life

not to exercise the power under the Act it shall be void. It is in the words "as far as" that the solution of the question lies. Residence may cease upon sale and consequent delivery of possession to a purchaser, or may cease upon cesser of residence irrespective of sale. Complete effect is given to s. 51 if the provision be deemed to be void in the first case but not in the second. Suppose a disposition of property in favour of A. B. during life or widowhood with a gift over in case of failing to reside, followed by a proviso that for the purposes of the gift over cesser of residence upon sale shall not be deemed a cesser of residence, and suppose a power of sale given to A. B. with an interest for life or widowhood in the proceeds of sale. Such a provision would not tend to induce the tenant for life not to sell. On the contrary, it would rather induce a sale. If she sold, she would be entitled to the income of the proceeds of sale discharged from the obligation of residence. I see no reason why there should not, consistently with the Act, co-exist a valid gift over in the event of ceasing to reside voluntarily and not upon a sale. It seems to me that that is the joint effect of this will and of the Act.

In the present case BYRNE, J., by an order of July 26, 1900, has declared that the widow has the power of a tenant for life under the Settled Land Act, and that she will not forfeit the benefits given her by the will by selling under such power. In other words she can sell, and if she sells she will be entitled as against the proceeds of sale to the same annual benefits (which must then be represented by money) as if she had not sold. This follows the decisions of PEARSON, J., in *Re Paget's Settled Estates* (1); of NORTH, J., in *Re Ames, Ames v. Ames* (2); and of NORTH, J., again in *Re Smith, Grose-Smith v. Bridger* (3). The result of s. 51 is that the provision, as far as it is a fetter upon the power of sale, is void, and under sub-s. (2) of that section a new estate is given to the beneficiary by virtue of the statute extending to a like interest in the proceeds of sale. But this having been insured, the words "as far as" in s. 51 are satisfied, and if there be voluntary cesser of residence apart from sale, there is no reason why the testator's disposition should not have effect, inasmuch as that provision does not tend to induce the tenant for life not to sell. This was the decision of NORTH, J., in *Re Haynes, Kemp v. Haynes* (4). It was argued that the decision of ROMER, J., in *Re Eastman's Settled Estates* (5) is inconsistent with this view. In my opinion that is not so. The form of the summons is stated in 43 SOLICITOR'S JOURNAL, 114—it did not go to the question of what the rights of the widow would be if she voluntarily ceased to reside apart from sale.

The question whether the provision for the reduction of the annuity was void under s. 51 was raised in connection with the question whether the applicant was entitled during widowhood to the income arising from the proceeds of sale. That question, as it seems to me, is the only question which the learned judge answered. He did not decide that, if she voluntarily ceased to reside, the reduction of the annuity would not take effect. In my judgment, therefore, the applicant in this case is not entitled to an interest during the widowhood discharged from the provision as to residence. But if she sells, and, therefore, ceases to reside, she will, by virtue of s. 51 of the Act of 1882, be entitled as against the income of the proceeds of sale to the same benefits as if she had not sold. Under these circumstances the question is whether the trustees can compromise her rights in the manner proposed. The summons asks first as to compromise, and, secondly, in default of a compromise, that the house may be let or sold. The attitude of the applicant, as I understand it, is this. She says: "I have a beneficial interest in this house, and I propose to keep it either by continuing to reside in it or by exercising my right of selling it under the Act of Parliament, and, therefore, having a beneficial interest in the proceeds of sale measured by the benefit given to me by the will." Under s. 50 of the Settled Land Act, 1882, she cannot assign or release her powers as tenant for life to sell, but there is nothing in the Act to prevent her from making any arrangement as to a disposition by her of her rights in the house. The nature of the compromise is this. The pecuniary benefit given to her by cl. 3 of the will is at present about £320 a year, which is measured by the rental value of the house and the rates and

taxes and other outgoings which the trustees are bound to pay. She says: "I am willing to take in exchange for that £275 a year. Pay me something less than the amount I am entitled to under the will, and I will give up my right to reside in the house." If that offer is accepted and she goes out of residence, her estate ceases, but she has been paid for it by a sum payable annually. The rule must be either good or bad. If it is good, she loses her interest in the property, but she keeps the purchase money. If it is bad, there is no forfeiture, and she resumes her right of residence and her powers of sale. She only goes out of residence because she is paid the value of the right. She sells something of which she is the owner, and gets its value.

It is argued for the trustees that this is a sort of investment of money belonging to married women and infants, and is a misapplication of their funds. That argument seems to me to be fallacious. This is not an investment of their funds; at present the estate is subject to a payment of £320 a year, and in future it will be liable to pay £275. In fact they are receiving something; they are not paying anything. They pay something less than before, and to that extent get a benefit. The widow gives up something, but she obtains this benefit, that she is no longer obliged to reside in a certain house. The trustees get this benefit, that they are relieved from the difficulty in which they have been placed that the widow might have continued to reside, and thus prevented the development of the estate, or she might have sold the house under the statutory powers and yet have retained her interest in the proceeds of sale. The rights which she gives up are for the benefit of the estate, and that the compromise is a proper one and within the power of the trustees, and I sanction it accordingly.

Solicitors : *Harston & Bennett; Wards, Perks & McKay.*

[*Reported by H. PROCTER, Esq., Barrister-at-Law.*]

Re HETLEY. HETLEY v. HETLEY

[CHANCERY DIVISION (Joyce, J.), July 9, 10, 15, 1902]

[Reported [1902] 2 Ch. 886; 71 L.J.Ch. 769; 87 L.T. 265; 51 W.R. 202]

Will—Evidence—Direction to widow to dispose of estate according to wishes verbally expressed by testator—Admissibility of parol evidence to ascertain wishes.

A testator, by his will, appointed his wife sole executrix, gave her his property for life, and then desired and empowered her by his will or in her lifetime to dispose of his estate in accordance with wishes verbally expressed by him to her.

Held: parol evidence to ascertain what were the "wishes verbally expressed" was not admissible, it being an attempt to create a power and not a trust attaching upon a gift of the subject-matter to a named legatee or devisee, and, therefore, the clause was void for uncertainty.

Re Fleckwood, Sidgreaves v. Brewer (1) (1880), 15 Ch. Div. 594, distinguished.

Notes. Considered: *Re Blackwell, Blackwell v. Blackwell*, [1928] Ch. 614. Distinguished: *Re Young, Young v. Young*, [1950] 2 All E.R. 1245. Referred to: *Blackwell v. Blackwell*, [1929] All E.R. Rep. 71; *Re Keen's Estate, Eveshed v. Griffiths*, [1937] 1 All E.R. 452.

As to evidence of the words used and dispositions made by a testator, see 34 HALSBURY'S LAWS (2nd Edn.), 165-170, and for cases see 43 DIGEST 592-595.

A Cases referred to :

- (1) *Re Fleetwood, Sidgreaves v. Brewer* (1880), 15 Ch.D. 594; 49 L.J.Ch. 514; 29 W.R. 45; 43 Digest 598, 463.
- (2) *Johnson v. Ball* (1851), 5 De G. & Sm. 85; 18 L.T.O.S. 182; 16 Jur. 538; 64 E.R. 1029; 43 Digest 598, 464.
- (3) *Re Hurtable, Hurtable v. Crawford*, [1902] 1 Ch. 214; 71 L.J.Ch. 168; 85 L.T. 516; reversed, [1902] 2 Ch. 793; 71 L.J.Ch. 876; 87 L.T. 415; 51 W.R. 282, C.A.; 8 Digest (Repl.) 407, 995.

Also referred to in argument :

- Moss v. Cooper* (1861), 1 John. & H. 352; 4 L.T. 790; 70 E.R. 782; 43 Digest 601, 484.
- Riordan v. Banon* (1876), 10 I.R.Eq. 469; 43 Digest 599, q.
- In the Goods of Marchant*, [1893] P. 254; 62 L.J.P. 114; 44 Digest 246, 723.
- Scott v. Brownrigg* (1881), 9 L.R.Ir. 246; 43 Digest 557, 77ii.
- Re Boyes, Boyes v. Carritt* (1884), 26 Ch.D. 531; 53 L.J.Ch. 654; 50 L.T. 581; 32 W.R. 630; 43 Digest 601, 487.
- Lambe v. Eames* (1871), 6 Ch. App. 597; 40 L.J.Ch. 447; 25 L.T. 175; 19 W.R. 659, L.JJ.; 43 Digest 575, 240.
- Re Hutchinson and Tenant* (1878), 8 Ch.D. 540; 26 W.R. 904; sub nom. *Re Hutchinson v. Tenant*, 39 L.T. 86; 43 Digest 570, 192.
- Re Adams and Kensington Vestry* (1884), 27 Ch.D. 394; 54 L.J.Ch. 87; 51 L.T. 382; 32 W.R. 883, C.A.; 43 Digest 581, 296.
- Re Williams, Williams v. Williams*, [1897] 2 Ch. 12; 66 L.J.Ch. 485; 76 L.T. 600; 45 W.R. 519; 41 Sol. Jo. 452, C.A.; 43 Digest 552, 17.
- Re Stead, Wilham v. Andrew*, [1900] 1 Ch. 237; sub nom. *Re Stead, Whitham v. Andrew*, 69 L.J.Ch. 49; 81 L.T. 751; 48 W.R. 221; 44 Sol. Jo. 146, C.A.; 43 Digest 602, 490.
- McCormick v. Grogan* (1869), L.R. 4 H.L. 82; 17 W.R. 961, H.L.; 43 Digest 600, 480.
- Re Weekes' Settlement*, [1897] 1 Ch. 289; 66 L.J.Ch. 179; 76 L.T. 112; 45 W.R. 265; 41 Sol. Jo. 225; 44 Digest 530, 3468.

Originating Summons to determine whether parol evidence was admissible to create a power.

The testator, Frederic Hetley, by his will, dated Dec. 3, 1897, appointed his wife executrix and bequeathed to her all his real and personal estate for her use and benefit during her life. The will then contained the following clause :

"And I desire and empower her by her will or in her lifetime to dispose of my estate in accordance with my wishes verbally expressed by me to her."

The testator died on Mar. 13, 1902. The widow claimed (subject to her life estate therein) to be trustee of the testator's estate upon certain trusts which he had communicated to her. Her evidence as to his wishes was as follows :

"On many occasions before February, 1897, the testator had conversations with me as to the disposal of his estate, in all of which he told me in more or less detail what were his wishes with regard to such disposal, but to the best of my recollection and belief he did not mention the subject to me between February, 1897, and the execution of his will on Dec. 3, 1897. We considered the matter as finally settled. Our last conversation was in February, 1897, when he expressed his wishes definitely and finally, and I then made a memorandum of the wishes so expressed. I promised that I would carry out his wishes to the best of my ability."

The wishes as finally expressed to the testator's widow were then set out in detail.

The widow took out an originating summons asking that it might be determined whether the plaintiff was absolutely entitled to the testator's real and personal estate.

of whether she was only entitled to a life interest therein and also, if the plaintiff was only entitled to a life interest, whether subject to such life interest the testator's real and personal estate was undisposed of or was held by the plaintiff on any or what trusts or was subject to a general or limited power of appointment vested in the plaintiff.

Greenwood for the widow.

Hughes, K.C., and George Henderson for the nephews and niece of the testator claiming under the trust.

R. J. Parker for the heir-at-law and next of kin.

Cur. adv. vult.

July 15, 1902. **JOYCE, J.**—In this case a gentleman of considerable wealth, having perfect confidence in his wife and having properly arranged with her as to how his property should be disposed of, instead of giving, devising, and bequeathing everything to her absolutely with a request framed not so as to impose any obligation that she would dispose of the property as agreed between them, made a will which, after appointing her executrix, proceeded in the following terms: [Mrs. LORSHUR read the will, and continued:] According to the true construction of the will, all that is thereby expressly given to the widow is a beneficial life interest. As to everything else that she takes by virtue of her appointment as executrix or otherwise, she is a trustee after payment of debts, etc., for the testator's heir-at-law and next of kin respectively. This, however, is subject to the clause, whatever may be its force and effect, "I desire and empower her," etc. This clause purports to create a special power of disposition in the testator's wife, but not a general power enabling her to do whatever she pleases with the property. Neither the objects of such power nor the limitations under which it is to be exercised are expressed in the will, but in order to ascertain these we are referred, not to any existing document which could be identified and possibly for the purposes of probate treated as incorporated in the will, but to the "wishes verbally expressed" by the testator to his wife, and it is only in accordance with these wishes that the power is to be exercised. It is not absolutely clear that the wishes referred to might not be wishes expressed between the date of the will and the testator's decease. Unless these subsequently expressed wishes be excluded by construction, the clause I am considering is manifestly invalid for the reasons appearing in *Johansen v. Bell* (2) and similar cases.

Assuming, however, that the testator must be taken to have referred only to wishes expressed prior to the execution of his will, parol evidence is not, in my judgment, admissible to show what those wishes were, any more than it would be to fill up a blank or to explain any patent ambiguity in the will. By the Wills Act, 1837, no will can be valid unless it be in writing executed by the testator and attested as by the statute provided. To define or supply by parol evidence that which on the face of the will is left indefinite or unexpressed would be to make a material addition to the written will. Counsel for the parties desiring to support the validity of the power cited and urged me to follow the decision in *Re Fleetwood* (1), and it appears that FARWELL, J., in *Re Hurltable* (3), which, however, I am told is under appeal, felt himself somewhat reluctantly bound to recognise the authority of that decision. But counsel for the heir-at-law pointed out and convinced me that *Re Fleetwood* (1) materially differs from the present, and that I should be extending the principle of that decision if I held that by the mode here adopted the testator created or could create a valid power of disposition in his widow. This is a case of an attempt to create a power and not of a definite trust for particular individuals attaching upon a gift of the subject-matter to a named legatee or devisee. If I held this power to be valid, I should be going beyond *Re Fleetwood* (1), and introducing, in spite of the statute, what KAY, J., calls a serious innovation upon the law relating to testamentary instruments. Therefore I hold the parol

vidence to be inadmissible, and the clause purporting to create the form of disposition in question to be void for uncertainty. The consequence is that, subject to the life interest in the testator's widow, the testator's real and personal estate is undisposed of. The costs of all parties will be paid out of the estate.

Solicitors: *Finch & Turner; Burgess, Cosens & Co.; J. E. Hetley.*

[*Reported by P. S. OSWALD, Esq., Barrister-at-Law.*]

HUNT v. LUCK

COURT OF APPEAL (Vaughan Williams, Stirling and Cozens-Hardy, L.JJ.), January 23, 1902]

[*Reported* 1902 1 Ch. 428; 71 L.J.Ch. 239; 86 L.T. 68; 50 W.R. 291;
18 T.L.R. 265; 46 Sol. Jo. 229]

Sale of Land—Inquiries before contract—Tenant in occupation—Inquiry as to whom rent paid—Duty of purchaser—Conveyancing Act, 1882 (45 & 46 Vict., c. 39), s. 3.

H., who owned freehold houses and was in receipt of the rents from the tenants in occupation, executed a conveyance, purported to be made in consideration of £12,000, of the property to G. It was assumed (but not proved) that no part of the purchase money was paid and that H. remained the true owner of the property. The tenants continued to pay their rents to W. who collected them on behalf of H. Subsequently G. executed legal mortgages of the property. The mortgagees had no express notice that G. was trustee of the property on behalf of H. or that H. was in receipt of the rents. A valuer, who surveyed the property for the mortgagees, inquired of the tenants to whom they paid their rents and learned that they paid them to W., but no further inquiries were made. H. died having made the plaintiff, his widow, tenant for life under his will, and on the subsequent death of G. she brought an action against the mortgagees to have the conveyance delivered up to be cancelled.

Held: it was not the duty of a purchaser or mortgagee to inquire of tenants in occupation to whom they paid their rents, either under s. 3, of the Conveyancing Act, 1882, or under the law as it stood independently of that Act, and, therefore, the action must be dismissed.

Notes. The Conveyancing Act, 1882, s. 3, has been replaced by s. 199 (1) (ii), (2) and (3), of the Law of Property Act, 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 822.

Considered: *Green v. Rheinberg* (1911), 104 L.T. 149; *Smith v. Jones*, [1954] 2 All E.R. 823. *Applied:* *Goody v. Baring*, [1956] 2 All E.R. 11. Referred to: *Powell v. Browne* (1907), 97 L.T. 854; *Universal Permanent Building Society v. Cooke*, [1951] 2 All E.R. 893; *Westminster Bank, Ltd. v. Lee*, [1955] 2 All E.R. 883; *Bridges v. Meurs*, [1957] 2 All E.R. 577; *Grace Rymer Investments, Ltd. v. White*, [1958] 2 All E.R. 777; *Weg Motors, Ltd. v. Hales*, [1960] 3 All E.R. 762.

As to constructive notice where title to land is not investigated, see 14 HALSBURY'S LAWS (3rd Edn.) 546; and for cases see 20 DIGEST (Repl.) 347 et seq. For s. 2 (viii) of the Conveyancing Act, 1881, see 20 HALSBURY'S STATUTES (2nd Edn.) 412.

Cases referred to :

- (1) *Barnhart v. Greenhalgh* (1833), 9 Moo. P.C.C. 18; 2 Ex. Rep. 1217; 31 L.T.O.S. 178; 14 E.R. 204, P.C.; 20 Digest (Repl.) 319, 569.
- (2) *Bulley v. Richardson* (1852), 9 Haro. 754; 68 L.R. 711; 20 Digest (Repl.) 338, 761.
- (3) *Mumford v. Stokely* (1871), L.R. 18 Eq. 556; 43 L.J.Ch. 694; 36 L.T. 809; 22 W.R. 833; 20 Digest (Repl.) 321, 583.
- (4) *Wallwyn v. Lee* (1803), 9 Ves. 24; 32 F.R. 509, L.C.; 20 Digest (Repl.) 276, 196.

Also referred to in argument :

- Bailey v. Barnes*, [1894] 1 Ch. 25; 63 L.J.Ch. 73; 69 L.T. 542; 42 W.R. 66; 38 Sol. Jo. 9; 7 R. 9, C.A.; 20 Digest (Repl.) 320, 578.
- Ogilvie v. Jeaffreson* (1860), 2 Giff. 353; 29 L.J.Ch. 905; 2 L.T. 778; 6 Jur. N.S. 970; 8 W.R. 745; 66 E.R. 147; 20 Digest (Repl.) 333, 663.
- Knight v. Bowyer* (1858), 2 De G. & J. 421; 27 L.J.Ch. 520; 31 L.T.O.S. 287; 4 Jur. N.S. 569; 6 W.R. 565; 44 E.R. 1053, L.J.J.; 20 Digest (Repl.) 336, 672.
- Re Hines Corn Charity, Charity Commrs. v. Bode*, [1901] 2 Ch. 750; 71 L.J.Ch. 76; 85 L.T. 533; 45 Sol. Jo. 163, 723; 8 Digest (Repl.) 470, 1726.

Appeal from a decision of FARWELL, J., reported [1901] 1 Ch. 45.

Dr. Alfred Hunt, the husband of the plaintiff, was the owner of freehold houses and land at Wimbledon, Surrey, and was in receipt of the rents. By a deed, dated Mar. 31, 1896, Hunt conveyed certain of the freehold houses by way of gift to William Mercer Gilbert. By a second deed, dated Oct. 10, 1896, in consideration of £12,000 paid by Gilbert, Hunt conveyed to Gilbert in fee simple the whole of the freehold houses and land, the subject of this action. The deed contained an acknowledgment by Hunt of the receipt of the purchase money. Gilbert subsequently by deed mortgaged a part of the freehold houses to the defendants, Sayer and Slater, to secure the sum of £3,750, and by another deed mortgaged the remaining houses and land to the defendant Hodgson to secure the sum of £2,250.

Hunt died on June 10, 1898, having by his will made the plaintiff, his widow, tenant for life of the property, and administration, with the will annexed, was subsequently granted to her. Gilbert died on Sept. 6, 1898, having by his will appointed the defendant, Luck, sole executrix, and made her residuary legatee and devisee. The plaintiff claimed to have the deeds of Mar. 31 and Oct. 10, 1896 delivered up to be cancelled, on the ground that they were not the deeds of Hunt, and that either his signatures to such deeds were forgeries, or that he was incapable of transacting business by reason of mental infirmity, and that he did not know what he was doing when he executed the deeds. It was further alleged (although not proved) that no part of the purchase money of £12,000 was ever paid by Gilbert. It was assumed, however, for the purpose of the action that Hunt in fact remained the true owner of the property. The property consisted of twenty-seven houses, twenty-five occupied by weekly tenants and two by tenants from year to year, and the rents were then being received by Woodrow, a well-known estate agent and valuer at Wimbledon, who was collecting them on behalf of Hunt, and continued to do so down to the time of his death. During the negotiations with reference to the mortgages, the defendants, the mortgagees, employed Woodhams, a valuer, to value the property for them. There was some evidence that Woodhams inquired of the tenants as to whom they paid their rents, and that he was informed that they paid them to Woodrow, but it did not appear that he had ever seen Woodrow, and no further inquiries were made on the point.

FARWELL, J., dismissed the action with costs as against the mortgagees, holding that it was not the duty of a purchaser or mortgagee to inquire of the tenants as to whom they paid their rent, and that the fact that a tenant was in occupation was only notice of the tenant's rights and not of the person through whom he claimed, although actual knowledge that the rent was paid to some person whose receipt

was inconsistent with the title of the vendor is notice of such person's rights. From this decision the plaintiff appealed.

Upjohn, K.C., and *W. F. Webster* for the plaintiff.

Hughes, K.C., *Rufus Isaacs*, K.C., and *Church* for the mortgagees.

The defendant Luck did not appear.

VAUGHAN WILLIAMS, L.J.—I am of the opinion that the judgment of FARWELL, J., must be affirmed. He apparently dealt with the case without reference to the provisions of the Conveyancing Acts, but he made a statement of the law as established by decisions, including decisions prior to the Conveyancing Acts, and if this question is to be determined with reference to the old law, then I still think that the conclusion of FARWELL, J., was right. In his judgment FARWELL, J., after quoting the older authorities, says :

"The rule established by these two cases [*Barnhart v. Greenshields* (1); *Bailey v. Richardson* (2)] may be stated thus : (i) A tenant's occupation is notice of all that tenant's rights, but not of his lessor's title or rights ; (ii) actual knowledge that the rents are paid by the tenants to some person whose receipt is inconsistent with the title of the vendor is notice of that person's rights."

I do not understand that it is suggested in this case, and, if it is suggested, in my opinion the suggestion is ill-founded, that there was actual knowledge on the part of the mortgagees that the rents were paid by the tenants to some person whose receipt was inconsistent with the title of the mortgagor, Gilbert. That is not suggested in fact, and, therefore, we have to go back to the first of these rules. What does it mean? It means that if there is a purchaser or a mortgagee and he has notice that the vendor or mortgagor is not in possession, he must make inquiries of the tenant in possession and find out from him what his, the tenant's, rights are, and that, if he does not choose to do so, then, whatever title he gets as purchaser or mortgagee, that title will be subject to the title of the tenant in possession.

That I believe to be a true statement of the law, and the only matter that I need allude to further is *Mumford v. Stohwasser* (3) to which the attention of FARWELL, J., was called after he had delivered his judgment. FARWELL, J., gave an explanation which comes to this—that in his judgment the passage in *Mumford v. Stohwasser* (3) (L.R. 18 Eq. at p. 562) which seems to favour the idea that notice of the tenancy is notice of the title of the lessor to the tenant, really was, if SIR GEORGE JESSEL, M.R., said so, a slip in his memory. SIR GEORGE JESSEL, M.R., did not profess to be stating new law; he professed to be reciting the old-established and unquestioned law, and it is impossible to affirm that the proposition in this passage in his judgment is right, unless one is prepared to disregard the authorities (including the case in the Privy Council of *Barnhart v. Greenshields* (1)) which show that notice of the tenancy has no operation whatever as affecting the question of notice of the title of the lessor of the tenant in possession. Of course if you do make inquiries and do get information, then you are affected by the notice, but not otherwise.

As to the Conveyancing Acts. One must look first at the definition clause in the Act of 1881. That definition clause provides, s. 2 (viii) :

"Purchaser, unless a contrary intention appears, includes a lessee or mortgagee, and an intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for any property."

The reason why it is necessary to quote that definition is because counsel for the plaintiff suggested that a tenant for valuable consideration could only set up that he was without notice in the case where his vendor was in possession. That definition shows that under the Conveyancing Acts that is not so, and I have my doubts whether it was ever so, although he has cited a decision of LORD ELDON, L.C., which he said favours that view (*Walwyn v. Lee* (4)). Passing from there to

the Conveyancing Act, 1882, s. 3 deals with the question of notice, and s. 3 (1) provides :

"A purchaser (which includes an intending mortgagee) shall not be prejudicially affected by notice of any instrument, fact, or thing unless— (1) It is within his own knowledge or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him."

In my judgment the only inquiry which might reasonably to have been made here by the intending mortgagee was an inquiry to protect himself against any right which the tenants would have in the subject-matter of the mortgage. I do not think that there is, for the purpose of ascertaining the title of the vendor, any obligation whatsoever to make these inquiries of the tenant in reference to any other thing but protection against the rights of the tenant. I wish to add that, in my judgment, on the facts of this case I do not think that if this inquiry had been made those matters as to the equitable title of Dr. Hunt and Mrs. Hunt, the plaintiff, would have come to the knowledge of the intending mortgagee. All that he would have learned, if he had made inquiries of the tenant, would have been that the tenants paid the rent to Mr. Woodrow, a local agent. In my judgment it is not true to say that the facts as to the equitable title of Dr. Hunt and Mrs. Hunt would have come to his knowledge by making these inquiries. Even if he were told that they were collected on account of Gilbert, I do not see that it would have carried the matter any further.

I have not looked sufficiently into the facts to see how far this matter really was carried out by the mortgagees personally or by their solicitors. In so far as it was carried out by their solicitors, s. 3 (1) (ii), of the Conveyancing Act, 1882, applies. It provides that a purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing unless

"in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the notice of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent."

Here, again, nobody suggests that there was actual notice, and the observations I have already made apply with reference to what inquiries ought reasonably to have been made, with this addition, that, when one comes to deal with the question what inquiries ought to have been made by the solicitor or other agent, it does seem to me that it would be a very strong thing to say that an inquiry ought reasonably to have been made by the solicitor or other agent which is not advised in any of the standard text books, and which is inconsistent with the decisions prior to the Conveyancing Act, and has no countenance from any decision subsequent to the Conveyancing Act. I only wish to call attention, further, to s. 3, sub-s. 3, of the Conveyancing Act, 1882 :

"A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been enacted."

I only call attention to that for the purpose of vouching what has been said in the course of the argument, that, so far as this s. 3 is concerned, the practical result is that the law prior to the Conveyancing Act can only be used as a shield, and not as extending the law beyond the code-like definition in s. 3.

STIRLING, L.J.—I am of the same opinion, and I have really nothing to add to the reasons which have been given by FARWELL, J., and by the Lord Justice.

COZENS-HARDY, L.J. I entirely agree. I cannot bring myself to hold that an inquiry ought reasonably to have been made, which is not usual, which has not, so far as we are aware, ever been recommended by any single text book writer, and which has not even been suggested by any judge, except in that one passage in the judgment of Sir George Jessel, M.R., in *Mumford v. Stohwasser* (3). I think the decision is perfectly right, and that the appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitors: Henry H. Faulstich; Leslie & Hardy, for Sayer & Colt, Hastings.

[Reported by W. C. Biss, Esq., Barrister-at-Law.]

ELLIS & ROWBOTHAM

COURT OF APPEAL (A. L. Smith, Henn Collins and Romer, L.JJ.), March 8, 1900]

[Reported [1900] 1 Q.B. 740; 69 L.J.Q.B. 379; 82 L.T. 191; 48 W.R. 423;
16 T.L.R. 258]

Landlord and Tenant—Rent—Apportionment—Periodical payments—Rent payable in advance—Right of re-entry on non-payment of instalment—Apportionment Act, 1870 (33 & 34 Vict., c. 35), s. 2.

The Apportionment Act, 1870, s. 2, which provides that "all rents . . . shall . . . be considered as accruing from day to day, and shall be apportionable in respect of time accordingly," does not apply to rent which has accrued due before the happening of the event said to necessitate apportionment.

A house was let for one year at a rent payable quarterly in advance, the agreement containing a clause that, if the rent should be in arrear for fourteen days after the day on which it was payable, the landlord might re-take possession on giving one week's notice in writing, such condition to be without prejudice to any other remedies of the landlord. The tenant made default in payment of one quarter's rent, and the landlord began an action to recover it and also re-took possession after giving the required notice.

Held: as the re-entry took place after the rent had accrued due the Apportionment Act, 1870, s. 2, did not apply and the landlord was entitled to the full amount of the instalment which had become due.

Notes. Applied: *Hildebrand v. Lewis*, [1941] 2 All E.R. 581. Considered: *London Fan and Motor Co. v. Silverman*, [1942] 1 All E.R. 307. Referred to: *Re Aspinall (deceased)*, [1961] 2 All E.R. 751.

As to apportionment of rent in respect of time, see 23 HALSBURY'S LAWS (3rd Edn.) 555 et seq., and for cases see 31 DIGEST (Repl.) 286. For the Apportionment Act, 1870, s. 2, see 13 HALSBURY'S STATUTES (2nd Edn.) 867.

Appeal from the judgment of KENNEDY, J., at the trial of the action without a jury.

The action was brought to recover a sum of £55 18s. 4d. for rent due from the tenant to the landlord on Dec. 10, 1898. By an agreement in writing dated June 8, 1898, the landlord let Creek House, Shepperton, to the tenant for one year, viz., from June 10, 1898, to June 9, 1899, at the rent of £357 payable as follows: £189 5s. before taking possession, and three instalments of £55 18s. 4d. payable respectively

on Sep. 10, 1898, Dec. 10, 1898, and Mar. 10, 1899. There was a clause in the agreement by which, if the rent should be in arrear for fourteen days after the day on which it was payable, the landlord might, after giving the tenant one week's notice in writing signed by him, re-take possession of the premises, and it was agreed that this condition was to be without prejudice to other remedies which the landlord might have. After paying the instalment of £189 5s. the tenant took possession of the house, and duly paid the instalment of £55 18s. 4d. each fall due on Sept. 10, 1898. Default was made by the tenant in the payment of the instalment due on Dec. 10, 1898. On Feb. 7, 1899, the landlord issued the writ in the present action, claiming £55 18s. 4d., the amount of the rent due and unpaid on Dec. 10, 1898. On Feb. 21, the writ was served on the tenant. On Feb. 24, the landlord served on the tenant a notice in writing of his intention to re-take possession and on Mar. 2, the landlord re-took possession.

The tenant contended that under the Apportionment Act, 1870, the rent which was payable in advance on Dec. 10, 1898, ought to be considered as accruing from day to day, and that he was liable for only a part of the rent in proportion to the number of days during which he was in occupation of the premises, and he paid into court that proportionate amount.

At the trial of the action KENNEDY, J., held that the Apportionment Act, 1870, did not apply, because the £55 18s. 4d. which the landlord claimed was a debt due by agreement on Dec. 10, 1898, and gave judgment for the landlord for the amount claimed. The tenant appealed.

Section 2 of the Apportionment Act, 1870, provides as follows :

"All rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly."

C. A. Russell, Q.C., and F. Dodd for the tenant.

Rawlinson, Q.C., and Woodfin for the landlord.

A. L. SMITH, L.J.—The landlord let a house to the tenant for one year from June, 1898 to June, 1899, for the sum of £357, and it was agreed that that sum should be paid by the following instalments in advance, namely, £189 5s. before taking possession; £55 18s. 4d. on Sept. 10, 1898; £55 18s. 4d. on Dec. 10, 1898; and £55 18s. 4d. on Mar. 10, 1899. The agreement also contained an express stipulation that if the rent should at any time be in arrear for fourteen days after the day on which it was payable the landlord might, after giving one week's notice in writing, re-take possession of the premises, and that this condition was to be without prejudice to other remedies which he might have. The tenant was in arrear with the £55 18s. 4d. which was due under the agreement on Dec. 10, 1898, and the landlord re-took possession in the manner provided by the agreement. He also resorted to another remedy, as he was entitled to do, and brought the present action to recover the £55 18s. 4d. due on Dec. 10, 1898. The tenant's contention amounts to this, that he may break his contract, and if the landlord re-enters under the agreement he, the tenant, need not pay the rent that has fallen due. KENNEDY, J., held that the tenant was bound to pay the £55 18s. 4d. due on Dec. 10, 1898, and I think his judgment was right. The tenant relied on the provisions of the Apportionment Act, 1870, but the meaning of that Act, so far as rent is concerned, is this: Supposing rent be payable on the last day of a term, and the tenant goes out before that day has arrived, then the rent is to be considered as accruing *de die in diem*, and the tenant is only liable to pay rent for the number of days he has been in occupation of the land. The Act does not apply to the present case. Here, according to the agreement, the rent was payable in advance, and on Dec. 10, 1898 the instalment now claimed by the landlord had accrued due. I think the landlord is entitled to the full amount he claims, and the appeal must be dismissed.

HENN COLLINS, L.J.—I am not altogether free from doubt, but I will not differ from the judgment of the court.

ROMER, L.J.—Looking at the wording of the Apportionment Act, 1870, and especially at the wording and provisions of s. 2, s. 3 and s. 4, I think that the Act is only intended to apply to sums which are accruing, but have not accrued, due at the time when the apportionment is said to be required. The Act does not in my opinion apply to any sum duly and properly paid or accrued due before the happening of the incident which is said to necessitate apportionment. To hold otherwise would lead to extraordinary results, some of which were pointed out in the course of the argument, results not in my opinion contemplated by the legislature, and would also put a very forced, and in my opinion unsound, construction on the Act. As to the special circumstances of the case now on appeal, I need only say that in my opinion the landlord is entitled by the terms of his contract to retain his rent paid in advance, although subsequently to receipt of the rent he became entitled to, and did, re-enter.

Appeal dismissed.

Solicitors: *C. D. Travers Wire; George Trenam.*

[*Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.*]

RABE v. OTTO

KING'S BENCH DIVISION (Kennedy, J.), October 31, November 5, 1903]

[*Reported 89 L.T. 562; 20 T.L.R. 27*]

Sale of Goods—Sale on credit—Agreement to accept bills for amount of price—Failure of buyer to accept—Rights of seller.

Where there is an agreement on the sale of goods that the seller shall give credit and as a security an agreement by the purchaser to accept bills to cover the price of the goods, the period of credit stands even though the purchaser refuses to give an acceptance.

Semble: if damage can be proved the seller's remedy in the meantime is an action against the buyer for damages for breach of his contract to accept the bills.

Notes. As to effect of failure to accept bill, see 34 HALSBURY'S LAWS (3rd Edn.) 117, 118, and for cases see 39 DIGEST 599, 600.

Cases referred to:

- (1) *Mussen v. Price* (1803), 4 East, 147; 102 E.R. 786; 39 Digest 599, 1972.
- (2) *Dutton v. Solomonson* (1803), 3 Bos. & P. 582; 127 E.R. 314; 39 Digest 574, 1782.
- (3) *Anderson v. Carlisle Horse Clothing Co., Ltd.* (1870), 21 L.T. 760, N.P.; 39 Digest 600, 1986.

Action tried by KENNEDY, J.

The plaintiff's claim was to recover the price of goods—skins and furs—sold by the plaintiff to the defendant, and the basis of the plaintiff's action was the refusal of the defendant to accept bills for the price of the goods. There were three sets of goods sold on three occasions—in February, March, and April, 1903—in respect

of which the claim arose. The goods were sold on credit, and that was not disputed by the plaintiff, but he said that the terms were, that while credit was to be given up to Christmas next, the defendant had agreed to give acceptance, at any rate in June of this year, to cover the price of the goods from that time until Christmas, and it was contended on his behalf that as the acceptance had not been given by the defendant he had the right to sue immediately for the price of the goods.

On the question of fact the learned judge thought, as regards the goods sold in February and March, that the plaintiff's story was the true one, in spite of the defendant's denial that there was any agreement to give acceptance for the goods.

But as regards the goods sold in April, he had come to the conclusion that the plaintiff's case failed, as he was of opinion that the evidence did not clearly establish that there was an agreement by the defendant to give an acceptance for the price of those goods.

E. Lewis Thomas for the plaintiff.

Mansfield for the defendant.

KENNEDY, J., having stated the facts set out above, continued:—That being the position of the facts, counsel for the defendant, raised the point that the action was misconceived as regarded the first two items. He contended that while there might be a breach of a contract to give an acceptance for which an action would lie if any damage could be shown as a consequence of the same being uncovered by security for the six months from June, yet the fact that it was not given, as promised did not enable the plaintiff to treat the sale as one for which he was entitled to cash at once. I am satisfied that this point is a good one. *Mason v. Price* (1) and *Dutton v. Solomonson* (2) have been cited in support of this proposition, and I have found another more recent case which puts the matter very clearly—viz., *Anderson v. Carlisle Horse Clothing Co., Ltd.* (3). I think the law stands in this way: If there is an agreement that credit should be given, and as a security an agreement by the defendant to give an acceptance, then, even if there is a refusal to accept, the period of credit still stands. There may be an action for damages, however, if damage can be proved. The law was clearly stated in the judgment of **COCKBURN, C.J.**, in *Anderson v. Carlisle Horse Clothing Co., Ltd.* (3) to which I have referred. He there said (21 L.T. at p. 761):

"If the agreement was for a bill with the option of cash, if the buyer preferred it, then the defendants were not bound to accept a bill for a larger amount than they owed; and, even if the bill was drawn for the correct amount of their debt, the plaintiffs could not sue until the three months had elapsed from the date of the bill which the defendants had refused to accept."

In these circumstances I am of opinion that no action will lie in the present case. As regards the third lot of goods, I cannot, on the facts, decide in favour of the plaintiff, and with regard to the first two lots the action fails on the point of law. As I am clear that the plaintiff was so far right in point of merits, I think it is a case in which, although I cannot mould the action so as to give the plaintiff damages, the righteousness of the action makes it just that it should be dismissed without costs.

Judgment for the defendant.

Solicitors: *Langford & Fisher; Cartwright & Cunningham.*

[Reported by W. B. HERBERT, Esq., Barrister-at-Law.]

INTERNATIONAL TEA STORES CO. v. HOBBS

[CHANCERY DIVISION (Farwell, J.), April 23, 24, 25, 1903]

[Reported 1903 2 Ch. 165; 72 L.J.Ch. 543; 88 L.T. 725; 51 W.R. 615]

Easement—Right of way—Permissive user—User enjoyed at time of conveyance—No express grant—Conveyancing Act, 1881 (44 & 45 Vict., c. 41), s. 6 (2).

By the Conveyancing Act, 1881, s. 6 (2) [now s. 62 (1) of the Law of Property Act, 1925]: "A conveyance of land, having houses and other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses and other buildings all . . . privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them or any part thereof . . ."

The defendant was the owner of two adjoining houses one of which he occupied himself, the other being held by the plaintiff company under a lease from the defendant and occupied by the plaintiffs' manager and servants carrying on their business. The houses were separated by a roadway leading to and forming part of the defendant's yard. A way across the yard to the door opening in the back of the plaintiffs' premises had been used, with the defendant's permission renewed from time to time to successive managers, the plaintiffs' servants, and their predecessors in title, by the plaintiffs for the purpose of their business. The defendant conveyed to the plaintiffs the freehold of the house leased to them, but there were no general words or reference in the conveyance to any right of way.

Held: the words in s. 6 (2) of the Act of 1881 were effective to pass the right of way to the plaintiffs even though it was only enjoyed by the permission of the defendant.

Notes. Applied: *Lewis v. Meredith*, [1913] 1 Ch. 571; *White v. Williams*, [1922] All E.R. Rep. 419; *Wright v. Macadam*, [1949] 2 All E.R. 565. Considered: *Goddberg v. Edwards*, [1950] Ch. 247; *Re Ellenborough Park*, *Re Davies*, *Powell v. Maddison*, [1955] 3 All E.R. 667.

As to effect of Conveyancing Act, 1881, s. 6 (2) (s. 62 (1) of the Law of Property Act, 1925), see 12 HALSBURY'S LAWS (3rd Edn.) 535, 536, and for cases see 19 DIGEST (Repl.) 35 et seq. For the Law of Property Act, 1925, s. 62 (1), see 20 HALSBURY'S STATUTES (2nd Edn.) 559.

Cases referred to:

- (1) *Barrows v. Lang*, ante p. 270; [1901] 2 Ch. 502; 70 L.J.Ch. 607; 84 L.T. 623; 49 W.R. 564; 17 T.L.R. 514; 45 Sol. Jo. 536; 19 Digest (Repl.) 37, 194.
- (2) *Birmingham, Dudley and District Banking Co. v. Ross* (1888), 38 Ch.D. 295; 57 L.J.Ch. 601; 59 L.T. 609; 36 W.R. 914; 4 T.L.R. 437, C.A.; 19 Digest (Repl.) 50, 277.
- (3) *Kay v. Orley* (1875), L.R. 10 Q.B. 360; 44 L.J.Q.B. 210; 33 L.T. 164; 40 J.P. 277; 19 Digest (Repl.) 34, 177.
- (4) *Barkshire v. Grubb* (1881), 18 Ch.D. 616; 50 L.J.Ch. 731; 45 L.T. 383; 29 W.R. 929; 19 Digest 34, 178.
- (5) *Roberts v. Kerr* (1809), 1 Taunt. 495; 127 E.R. 926; 19 Digest (Repl.) 110, 681.

Also referred to in argument:

- Watts v. Kelson* (1871), 6 Ch. App. 166; 40 L.J.Ch. 126; 24 L.T. 209; 35 J.P. 422; 19 W.R. 388, L.J.J.; 19 Digest (Repl.) 48, 265.
- Bayley v. Great Western Rail. Co.* (1884), 26 Ch.D. 434; 51 L.T. 337, C.A.; 19 Digest (Repl.) 35, 179.
- Collins v. Slade* (1874), 23 W.R. 199; 19 Digest (Repl.) 124, 779.

Godwin v. Schweppes, Ltd., [1902] 1 Ch. 926; 71 L.J.Ch. 438; 86 L.T. 377; 50 W.R. 409; 19 Digest (Repl.) 37, 195.

Hyemfield v. Williams, [1867] 1 Ch. 662; 66 L.J.Ch. 803; 76 L.T. 249; 45 W.R. 469; 13 T.L.R. 278; 41 Sol. Jo. 348, C.A.; 19 Digest (Repl.) 86, 187.

Action tried by FARWELL, J., in which the plaintiff, the International Tea Co., sought to restrain the defendant from interfering with a right of way which they claimed over a roadway adjoining their property at Petersfield.

Down to 1889 the defendant was the owner of both properties. In 1890 he leased the plaintiff's premises to the predecessors in title of the International Tea Co. by the description of

"A piece or parcel of land situate at Petersfield, in the county of Southampton, abutting on and having a frontage of 26ft. or thereabouts to Chapel Street on the west and bounded by a brook or stream towards the north, together with the messuage or dwelling-house, shop, or premises erected or built on the piece of land hereby demised."

The stream had prior to this been arched over, and at this time formed part of the roadway in the defendant's yard and led to his smithy where he carried on the business of a blacksmith. A side door from the yard at the rear of the demised premises opened into this yard, which originally was closed to Chapel Street by a wall, but, before the date of the conveyance to the plaintiffs hereafter mentioned, had an opening to Chapel Street made in the wall to which doors had been fitted. On Dec. 4, 1895, the lease was assigned to the plaintiffs, and they had since carried on their business there, their managers residing on the premises. And on the same date the plaintiffs purchased the freehold of the premises, and in the conveyance to them the premises were described as

"All that piece or parcel of land situate at Petersfield, in the county of Southampton, being the northern portion of a piece of land comprised in and demised by an indenture [therein mentioned], and more particularly described in the map or plan drawn in the margin hereof and therein coloured pink, and which piece of land intended to be hereby conveyed has a frontage of 26ft. or thereabouts to Chapel Street, and abuts thereon towards the west, and is bounded towards the north by a roadway constructed over a brook or stream leading to a yard and blacksmith's shop . . . together with the messuage or dwelling-house, shop, and premises erected and built on the said piece of land, all which premises are now in the occupation of the company."

There were no general words in the conveyance nor was there anything to show an intention to exclude the provisions of the Conveyancing Act. The plaintiffs claimed that their predecessors in title had been accustomed at the date of the conveyance to use the way across the yard for all the purposes of their business, and that this right passed to them under the conveyance by virtue of s. 6 (2) of the Conveyancing Act, 1881.

Upjohn, K.C., and Vernon for the plaintiffs.

Lord Coleridge, K.C., and Adams for the defendant.

FARWELL, J.—Having got this conveyance and this description of the boundaries of the property and so forth, I must have regard to the provisions of the Conveyancing Act, 1881, as to which no contrary intention was expressed in the deed, and it provides, s. 6 (2), that

"a conveyance of land having houses or other buildings thereon shall be deemed to include and shall by virtue of this Act operate to convey with the land, houses, or other buildings all . . . ways, passages . . . easements, rights, and advantages whatsoever appertaining or reputed to appertain to the land, houses, or other buildings conveyed or any of them or any part thereof or at the time of

conveyance demised or occupied or enjoyed with or reputed or known as part or parcel of or appurtenant to the land, houses, or other buildings conveyed or any of them or any part thereof."

I am, therefore, thrown back on the inquiry as to the fact whether at the date of the conveyance this way in question was or was not "used and enjoyed" with the property conveyed. If it was, then it passed by the very words of the grant.

The facts were these. Hobbs owned the property on both sides of the roadway or yard in question. In 1889 he let the plaintiffs' premises to one Sharpe, and allowed him to make a hole in the wall which bounded the property against the roadway for the purpose of carrying packing cases and other things in and out. And that hole in the wall was there at the date of the lease to the predecessors of the plaintiffs in title. A door was afterwards put there, but at the date of the lease there was no doorway nor anything but a hole in the wall. The lease did not contain any descriptive words which would be sufficient to pass such a right. Therefore on the construction of the lease the lessees the predecessors in title of the plaintiffs did not get any right of way demised to them over this particular roadway. In 1890-91, which was the commencement of the term, the plaintiffs' predecessors in title came in under the lease, and their first manager, Mr. Gardner, obtained permission from Hobbs to use the roadway, which was then constructed of brick on one side and gravel on the other, to Chapel Street from the hole in the wall on their premises. I find on the evidence as to that, that permission was given to do this once for all, and that no difficulties arose. He was succeeded by Mr. Allen, who used the roadway in the same way. I find also that Mr. Phillips, the occupier on the other side, by his servants, used the same way for the conveyance of goods whenever he required it. In 1895 the plaintiff company took an assignment of the lease which was granted in 1890, taking over the business of the original lessees, which had since been carried on by the plaintiffs. Mr. Kite, their first manager, also used the roadway by permission as before. There was considerable conflict of testimony on the subject of user on the part of the witnesses, but I have no hesitation in saying that, taking the evidence generally, I believe the testimony of the plaintiffs' witnesses, that the roadway had in fact been used, since 1895 at least, for all purposes of the company's business, not merely for carrying coals or rubbish or things of that nature, but also for carrying out wood sold by the company, such as their old packing cases. Therefore, there was as a matter of fact a user for a considerable number of years of this particular road by the plaintiffs' employés for the purposes of their business, but I do not find that there had been any actual obstruction for any length of time, so as to prevent the user by the plaintiffs' employés when they desired to use the yard. It was quite impossible not to see that carts standing there may have been an inconvenience, but not such an obstruction as to prevent the user. In fact there was no actual obstruction sufficient to cause any serious inconvenience to the plaintiffs in conducting their business.

Then counsel for the defendant contends that it was only a permissive use. Cases of this sort arise necessarily where the defendant is the owner of both properties, and has conveyed one property to the plaintiff and the other is not conveyed over which it is alleged that there is a right of way, whatever it may be. If the plaintiff himself has been in occupation, no question of precariousness arises, but the mere question of fact whether there was a roadway which was in fact used at the time of the conveyance or the particular assignment in question. This is a case where, although there is unity of title, there is not unity of possession. The plaintiffs are in the position of adjoining tenants. The user is not of right, but, of course, if they had had their right under the lease there would probably have been no question. I have found as a fact that it was not of right, because the lease did not give it to them; therefore, as they did in fact use it, they must have used it either by licence of the defendant or without licence. Unless I am prepared to say that in no case can the tenant, who had in fact enjoyed the use of the roadway,

enjoyed under the Conveyancing Act as a right of way unless he had enjoyed it as of right, it appears to me that I must in this case hold that the fact of a licence makes no difference. It must be a question of licence or no licence. If there be no licence, it is sufficient to say it is precarious, although you want then the power to say, "I can stop you any day." If there be a licence, it is still precarious in this sense, that, being revocable, it might be revoked at any time, and in degree of precariousness the latter is less precarious than the former.

But I am of opinion that precariousness has nothing to do with this sort of case where there is a right known to the law, or where there is a privilege not known to the law which has been in fact enjoyed. The argument of counsel for the defendant on precariousness is founded on what I venture to think is a misconstruction of a judgment of my own in *Barrow v. Long* (1), where I was using the argument of precariousness to show that the right there desired to be enjoyed was unknown to the law—namely, the right to take water. That is a sort of right which by reason of its precariousness does not exist at all; but a right of way is well known to the law. The real truth is that people do not consider the question of title, but the question of user in fact. If you find that a way has in fact been used, you do not consider the manner in which it has been used. I quite agree that you have to take into consideration all the circumstances, and you might possibly find a case where a contract or something of that sort would prevent the way claimed passing under the general words of the deed. Considerations such as are referred to in *Birmingham, Dudley, and District Banking Co. v. Ross* (2) would, I think, be properly taken into consideration in the case of a right of way as well as of a right to light. I am not sure that that case was decided on the Conveyancing Act. That it was not decided on that Act appears, I believe, from *COTTON, L.J.*'s statement that he refers to the Act in order to show that it had not been overlooked, although it was not, his Lordship thought, mentioned in the argument. That a licence is immaterial appears from the judgment of *LORD BLACKBURN* in *Kay v. Orley* (3) where he says (L.R. 10 Q.B. at p. 368):

"I do not think it necessary to consider whether or not that parol licence which was given by the defendant to use the road was revocable, or whether an action might have been maintained for obstructing the tenant in doing that which he had a parol licence to do, or whether an action of trespass could have been brought against the tenant for using that road. I do not think it material to decide that. The licence was not in fact revoked."

Therefore, as I understand him, he treats it as a relevant question whether the fact was that the right was at the date of the conveyance enjoyed. If so, the fact that it was not revoked is immaterial. If it was enjoyed for a number of years in a restrictive way, still it was in fact enjoyed. In each case you have to determine whether in the circumstances it has or has not been enjoyed within the meaning of the statute. That I regard as disposing of this case, because counsel for the plaintiffs does not claim the right to use horses and carts. I find as a fact that the gates have been unlocked from 6 a.m. to 10 p.m. on weekdays except Saturdays, when they are closed at 8 p.m.

With regard to the other question, I do not think there has been any sufficient evidence to make it necessary to put any words by which it should be qualified. On ordinary holidays, such as bank holidays, and so forth, no question arises, because both premises are shut, and this right is claimed only for business. With regard to Saturday in Easter week, the evidence showed that it could not be regarded as establishing any exception. Probably no difficulty will arise as to that. The user must, of course, not exclude the right of the manager to use the house as his private residence. There is one point I ought to mention. The cases such as *Barkshire v. Grubb* (4) turn mainly on the fact that there was a made roadway leading to the plaintiffs' premises. In this case there was a way made, although it was not paved on the plaintiffs' side until recently, but in my opinion, on the

authority of *Hobbs v. Kerr* (3), the fact that the conveyance states that the property is bounded by a roadway constructed and leading to the yard estops the defendant from saying there is not in fact a roadway which necessarily passes the door which as a matter of fact exists in the plaintiffs' wall opening on the yard.

Solicitors: *Ashurst, Morris, Crisp & Co.*; *G. & A. Marshall*, for *Shield & Mackarness*, Petersfield.

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

Re WARRINER. BRAYSHAW v. NINNIS

[CHANCERY DIVISION (Swinfen Eady, J.), June 9, 1903]

Reported [1903] 2 Ch. 367; 72 L.J.Ch. 701; 88 L.T. 766; 67 J.P. 351;
19 T.L.R. 543; 1 L.G.R. 765]

Landlord and Tenant—"Impositions"—*Liability of tenant to pay*—*Agreement by tenant to pay all "impositions whatsoever . . . in respect of the premises"*—*Repair of drains ordered by local authority*—*Public Health (London) Act, 1891 (54 & 55 Vict., c. 76), s. 4.*

By an agreement in writing a landlord let a house to a tenant for a term of three years from Sept. 29, 1898, at a yearly rent of £54 clear of all deductions except property tax. The tenant covenanted to pay the rent and "to pay and discharge all rates, taxes, assessments, and impositions whatsoever, whether Parliamentary, parochial, or otherwise, that may become due or assessed in respect of the premises." On Feb. 20, 1899, the sanitary authority served a notice on both the landlord and the tenant requiring repairs of a drain and closet and other sanitary work. The landlord did not do the work so the tenant complied with the notice and spent £118 in so doing. On the death of the landlord in 1902 the tenant claimed to be admitted as a creditor in respect of this sum.

Held: the duty and expense of complying with the notice from the sanitary authority to repair drainage defects was an "imposition due in respect of the premises" within the meaning of the covenant and fell on the tenant notwithstanding the absence of such words as "payable by the tenant" and notwithstanding the shortness of the term, and, therefore, the claim against the landlord's estate failed.

Foulger v. Arding (1), [1902] 1 K.B. 700, and *Stockdale v. Ascherberg* (2), [1903] 1 K.B. 873; [1904-7] All E.R. Rep. 153, applied.

Notes. The Public Health (London) Act, 1891, has been repealed and replaced by the Public Health (London) Act, 1936. For s. 4 of the Act of 1891 see now s. 282, Sched. 5 of the Act of 1936.

Referred to: *Lowther v. Clifford*, [1926] All E.R. Rep. 290.

As to effect of covenant to pay impositions, see 23 HALSBURY'S LAWS (3rd Edn.) 613-617, and for cases see 31 DIGEST (Repl.) 330, 331. For the Public Health (London) Act, 1936, s. 282, see 15 HALSBURY'S STATUTES (2nd Edn.) 1043.

Cases referred to:

(1) *Foulger v. Arding*, [1902] 1 K.B. 700; 71 L.J.K.B. 499; 86 L.T. 488; 50 W.R. 417; 18 T.L.R. 422; 46 Sol. Jo. 356, C.A.; 31 Digest (Repl.) 330, 1644.

(2) *Blackdale v. Ashkethery*, [1903] 1 R.E. 833; 72 T.L.R. 422; 88 L.T. 701; 67 J.P. 405; 19 T.L.R. 451; affirmed [1904] 1 All E.R. Rep. 159; [1904] 1 K.B. 447; 73 L.J.K.B. 206; 90 L.T. 111; 68 J.P. 241; 52 W.R. 289; 20 T.L.R. 235; 48 Sol. Jo. 244; 2 L.G.R. 529, C.A.; 31 Digest (Repl.) 333, 4677.

Also referred to in argument :

Hindlas v. Briggs [1878] 3 C.P.D. 368; 47 L.J.Q.B. 487; 42 J.P. 791; 27 W.R. 138; 31 Digest (Repl.) 336, 4703.

Valpy v. St. Leonard's Wharf Co., Ltd. (1903), 67 J.P. 492; 1 L.G.R. 305; 31 Digest (Repl.) 331, 4654.

Brett v. Rogers, (1897) 1 Q.B. 525; 66 L.J.Q.B. 287; 76 L.T. 26; 45 W.R. 384; 13 T.L.R. 175; 41 Sol. Jo. 258, D.C.; 31 Digest (Repl.) 330, 4643.

Farlow v. Stevenson, [1900] 1 Ch. 128; 69 L.J.Ch. 106; 81 L.T. 589; 48 W.R. 213; 16 T.L.R. 57; 44 Sol. Jo. 73, C.A.; 31 Digest (Repl.) 334, 4677.

George v. Coates (1903), 88 L.T. 48, C.A.; 31 Digest (Repl.) 329, 4642.

Adjourned Summons to determine whether a claim against the estate of the testator for money expended in consequence of a notice to repair a drain, etc., could be enforced.

By an agreement, dated July 16, 1898, and made between E. Warriner of the one part and Miss C. G. E. Brayshaw of the other part, a messuage and premises known as No. 122, Shooter's Hill Road were demised for the term of three years from Sept. 29, 1898, at the rent of £54 per annum clear of all deductions except property tax, and the tenant covenanted to pay the rent, and

"To pay and discharge all rates, taxes, assessments, and impositions whatsoever, whether Parliamentary, parochial, or otherwise, that may become due or assessed in respect of the premises. To keep and at the expiration of the said tenancy to quit and deliver up quiet and peaceable possession of the premises, together with all fixtures and fittings, in as good state, order, and condition and repair as the same shall be at the commencement of the tenancy, fair wear and tear and accidental damage by fire in the meantime only excepted."

On Feb. 20, 1899, notice by the sanitary authority was served both on the landlord and tenant requiring certain specific work to be done with regard to the drains. The landlord delayed doing anything, and the tenant did the work and paid £118 1s. in respect of it. The landlord died in May, 1902, and the tenant had applied to be recouped in June, 1899, but the landlord had repudiated liability.

The question now to be determined was whether the tenant was entitled to prove against the landlord's estate for this £118 1s. There was evidence that at the time of the notice by the sanitary authority the drains were not in a worse condition than at the date of the agreement.

G. Lawrence for the tenant.

St. John Clerke for the legal personal representatives of the landlord.

SWINFEN EADY, J.—The question is whether a claim against the estate of the testator for money expended in consequence of a notice to repair a drain and closet and do other sanitary work can be enforced. This depends on the true construction of the tenant's contract with the landlord. She was required to put the drainage in order, and did so. Can she claim to be repaid the amount expended by her in so doing from her landlord's estate? She expended £118 1s., and I am of opinion that she is not entitled to recover this sum. I have to determine the legal rights of parties, and not what an arbitrator might think fair and reasonable. In my opinion the obligation fell upon her because she covenanted to pay the rent clear of all deductions whatsoever, and to pay all impositions. By reason of the premises becoming insanitary, notice was served by the local sanitary authority.

The duty to repair the drains was imposed by the Public Health (London) Act, 1891. It is true that the agreement does not include the word "duty," but, reading the judgment of ROMER, L.J., in *Foulger v. Arding* (1) the use of the word "impositions" has the same effect. He says ([1902] 1 K.B. at p. 710):

"I take it that, as the authorities now stand, if, in a case like the present the word 'duties' were included in the covenant, undoubtedly the tenant would be bound to recoup the landlord for expenditure which he might have incurred such as that here in question. . . . That being so, can we or ought we to draw a distinction between the case of a covenant like this, but containing the word 'duties,' and the case now before us? It appears to me that it would be a lamentable thing that the result of the authorities should be that, if a covenant of this kind speaks of 'duties imposed on the landlord or tenant in respect of the demised premises,' such an expense as that here in question must be borne by the tenant, but if the covenant speaks of 'impositions charged or imposed on the landlord or tenant in respect of the demised premises,' then the tenant is not liable under it. It seems to me that such a distinction is one which we ought not to draw. The cases show that a 'duty imposed' means a sum of money payable in respect of a duty imposed. What, then, is an 'imposition' within the meaning of this covenant? I should say, apart from authority, that in this covenant it means a sum of money payable by the landlord or tenant in respect of an imposition. A duty imposed appears to me to be an imposition, and I should say that the word 'imposition' is, if anything, rather larger than the word 'duty.'"

In my view, compliance with the sanitary notice and payment of the costs was an imposition due in respect of the messuage. At first it was said that it is only when the contract imposed the duty on the tenant by words such as "payable by either landlord or tenant" that he is liable. But there are cases in which those words are not used, but in which a tenant has been held liable. The present case is clear when we consider s. 121 of the Public Health (London) Act, 1891, although the section does not apply, because the sanitary authority did not do the work. That section provides that the costs and expenses may be recovered from the occupier, and the owner shall allow the occupier to deduct any money so paid from the rent, but

"nothing in this section shall affect any contract between any owner and occupier of any premises whereby the occupier agrees to pay or discharge all rates, dues, and sums of money payable in respect of such premises, or shall affect any contract whatsoever between landlord and tenant."

Moreover, if the sanitary authority had done the work and recovered the cost from the occupier, and the occupier had claimed to deduct the amount from the rent, he would have been making a deduction, although the covenant is to pay rent clear of all deductions whatsoever. As to the shortness of the term, the present case cannot be distinguished from *Stockdale v. Ascherberg* (2) before WRIGHT, J., where, as here, the agreement for a lease was for three years. On these grounds I am of opinion that the claim fails.

Solicitors: *Frederick Kinch; W. J. & E. H. Tremellen.*

[*Reported by G. B. HAMILTON, Esq., Barrister-at-Law.*]

MARDORF v. ACCIDENT INSURANCE CO.

[KING'S BENCH DIVISION (Wright, J.), February 23, 1903]

[Reported 1903 1 K.B. 584; 2 L.L.R.B. 362; 88 L.T. 990; 19 T.L.R. 274]

Insurance—Accident insurance—Exception—"Death caused by disease or other intervening cause"—Death to be "directly and solely caused by accident"—Accident resulting in septicæmia—Death due to septic pneumonia.

The deceased insured himself with the defendants under a policy of insurance whereby the defendants agreed to pay him or his personal representatives a certain sum if he should sustain any injury caused by external and accidental violence or die within three months of its occurrence if the injury should be "the direct and sole cause of the death of the assured." The policy contained a proviso that it was to apply only to "accidents, injuries, death or disablement directly and solely caused by some outward and visible means," and was not to apply "to accidents, injuries, death or disablement caused by or arising wholly or in part from fits, disease or other intervening cause." Disease was defined in the policy as meaning "typhus, scarlet or typhoid fever, smallpox, diphtheria, or measles." The assured, while taking off his boot, accidentally inflicted a wound with his thumb nail on the inner side of his right leg. Four days later erysipelas originating in the wound set in; some days afterwards septicæmia set in and then septic pneumonia, from which complaint the assured died within three weeks from the date of the accident. The septic pneumonia was the direct cause of death, and it was admitted by the insurers that the septic germs were introduced into the wound at the time of the accident.

Held: the death of the assured was directly and solely caused by the accident, and was not caused by and did not arise from "disease or other intervening cause" within the meaning of the exception in the policy, and, therefore, the insurance company were liable on the policy.

Notes. Referred to: *Re Jamaica Street Stepmay*, 36, 38, 40, 42, [1946] 2 All E.R. 658.

As to personal accident insurance, see 22 HALSBURY'S LAWS (3rd Edn.) 292 et seq., and for cases see 29 DIGEST 393 et seq.

Cases referred to in argument:

Fulton v. Accidental Death Insurance Co. (1864), 17 C.B.N.S. 122; 34 L.J.C.P. 28; 144 E.R. 50; 29 Digest 400, 3169.

Smith v. Accident Insurance Co. (1870), L.R. 5 Exch. 302; 39 L.J.Ex. 211; 22 L.T. 861; 18 W.R. 1107; 29 Digest 400, 3170.

Isit v. Railway Passengers Assurance Co. (1889), 22 Q.B.D. 504; 37 W.R. 477; sub nom. *Re Isit and Railway Passengers Assurance Co.*, 58 L.J.Q.B. 191; 60 L.T. 297; 5 T.L.R. 194; 29 Digest 400, 3172.

Hansper v. Accident Insurance Co. (1880), 6 Q.B.D. 42; 50 L.J.Q.B. 292; 43 L.T. 459; 45 J.P. 110; 29 W.R. 116, C.A.; 29 Digest 399, 3168.

Lawrence v. Accident Insurance Co., Ltd. (1881), 7 Q.B.D. 216; 50 L.J.Q.B. 527; 45 L.T. 29; 45 J.P. 781; 29 W.R. 802, D.C.; 29 Digest 399, 3163.

Special Case stated by arbitrators in the matter of a claim by the executors of the will of John Mardorf, deceased, against the Accident Insurance Co., Ltd.

In September, 1895, John Mardorf effected an insurance for £1,000 with the Accident Insurance Co., and a duly executed policy, which was attached to this case, was issued to him, whereby the insurance company bound themselves to pay to his personal representatives the sum insured in case he should be injured by external and accidental violence and should within three months of its occurrence

112. "If such injury shall be the direct and sole cause" of his death. The policy provided that

"The company hereby agrees that if at any time during the continuance of the liability of the company under this policy the insured shall sustain any personal injury caused by external and accidental violence within the meaning of this policy, then in that case the company shall pay to the insured, or his legal personal representatives, compensation as follows: A. If such injury shall be the direct and sole cause-- (1) of the death of the insured . . . within three months from the happening of the injury the maximum sum of £1,000. E. And the company hereby further agrees that if the insured, not being entitled to any other form of compensation under this policy, shall independently of all other causes be totally and absolutely incapacitated by disease, as defined in the notices endorsed hereon, from attending to business of any kind, then the company shall pay for every week during which he shall be so incapacitated compensation at the rate per week of £6."

Then there was (among others) the following proviso:

"Provided, further, that this policy with reference to compensation for injury to the insured applies only to accidents, injuries, death, or disablement directly and solely caused by some outward and visible means of which proof satisfactory to the directors can be furnished, and does not apply to accidents, injuries, death, or disablement caused by or arising wholly or in part from fits, disease, or other intervening cause, or weakness or exhaustion, even although the disease or other intervening cause may either directly or otherwise be brought on or result from or have been aggravated by accident, or be due to weakness or exhaustion consequent on accident or the death accelerated thereby. . . ."

There was a further proviso

"That this policy and the insurance hereby effected shall be subject to the several provisos hereof, and the conditions of insurance and notices endorsed hereon and all such conditions are to be deemed conditions precedent to any liability on the part of the company."

And at the end of the notices was the following:

"The word 'disease' in this policy means typhus, scarlet, or typhoid fever, smallpox, diphtheria, or measles."

Mardorf regularly paid the premiums on the policy and died under the circumstances hereinafter mentioned on July 22, 1901, and at the time of his death the policy was in force. The executors claimed £1,000, the sum assured, from the insurance company, who denied their liability, and the dispute was referred, pursuant to the arbitration clause in the policy, to two arbitrators, who heard counsel and witnesses, on Oct. 23, 1902.

Mardorf, the deceased, was a master baker and was fifty-nine years of age. He had several shops in different localities which he used to visit, and after a long day's work he came home in the evening, hot and tired, on July 2, 1901, and, while he was taking off his socks, one sock adhered to the skin, and, in trying to free it, he inflicted a wound with his thumb nail on the inner side of the right leg below the knee. There appeared to have been no eye-witness of the occurrence, and the evidence as to how the injury was inflicted was obtained by admitting evidence as to what the deceased said in answer to the doctor when inquiring into his case and in answer to his wife, but their evidence was admitted subject to the objection of counsel for the insurance company that such evidence was not legally admissible, and with the view of obtaining the opinion of the court as to its admissibility. The deceased was, on July 2, 1901, according to the evidence given by his widow, a remarkably strong man, in good health, who never had anything wrong with him,

and who looked the picture of health, while the evidence of his medical attendant was that the deceased was of rather irregular habits both as regards food and drink, and was full blooded and arthritic, and naturally a bad subject for all inflammatory disorders. Between July 2 and 7 the deceased attended to business, but complained of feeling ill, and took to his bed on July 7, 1901, which was a Sunday. His wife first saw the wound on July 5, and on the evening of Monday, July 8, she sent for a doctor. The doctor was not at home, but his assistant, who was a qualified medical practitioner, called and saw the wound, which he described as showing a septic condition. On July 9 the doctor examined the leg and found a wound about three-quarters of an inch long and a quarter of an inch wide on the inner side of the right leg below the knee. It was a wound such as would be inflicted by a slip of the thumb nail, as described by the deceased. Erysipelas had then set in, and, from its appearance on July 9, had probably commenced on July 6. The erysipelas had originated in the wound, and from all appearances the wound had probably been inflicted on July 2. On or about July 12 septicaemia set in, and sometime between July 12 and July 16, in the opinion of the doctor, septic pneumonia had set in, as there were symptoms of it on July 16, when a consultation was advised. On Monday, July 22, John Mardorf died. Septic pneumonia was the cause of death, and it was, in the opinion of the medical men, consequent on the wound, and but for the wound he would not, in their opinion, have had septic pneumonia. The death of the insured resulted within three months from the happening of the injury to the leg. The amount (if any) recoverable by the executors of the deceased under clause A of the policy was £1,000. It was contended on behalf of the insurance company that, from the facts and circumstances above stated, the death of John Mardorf was not a death covered by the policy, and various authorities and cases were cited as to the law on the subject, and the arbitrators were desirous that the opinion of the court should be taken on the point, and they therefore, stated this Case.

The questions for the opinion of the court were: (i) Whether the evidence as to what the deceased told the doctors or his wife in answer to their questions, or any portion of such evidence, was admissible; (ii) if the evidence was not admissible, whether there was any evidence that the injury was "caused by external and accidental violence" within the meaning of the policy; and (iii) if the court should be of opinion that the injury was "caused by external and accidental violence" within the meaning of the policy, then whether the death of John Mardorf was or was not a death covered by the policy. If the court should answer the third question in the affirmative, then the arbitrators awarded and determined that the insurance company should forthwith pay to the executors of the deceased the sum of £1,000 and their costs of the arbitration and the costs of the award. If the court should answer the third question in the negative, then they determined that the executors of the deceased were not entitled to recover anything under cl. A in the policy, and they awarded that they should pay to the insurance company their costs of the arbitration and the costs of the award. It was admitted during the argument by counsel for the insurance company that the septic germs were introduced into the wound at the time of and by the accident, and the judgment proceeded upon that basis.

Norman Craig for the plaintiffs, the executors of the deceased.

Spencer Bower for the defendant insurance company.

WRIGHT, J.—There seems to be no case bearing exactly upon the point which I have to decide; but in this case I have been able to come to a definite conclusion. Counsel for the insurance company has agreed that I should treat the case as if there were a finding in the Special Case that the septic germs were introduced into the wound at the time the wound was made and by the same instrument. I think counsel was wise in acceding to this and in admitting that

fact, as, if the case had been sent back to the arbitrators for an express finding upon that point, I have very little doubt that they would have found that as a fact. With that finding I can deal with the Case without sending it back to the arbitrators.

The first part of the argument of counsel for the company was that the death could not be said to have been directly and solely caused by the outward and visible means of the scratch. It seems to me that once it is agreed—as it has been agreed in this case—that the same wound broke the man's skin and introduced into the wounded surface the septic germs which eventually poisoned him, one must come to the conclusion that the condition of the lungs which proved fatal was directly and solely caused by the wound which introduced the germs which by their own powers of reproduction arrived at last at the stage when they produced the fatal disease. To take an illustration cited during the argument, let us suppose the case of a bite of a mad dog; if a person dies from hydrophobia from the bite of a mad dog, it would be introducing too great a nicety into this matter to say that the death did not result from the bite, although the actual destruction of life did not result from the bite, but from the poisoning set up by the bite. Take, again, the case of a death resulting from a poisoned arrow, and the same observation would apply.

Then comes the second point made by counsel for the insurance company—namely, that there is an exception in the policy that the policy is not to apply to "accidents, injuries, or death caused by or arising wholly or in part from fits, disease, or other intervening cause." He says that that exception applies to protect the company. The death was clearly not a death caused by "fits"; that is out of the question. It is said that it was caused by "disease" and was not caused by the wound. I do not see how that can be so. The word "disease" as used in the policy is defined in the notices, and is confined to certain specified diseases. I think, therefore, that the word "disease" in this proviso must be limited in the way there pointed out, and the case does not come within the proviso upon that ground. Then there only remains the exception "other intervening cause," and I think that that also does not apply. I think, therefore, that the executors of the insured are entitled to recover on the policy; and the third question must be answered in the affirmative.

Judgment for the plaintiffs.

Solicitors: *Stacpoole, Batters & Stacpoole; Wynne-Baxter & Keeble.*

[*Reported by W. W. ORR, ESQ., Barrister-at-Law.*]

EVANS v. CHAPMAN

[CHANCERY DIVISION (Joyce, J.), April 11, 1902]

[Reported 86 L.T. 381; 18 T.L.R. 506; 46 Sol. Jo. 432]

Company—Articles—Rectification of mistake—Statutory authority—No power of court to rectify under equitable jurisdiction—Companies Act, 1862, (25 & 26 Vict., c. 89), s. 50.

The articles of association of a company being a document with only statutory effect, any mistake therein can only be rectified under statutory authority pursuant to s. 50 of the Companies Act, 1862. The court has no power to rectify such a mistake under its general jurisdiction to rectify written instruments even though the articles have been executed by the seven signatories to the memorandum and no one else has come in under the articles and no shares have been allotted.

Notes. The Companies Act, 1862, has been repealed. For s. 50 of that Act, see now s. 10 of the Companies Act, 1948 (3 HALSBURY'S STATUTES (2nd Edn.) 469, 470).

Considered: *Scott v. Frank F. Scott (London), Ltd.*, [1940] 3 All E.R. 508.

As to rectification of a mistake in the articles of association of a company, see 6 HALSBURY'S LAWS (3rd Edn.) 271, 272, and for cases see 9 Digest (Repl.) 591, 592.

Cases referred to in argument:

Hall-Dare v. Hall-Dare (1885), 31 Ch.D. 251; 55 L.J.Ch. 154; 54 L.T. 120; 34 W.R. 82; 2 T.L.R. 100, C.A.; 38 Digest (Repl.) 857, 706.

Draiff v. Lord Parker (1868), L.R. 5 Eq. 131; 37 L.J.Ch. 241; 18 L.T. 46; 16 W.R. 557; 35 Digest 115, 193.

Ashworth v. Bristol and North Somerset Rail. Co. (1867), 15 L.T. 561; 9 Digest (Repl.) 224, 1437.

Motion for the rectification of a mistake, due to a clerical error, in the articles of association of a company. In order to have the mistake rectified at once an application was made by motion in an action by one of the signatories to the memorandum against the other signatories and the new company asking that the articles of association might be rectified by striking out the words "per cent" in art. 7, and by consent of all the defendants treating the motion as the trial of the action.

Special resolutions to wind-up voluntarily a company called the Sulphides Reduction (New Process), Ltd., for the purposes of reconstruction under s. 161 of the Companies Act, 1862 [see now s. 287 of the Companies Act, 1948] and to appoint liquidators, who were thereby authorised to consent to the registration of a new company of the same name with a memorandum and articles of association which had already been prepared with the privity and approval of the directors, were passed and confirmed on Feb. 18, and Mar. 7, 1902 respectively. The capital of the old company was £100,000. The proposed capital of the new company was £112,500, divided into shares of £1 each. On April 3, 1902 a prospectus inviting subscriptions for shares was issued to the public by the new company, and stated that the new company had been formed for the purpose of acquiring and taking over the assets of the old company. On the front page of the prospectus were the following statements made in accordance with s. 4 of the Companies Act, 1900 [see now s. 47 of the Companies Act, 1948]:

"Seven shares of £1 each (being the amount of the minimum subscription upon which the directors under the articles of association can proceed to allotment) are now offered for subscription at par, payable 1s. per share on application and 16s. 6d. per share on allotment.

Seven shares have been subscribed by the signatories of the memorandum."

In the body of the prospectus it was also stated that the minimum subscription on which the directors might proceed to allotment was seven shares of £1 each. Clause 7 of the articles of association of the new company as registered was as follows:

"7. If the company shall offer any of its shares to the public for subscription:
(a) The directors shall not make any allotment thereof unless and until at least 7 per cent. of the shares so offered shall have been subscribed, and the sums payable on application shall have been paid to and received by the company"

The articles had been prepared from a print of the articles of another company in which the words "per cent." occurred in cl. 7. The draftsman struck out the words "per cent." in preparing the draft, but the printers reproduced them in the proof. The words were again struck out when the proof was revised, and the proof as corrected was produced at the meetings of the old company at which the special resolutions were passed and confirmed. By mistake the wrong proof, in which the words "per cent." had by inadvertence been allowed to remain, was sent to the printers instead of the proof as revised, and the articles were printed and eventually signed by the seven signatories to the memorandum of association without it being observed that the words "per cent." were still retained in cl. 7. Several applications for shares by the public had been received, but no shares had been allotted. The mistake was not discovered until April 7, 1902, when the necessary application for leave to commence business was made to the Registrar of Joint Stock Companies. He then pointed out the discrepancy between the prospectus and the articles, and refused to certify that the company was entitled to commence business as required by s. 6 of the Companies Act, 1900 [see now s. 109 of the Companies Act, 1948].

Hughes, K.C., and Mark Romer for the plaintiff.

Cassel for all the defendants.

JOYCE, J.—I do not see my way to make the order asked for. No doubt a blunder was made in drafting the articles, but that can be rectified under the provisions of s. 50 of the Companies Act, 1862, and is the proper way of doing it. With reference to the jurisdiction to rectify such a document, counsel have not had much time or opportunity to look into the authorities on the subject; but on the materials before me and as at present advised, I am of opinion that the general jurisdiction of the court to rectify instruments has no application to a document of this kind, which has only a statutory effect, and can only be rectified by statutory authority. I, therefore, refuse the motion.

Motion dismissed.

Solicitors: Cheston & Sons.

[*Reported by P. S. OSWALD, ESQ., Barrister-at-Law.*]

Re POLICY No. 6402 OF THE SCOTTISH EQUITABLE ASSURANCE SOCIETY

[CHANCERY DIVISION (Joyce, J.), December 18, 19, 1901]

Reported [1902 1 Ch. 282; 71 L.J.Ch. 189; 85 L.T. 720; 50 W.R. 321; 18 T.L.R. 210]

Insurance—Life assurance—Trust—Resulting trust—Right to sum assured—Policy effected "for behoof of" a stranger—Premiums paid by assured—Provision that stranger and her executors, administrators or assigns entitled to sum assured after death of assured—Stranger predeceasing assured—Rights of legal personal representative of assured.

In 1850 W.S. took out a policy of assurance on his life "for behoof of H.S.," and it was thereby provided that H.S. and her executors, administrators, or assigns should be entitled to receive the sum assured after the death of W.S. After his wife's death, W.S. went through a form of marriage with H.S. who was his deceased wife's sister. W.S. retained possession of the policy and paid the premiums to the date of his death. H.S. predeceased him.

Held: there being no circumstances to rebut the presumption of a resulting trust, although in law the legal personal representative of H.S. was entitled to receive the sum assured and to give a receipt for it, in equity that sum belonged to the legal personal representative of W.S. who took out the policy, and, therefore, the sum was held in trust for the estate of W.S.

Notes. As from Aug. 28, 1907, marriage between a man and his deceased wife's sister was legalised by s. 1 of the Deceased Wife's Sister's Marriage Act, 1907 (11 HALSBURY'S STATUTES (2nd Edn.) 767) now repealed and replaced by the Marriage Act, 1949: see 28 HALSBURY'S STATUTES (2nd Edn.) 653.

Referred to: *Re Foster, Hudson v. Foster*, [1938] 3 All E.R. 357; *Re Webb, Barclays Bank, Ltd. v. Webb*, [1941] 1 All E.R. 321.

As to persons entitled to payment under policies of life insurance see 22 HALSBURY'S LAWS (3rd Edn.) 286, and for cases see 29 DIGEST 374, 375. For the Life Insurance Companies (Payment into Court) Act, 1896, see 13 HALSBURY'S STATUTES (2nd Edn.) 13.

Cases referred to:

- (1) *Dyer v. Dyer* (1788), 2 Cox, Eq. Cas. 92; 30 E.R. 42; 25 Digest 511, 78.
- (2) *Ebrard v. Dancer* (1680), 2 Cas. in Ch. 26; 22 E.R. 829, L.C.; 25 Digest 513, 94.
- (3) *Rider v. Kidder* (1805), 10 Ves. 360; 32 E.R. 884, L.C.; subsequent proceedings (1806), 12 Ves. 202; 13 Ves. 123; 43 Digest 651, 854.
- (4) *Mortimer v. Davies*, cited in 10 Ves. at pp. 363, 365.
- (5) *Garrick v. Taylor* (1860), 29 Beav. 79; 30 L.J.Ch. 211; 9 W.R. 181; affirmed (1861), 4 De G.F. & J. 159; 31 L.J.Ch. 68; 5 L.T. 404; 7 Jur.N.S. 1174; 10 W.R. 49; 45 E.R. 1144, L.JJ.; 9 Digest (Repl.) 427, 2768.

Also referred to in argument:

- Re Richardson, Weston v. Richardson* (1882), 47 L.T. 514; 25 Digest 516, 114.
- Pfleger v. Brown* (1860), 28 Beav. 391; 54 E.R. 416; 29 Digest 382, 3667.
- Beecher v. Major* (1865), 2 Drew. & Sim. 431; 6 New Rep. 370; 13 L.T. 54; 13 W.R. 1054; 62 E.R. 684, L.C.; 43 Digest 566, 154.
- Milroy v. Lord* (1862), 4 De G.F. & J. 264; 31 L.J.Ch. 708; 7 L.T. 178; 8 Jur.N.S. 806; 45 E.R. 1185, L.JJ.; 25 Digest 530, 206.
- Worthington v. Curtis* (1875), 1 Ch.D. 419; 45 L.J.Ch. 259; 33 L.T. 828; 24 W.R. 228, C.A.; 29 Digest 382, 3058.

A **Adjourned Summons.**

In March, 1850 William Sanderson took out a policy of insurance for £400 on his own life with the Scottish Equitable Life Assurance Society "for behoof of Miss Harriott Stiles." The policy provided that William Sanderson had been duly admitted a member of the society, and that Harriott Stiles and her executors, administrators, or assigns should be entitled to receive out of the stock and funds of the society at the end of six months after the decease of William Sanderson the sum of £400 sterling. And it was also thereby specially declared and agreed that the sum or sums to become due and payable out of the funds of the society should be payable to the executors, administrators, or assigns of assured at the office of the society in London, and that the receipt of the person or persons who in the character of executor or executors or administrator or administrators would by the law of England have been competent to have given a discharge for the sum or sums if the policy had been issued by a society or company established in England should be a valid and sufficient discharge to the society notwithstanding that the policy was issued by a society established in Scotland. William Sanderson's wife died soon after the issue of the policy, and on May 20, 1852 he went through the form of marriage [then illegal] with Miss Harriott Stiles, who was his deceased wife's sister. William Sanderson retained possession of the policy and continued to pay the premiums up to the date of his death on Sept. 22, 1900. Miss Harriott Stiles died intestate on Sept. 21, 1890, and letters of administration of her personal estate were granted to Mrs. Margaret Pryke. The Scottish Equitable Life Assurance Society did not dispute the validity of the policy, but, a question having arisen as to whom the moneys were payable, they paid the same, amounting to £790 17s. 4d., into court under the provisions of the Life Assurance Companies (Payment into Court) Act, 1896. Sidney Sanderson and Ernest Sanderson, the executors of the will of William Sanderson, accordingly took out an originating summons asking that it might be declared whether upon the true construction of the policy, and in the events which had happened, the sum of £790 17s. 4d. and any cash in court belonged to the applicants as executors of William Sanderson, deceased, or to Margaret Pryke as legal personal representative of Harriott Stiles, deceased.

George Lawrence, for the applicants, the executors of William Sanderson.

R. M. Pattisson for the respondent, the legal personal representative of Miss Harriott Stiles.

Cur. adv. vult.

Dec. 19, 1901. **JOYCE, J.**—In the leading case of *Dyer v. Dyer* (1) EYRE, C.B., in giving his judgment said (2 Cox, Eq. Cas. at p. 93):

"The clear result of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold, or leasehold, whether taken in the names of purchasers and others jointly, or in the names of others without that of the purchaser; whether in one name or several, whether jointly or successively, results to the man who advances the purchase-money,"

and, although the judgment goes only to real estate or to leaseholds, I think the law is correctly laid down in LEWIN ON TRUSTS (10th Edn.), p. 175 [see now (15th I Edn.) p. 144] where it stated:

"Not only real estate, but personalty also, is governed by these principles, as, if a man take a bond or purchase an annuity, stock, or other chattel interest . . . in the name of a stranger the equitable ownership results to the person from whom the consideration moved."

The case referred to with reference to a bond is *Ebrand v. Dancer* (2), where the bond had been taken by the grandfather in the name of his infant children, their father being dead. LORD NOTTINGHAM, L.C., there said (2 Cas. in Ch. at p. 26):

There is difference in the case where the father is dead and where he is alive; for when the father is dead the grandchildren are in the immediate care of the grandfather; and if he takes bonds in their names or makes leases to them it shall not be judged trusts, but provision for the grandchild, unless it be otherwise declared at the same time."

In other words, it means that if the grandfather in this case had not been in loco parentis to the grandchildren in whose name the bond had been taken out, then they would have been trustees for the grandfather, who took the bond.

Then there is *Rider v. Kidder* (3), in which one John Rider purchased Consolidated three per cent. Annuities and transferred the stock into the joint names of himself and the defendant Anne Kidder, and Sir Samuel Romilly in his argument in this case cites *Mortimer v. Davies* (4), and says (10 Ves. at p. 363):

"In *Mortimer v. Davies* (4), a late case at the Rolls, a man living in this way, but not married, purchased an annuity in the name of the woman with whom he cohabited. It appeared the purchase money was his, and no consideration passed from her. She insisted that it was intended as a provision for her, but was held to be a trustee."

Then that case is again mentioned by Sir Samuel Romilly in his reply. He says (10 Ves. at p. 365):

"In *Mortimer v. Davies* (4), there were no circumstances. Upon the dry point alone, that the defendant cannot produce evidence of an intention to make a provision for her, this plaintiff is entitled."

It appears from subsequent reports (12 Ves. 202 and 13 Ves. 123) that in *Rider v. Kidder* (3) the annuities were directed to be re-transferred. Lord Eldon, L.C., says (10 Ves. at p. 366):

"If the case at the Rolls was purely this— that A. bought an annuity in the name of B., A. paying for it, and B. had no proof that it was meant as a provision for her, in this court the fact of the advancement of the purchase money, as between these persons, standing in no relation to each other that would meet the presumption, raises a trust in the person vested with the interest for the benefit of the person who paid the money,"

and later on he says, at (ibid. at p. 367):

"If, therefore, this case depended upon the mere naked circumstances of the purchase of stock in both their names, and he had died immediately, without any dealing or transaction upon it, I should have thought the defendant would have been a trustee for his personal representative, as she would have been for himself."

LORD ROMILLY, M.R., puts it quite generally in *Garrick v. Taylor* (5), which was affirmed in the Court of Appeal. He says (29 Beav. at p. 83):

"If a purchase be made by one in the name of another, the presumption is that the latter is a trustee for the person who pays the money, unless the parties stand in the relation of parent and child."

The present is the simple case of a policy taken out a great many years ago, in which the name of the lady appears in the policy as the person to whom the money is to be paid. The policy was never handed to her, and she is now dead, and the premiums were always paid, and were paid for many years after her death, by the person who took out the policy. That really is a case of taking the policy out in the name of another, that other person being a sister of his deceased wife, and therefore not standing in the relation to him that would "meet the presumption," as LORD ELDON, L.C., expressed it. It comes really to a case of a purchase

by one in the name of another with no other circumstances at all proved. Therefore, in my opinion, although the legal personal representative of the lady in this case would be the person entitled to receive the money at law and give a receipt for it, in equity the money belongs to the legal personal representative of Mr. Sanderson, who took out the policy.

Order accordingly.

Solicitors: *Sole, Turner & Knight*, for Palmer, Wardley & Barton, Tonbridge.

[*Reported by P. S. OSWALD, ESQ., Barrister-at-Law.*]

Re BLAGRAVE'S SETTLED ESTATES

COURT OF APPEAL (Sir Richard Henn Collins, M.R., Romer and Cozens-Hardy, L.JJ.), February 25, 1903]

[*Reported* [1903] 1 Ch. 560; 72 L.J.Ch. 317; 88 L.T. 253; 19 T.L.R. 280; 47 Sol. Jo. 334; 51 W.R. 437]

Settled Land—Tenant for life—Improvement—Application of capital money—“Additions to or alterations in buildings”—Electric lighting installation—Engine-house—Separate building—Settled Land Act, 1882 (45 & 46 Vict., c. 38), s. 25—Settled Land Act, 1890 (53 & 54 Vict., c. 69), s. 13 (ii).

To enable a mansion-house, which was subject to a settlement, to be let, it was fitted with a complete electric lighting installation, a separate building, standing at some distance from the mansion-house, being erected for the purposes of an engine-room and accumulating-room. This was fitted with a petroleum engine, a dynamo, an accumulator, etc. In the mansion-house were set up a switch-board, branch circuit wiring, branch switches, wall plugs, pendants, and the like, and the engine-room and mansion-house were connected by a cable. On an application, under s. 13 (ii) of the Settled Land Act, 1890, that the expenditure so incurred might be paid for out of capital money, the expenditure on the erection of the engine-room and accumulating-room was allowed, but not the expenditure on the electric plant. The tenant for life appealed as to the latter expenditure.

Held: an “addition” to a building must be something in the nature of a structural addition; the electric plant was not an “addition” to the mansion-house, and, therefore, it was not an “improvement” within the meaning of s. 13 (ii), of the Act of 1890, and the expenditure could not be allowed.

Re Clarke's Settlement (1), [1902] 2 Ch. 327, approved.

Notes. The Settled Land Act, 1882, s. 25, has been repealed; see now the Settled Land Act, 1925, s. 83 and Sched. III, 23 HALSBURY'S STATUTES (2nd Edn.) 186, 272. The Settled Land Act, 1890, s. 13, has been repealed; see now Schedule III, Part I (xxiii) of the Act of 1925, *ibid.* p. 273.

Considered: Re Insole's Settlement, [1938] 3 All E.R. 406. Referred to: *Re Lindsay's Settlement* (No. 2), [1941] Ch. 119.

As to land improvements authorised under the Settled Land Act, 1925, see 23 HALSBURY'S LAWS (3rd Edn.) 116-124, and for cases see 30 DIGEST (Repl.) 317 et seq.

Cases referred to :

- (1) *Re Clarke's Settlement*, [1902] 2 Ch. 321; 71 L.J.Ch. 502; 86 L.T. 222; 50 W.R. 585; 18 T.L.R. 610; 46 Sol. Jo. 499; 30 Digest (Repl.) 324, 139.
- (2) *Re Freake's Settlement*, *Kinnaird v. Freake*, [1902] 1 Ch. 97; 71 L.J.Ch. 20; 85 L.T. 454; 50 W.R. 237; 30 Digest (Repl.) 324, 145.
- (3) *Re Gashill's Settled Estates*, [1891] 1 Ch. 485; 63 L.J.Ch. 243; 70 L.T. 354; 42 W.R. 219; 38 Sol. Jo. 200; 8 R. 67; 30 Digest (Repl.) 324, 142.

Appeal from an order of JOYCE, J., on a summons under the Settled Land Act, 1882 to 1890, by which Henry Barry Blagrave, tenant for life of the Cabot Park and Blagrave estates, in the county of Berks, settled by the will of the late John Henry Blagrave, asking that certain sums might be allowed to the applicant out of the capital money subject to the settlement in respect of the expenses incurred by him for the various improvements made to the mansion-house.

The improvements in question were in the nature of a complete electric lighting installation, and were made for the purpose of enabling the mansion-house to be let. The cost of the work amounted to £1,302 10s. 2d. Of this sum £227 16s. 8d. was the amount of the account for erecting an engine-room and accumulating-room, and the necessary working connection therewith for the electric light installation. The sum of £737 15s. 8d. was expended for supplying and fixing the following: a petroleum engine, a dynamo, an accumulator, a main switchboard with the necessary fittings and connections with the accumulator in the engine-room, and a main cable connecting the engine-room with the mansion-house. The sum of £336 17s. 10d. was paid for supplying and fixing a switchboard and distributing fuse-board in the mansion-house, branch circuit wiring, casing, branch switches, wall plugs, plain and counterbalance pendants, standards, brackets and lamps, and for labour. The question turned upon s. 13 (ii) of the Settled Land Act, 1890, which supplemented s. 25 of the Settled Land Act, 1882. Section 13 (ii) of the Act of 1890 enacted that improvements authorised by the Act of 1882 should include "making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let." Section 25 of the Act of 1882 enacted that the "improvements" authorised by the Act were "the making or execution on, or in connection with, and for the benefit of settled land" of any of the works mentioned in the section "and any operation . . . necessary or proper for carrying into effect any of those purposes, and for securing the full benefit of any of those works or purposes." The summons was adjourned into court and came on to be heard before JOYCE, J., on July 17, 1902, when his Lordship decided (87 L.T. 62) that the cost of the engine-room and accumulating-room ought to be allowed; but, upon the authority of the decision of BUCKLEY, J., in *Re Clarke's Settlement* (1), his Lordship decided that electric lighting plant was not an "improvement" for which expenditure out of capital money could be allowed under the Settled Land Acts. From that decision the tenant for life now appealed.

Dibdin, K.C., and Errington for the tenant for life.

C. L. Garnett for the trustees.

SIR RICHARD HENN COLLINS, M.R. This is an appeal from a decision of JOYCE, J. Virtually it is an appeal from a decision of BUCKLEY, J., in *Re Clarke's Settlement* (1), and the question is whether a tenant for life of settled estates is entitled to have paid for him out of the capital money the expense of an electric installation. His rights depend on the Settled Land Acts, and if he has them, they are to be found only in s. 13 (ii) of the Act of 1890 coupled with s. 25 of the principal Act of 1882. The words of sub-s. (ii) of s. 13 of the Act of 1890 which come under the head of "improvements" are these: "Making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let." That provision in s. 13 supplemented the last words of s. 25 of the principal Act of 1882, which are, "necessary or proper for carrying into effect any of

those purposes, or for securing the full benefit of any of those works or purposes"—namely, those mentioned in the subsequent sub-sections of the Act.

The first argument of counsel for the tenant for life is this. He says: "I have obtained from the learned judge in the court below the right to have built out of capital money a house for electric plant." Then he says: "Now that I have got that house I am entitled to say I cannot secure the full benefit of that house unless you allow me to put electric plant into it." In other words, he says that the electric plant is not only for generating electricity, but also for all that is necessary for the installation—that is to say, the wires, apart from the ornamental fittings—are accessories to the house in which they are put. That seems to me to be rather an invention on the part of the appellant that having got leave to build the house he is, therefore, entitled at the expense of the capital to fix the plant for an electric installation in the mansion house. That argument cannot, in my opinion, be supported. If he has any case, he might come in on the main argument that the electric plant is an addition to the building under the words of the Act. It really comes to this: Is electric plant an addition to a building within the meaning of that section? BUCKLEY, J., has decided that it is not. JOYCE, J., in an earlier case of *Re Freake's Settlement*, *Kinnaird v. Freake* (2), without giving any reasons, allowed the expenditure out of capital. But in the present case, a subsequent case, having BUCKLEY, J.'s decision in *Re Clarke's Settlement* (1) before him, he elected to follow BUCKLEY, J. So that, so far as the courts below go, there is a decision of two judges that the addition of electric plant is not an addition to the building.

I have great difficulty in differing from BUCKLEY, J.'s view, which was based not merely upon his own opinion, but upon an earlier decision of CHITTY, J., in *Re Gaskell's Settled Estates* (3). Although the words "structural addition" are not used in the Act of 1890, the learned judge in that case seems to have considered that an addition to a building must in its terms be something in the nature of a structural addition. This view BUCKLEY, J., adopted in *Re Clarke's Settlement* (1), although he says that the word "structural" is not used in the Act, and that the word "addition" is capable of a good many meanings. But when you have an addition to a building, it is difficult to imagine what addition there can be within this Act which does not involve a structural addition. Counsel for the tenant for life does not contend that something added to the building which is not attached to it, such as furniture and loose chattels, can be said to be additions to the building. But why not, if his main argument is correct? It is not the addition of light to light, but something that adds to the amenities of the building. Into what category are you to divide them? You can only get three gradations—namely, loose chattels which are not attached at all, fixtures which are attached in a certain sense, and actual structural additions. Which of those is meant? It would be very difficult to divide off any possible alternative short of an actual structural addition. *Prima facie* the section seems to mean a structural addition to the building, and that is not satisfied by putting wires into a building or putting an engine into an engine-house. Those do not seem to me to come within the sort of addition that is meant in this Act. I agree entirely with the observations of BUCKLEY, J., in *Re Clarke's Settlement* (1) as to electric plant, and of CHITTY, J., in *Re Gaskell's Settled Estates* (3) to electric apparatus. They completely cover this case and, therefore, this appeal fails, and must be dismissed.

ROMER, L.J.—I also agree with the reasoning and the decision of CHITTY, J., in *Re Gaskell's Settled Estates* (3) and of BUCKLEY, J., in *Re Clarke's Settlement* (1), and the principle of the decisions in those cases governs the present. The appellant's counsel are obliged to admit that there is nothing in the Settled Land Acts which deals specifically with lighting either by electricity or by gas; and they are obliged to try to bring the installation for the electric lighting within s. 13 (ii) of the Act of 1890. Now, as to that, when the Legislature in that sub-section speaks of an addition to or alteration in buildings, it is speaking of something which is in itself

of the nature of a building. That being so, it appears to me clearly in the present case that even if the building itself, the dynamo-house, which may be described as additional, the cost of which has been allowed by the court below, comes within the sub-section, it cannot be said that the installation for the electric lighting also falls within the sub-section. I do not quite see how the learned judge in the court below came to allow the expense of the erection of the dynamo-house, seeing that that house was some distance from the mansion-house. It is difficult to see at first sight how it could be said to be an addition to or alteration in the mansion-house or any previously existing buildings. But that point is fortunately not before us.

COZENS-HARDY, L.J.—I entirely agree with ROMER, L.J. I at present entertain great doubt whether the expenditure of capital money in the construction of the dynamo-house, situate as it is, can be brought within any head of the Settled Land Acts. Section 13 (ii) certainly does not mean making any additional building to an estate, but it must be an addition to or alteration in existing buildings. However that may be, I think it is impossible to escape from the cogency of the reasoning of BUCKLEY, J., in the case of *Re Clarke's Settlement* (1). It may well be that it might be desirable to extend sub-s. (xiii) of s. 25 of the Act of 1882 so as to authorise the provision of electricity or gas, whether for lighting or for power, on the same footing as water supply, but that is a matter for the Legislature, and not for us. We have in the Settled Land Acts a code which is exhaustive and complete; and it is idle to argue that an improvement will be beneficial, unless, in the first instance, you can bring it within one or more of the sub-sections of these Acts. I think, therefore, that the decision of the learned judge in the court below is quite right.

Appeal dismissed.

Solicitors: *Bridges, Sawtell & Co.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

BRITISH ASBESTOS CO., LTD. v. BOYD

[CHANCERY DIVISION (Farwell, J.), May 27, 1903]

[Reported [1903] 2 Ch. 439; 73 L.J.Ch. 31; 88 L.T. 763; 51 W.R. 667; 11 Mans. 88]

Company—Director—Disqualification—Validation of acts done by disqualified director—Subsequent discovery of defect—Companies Act, 1862 (25 & 26 Vict., c. 89), s. 67.

By art. 89 (a) of the articles of association of a company it was provided that a director should vacate his office "if he without the sanction of any general meeting accept or hold any other office under the company except that of managing director, manager, or trustee." B., one of the directors, was appointed secretary to the company, continued to act as director, and purported with another director to carry on the business of the company. Under the articles of association a quorum of two was necessary at all meetings of the directors. B. and the other director appointed M. to be a director. Later the disqualification of B. was discovered. Article 108 of the articles of association validated acts done at a meeting of directors notwithstanding the subsequent discovery of any defect in the appointment or qualifications of all or any of them.

Held: (i) art. 108 and s. 67 of the Companies Act, 1862, were sufficient to cover such irregularities as those alleged; (ii) although the facts which gave rise to the defect were throughout within the knowledge of the company, the actual existence of the defect not having been discovered until after the appointment of M., he was a properly elected director.

Dawson v. African Consolidated Land and Trading Co. (1) [1898] 1 Ch. 6, considered.

Notes. The Companies Act, 1862, has been repealed. For s. 67 of that Act see now s. 145, 180 of the Companies Act, 1948, 3 HALSBURY'S STATUTES (2nd Edn.) 573, 600; and for s. 52 of the Act of 1862, s. 134 of the Act of 1948, 3 HALSBURY'S STATUTES (2nd Edn.) 564.

Applied: *Boschock Proprietary Co. v. Fuke*, [1906] 1 Ch. 148; *Ellett v. Sternberg* (1919), 27 T.L.R. 127. Approved: *Channel Collieries Trust Ltd. v. Dover, St. Margaret's and Martin Mill Light Rail. Co.*, [1914-15] All E.R. Rep. 265. Referred to: *Re Allison, Johnson and Foster, Ex parte Birkenshaw*, [1904] 2 K.B. 327; *Transport v. Schonberg* (1905), 21 T.L.R. 305; *Morris v. Kanspen*, [1946] 1 All E.R. 586.

As to appointment of company directors, see 6 HALSBURY'S LAWS (3rd Edn.) 274 et seq., and for cases see 9 DIGEST (Repl.) 458-461.

Case referred to:

(1) *Dawson v. Consolidated Land and Trading Co.*, [1898] 1 Ch. 6; 67 L.J.Ch. 47; 77 L.T. 392; 46 W.R. 132; 14 T.L.R. 30; 42 Sol. Jo. 45; 4 Mans. 372, C.A.; 9 Digest (Repl.) 451, 2965.

Also referred to in argument:

Re Bank of Syria, Owen & Ashworth's Claim, Whitworth's Claim, [1900] 2 Ch. 272; 69 L.J.Ch. 412; 83 L.T. 165; 48 W.R. 35; affirmed [1901] 1 Ch. 115; 70 L.J.Ch. 82; 83 L.T. 547; 49 W.R. 100; 17 T.L.R. 84; 45 Sol. Jo. 77; 8 Mans. 105, C.A.; 9 Digest (Repl.) 546, 3597.

Injunction to restrain persons irregularly appointed from acting as the directors of a company.

The British Asbestos Co., Ltd. was registered on Jan. 21, 1899, and by the articles of association W. Menzies, James Boyd, and James Reid were appointed the first

directors of the company. On Sept. 10, 1902, the plaintiffs Brauns and Perotti were elected additional directors. On Oct. 23, 1902, James Boyd, one of the original directors, was appointed secretary to the company, and, therefore, under art. 89 (a) of the articles of association vacated the office of director. This provision was, however, overlooked and he continued to act.

On Dec. 4, 1902, Morries under art. 89 (f) resigned his office of director, and on the same day Reid and Boyd purported to hold a meeting of directors for which under art. 102 a quorum of two was essential. They purported at the meeting to appoint Boyd's son to be secretary in place of his father and to elect Boyd chairman and managing director of the company, but by art. 98 of the articles of association in order that this appointment be valid, it was necessary that Boyd should at the time have been a director. On Jan. 5, 1903, another meeting was held by the same two persons, Brauns and Perotti being absent in Italy. Perotti was given special leave of absence from the meetings of the directors, and Reid and Boyd then purported to elect the defendant Methven a director of the company. At a meeting of Feb. 18, 1903, at which Methven, Reid and Boyd were present, it was decided that Brauns having been absent for more than six months without leave had thereby ceased to be a director, and a notification to that effect was sent to him. On Mar. 3, 1903, a general meeting was summoned for Mar. 25, 1903, and a report issued signed by Boyd and Reid.

On Mar. 16, five shareholders (among whom were Brauns and Perotti) issued a circular summoning an extraordinary general meeting of the company for Mar. 31. They purported to do so under s. 52 of the Companies Act, 1862, upon the ground that there was no board of directors competent to summon a general meeting. They alleged that the notice of Mar. 3 calling a fourth general meeting for Mar. 25 was inoperative and invalid.

On Mar. 17, Boyd, Reid, and Methven held a board meeting, and it was resolved that, in consequence of the position of Boyd as a duly constituted director of the company having been challenged by the issue of the above-mentioned circular, Boyd should be and was thereby re-appointed a director of the company. The meeting summoned by the de facto directors for Mar. 25 was duly held, and the defendant Brooks was then appointed a director. The extraordinary meeting summoned for Mar. 31 by five shareholders was also held, and four directors in addition to Reid appointed. On Mar. 27, 1903, Brauns and Perotti (on behalf of themselves and all the shareholders in the company other than the defendants) issued a writ, employing the name of the company as a co-plaintiff, asking for a declaration that Boyd, Methven, and Brooks were not directors of the plaintiff company. They also asked for an injunction to restrain these three persons from acting or purporting to act as directors, and from paying a dividend purported to have been voted at the meeting of Mar. 25, 1903. Notice of motion was given the same day asking for a similar interim injunction.

Arts. 89 and 98 of the articles of association provide :

- "Article 89. The office of director shall be vacated : (a) If he without the sanction of any general meeting accept or hold any other office under the company except that of managing director, manager, or trustee. . . .
 (d) If he cease to hold the required amount of shares to qualify him for office, or do not acquire the same within one month after election or appointment.
 (e) If he absent himself from the meetings of the directors during a period of six calendar months without special leave of absence from the directors. . . .
 (f) If by notice in writing to the company he resign his office.

Art. 98. The directors may from time to time appoint one or more of their body to be managing director or managing directors of the company.

Section 52 of the Companies Act, 1862 provides :

" . . . In default of any regulation as to the persons to summon meetings, five members shall be competent to summon the same, and in default of any

A regulation as to who is to be chairman of such meeting, it shall be competent for any person elected by the members present to preside."

Upjohn, K.C., and Martelli, for the plaintiffs.

Gore-Browne, K.C., and H. E. Wright, for the defendants.

B FARWELL, J.—The only question that I have to determine in the case is the meaning of art. 108 and s. 67 of the Companies Act, 1862, and, inasmuch as the article is in the common form, it is of some little importance. In my opinion, the words in art. 108, "notwithstanding that it shall afterwards be discovered that there was some defect," do not limit the validating power of the article to instances where the facts giving rise to a defect are subsequently discovered. It is only necessary that the defect arising out of the facts should be subsequently discovered. C The facts in a case like the present necessarily appear on the books of the company, but they did so too in *Dawson v. African Consolidated Land and Trading Co.* (1) for the transfers there which caused the disqualification of a director were transfers out of his name. Those transfers were in the company's books, and appeared on the face of the company's books. It is not, therefore, necessary that the facts should not be known, in the sense of not appearing on the face of the company's D books. But the knowledge of the defect must not be present to the mind of any person to whom it is material to know it. As stated in BUCKLEY ON THE COMPANIES ACTS (8th Edn.), p. 230, the object of a clause like this and of s. 67 of the general Act is to make the honest acts of de facto directors as good as the honest acts of de jure directors, and, although down to the decision in *Dawson v. African Consolidated Land and Trading Co.* (1) it was generally supposed that such article or E section only applied as between members of the company and outsiders, and did not apply as between members of the company inter se or as between members of the company and the company, that decision has stated such a view of the law to be incorrect, and has held the article or section to be of general operation. Therefore, although there may be some slip which has been bonâ fide overlooked, the acts of the de facto directors are as good as the acts of the de jure directors.

F The next point is this. It is said that the discovery referred to must be of some defect in the appointment of directors. It is clear that there is no defect in the appointment here. The disqualification in the present case is under art. 89 (a), which is as follows:

"If he without the sanction of any general meeting accept or hold any other G office under the company except that of managing director, manager, or trustee."

Mr. Boyd accepted the office of secretary and thereby vacated his office. It has been argued that the word "disqualified" has a technical meaning, and that the disqualification referred to is the ceasing to hold qualification shares. That is not the case. "Disqualified" refers back to art. 89, and is used in the general colloquial H sense that a director becomes disqualified if he ceases to hold his office or does some act or suffers something to happen which causes him to vacate his office under art. 89. "Disqualified" is used in the wide sense, and, therefore, the article applies. The result is that on Jan. 5, which was the critical moment, there was a de facto board of directors as to whom there had been no discovery that there was any defect in their appointment. Consequently I hold that the defendants are I right and are properly constituted directors.

Solicitors: W. A. Crump & Son; E. W. Oliver.

[Reported by H. C. GARSIA, Esq., Barrister-at-Law.]

MALLOTT v. WILSON

[CHANCERY DIVISION (Byrne, J.), April 21, May 27, 1903]

[Reported [1903] 2 Ch. 494; 72 L.J.Ch. 664; 89 L.T. 522]

Settlement—Voluntary settlement—Really—No power of revocation—Disclaimer by trustee—Validity of settlement.

By a voluntary settlement of 1866 real estate was granted under and to the use of a trustee upon certain trusts. There was the usual covenant for further assurance, but no power of revocation. In 1867 the trustee disclaimed the trusts of the settlement by deed poll, and the settlor executed a deed poll purporting to put an end to the settlement.

Held: the trusts of the settlement still subsisted and had re-vested in the settlor on the trustee's disclaimer.

Jones v. Jones (1) (1874), 31 L.T. 535, applied.

Equity—Marshalling—Settlement—Mortgage by settlor of part of settled property—Right of beneficiaries—Discharge of mortgage out of unsettled estate.

In 1888 the settlor mortgaged part of the hereditaments comprised in the settlement, and in 1899 a transfer of the mortgage was executed in favour of his trustees and executors.

Held: the beneficiaries under the settlement were entitled to have the settlor's estate marshalled and the mortgage discharged out of the unsettled estate.

Hales v. Cox (2) (1863), 32 Beav. 118, applied.

Notes. The Voluntary Conveyances Act, 1893, has been repealed. See now the Law of Property Act, 1925, s. 173, 20 HALSBURY'S STATUTES (2nd Edn.) 788.

Referred to: *Westminster Bank, Ltd. v. Wilson*, [1938] 3 All E.R. 652.

As to disclaimer of office by trustee, see 38 HALSBURY'S LAWS (3rd Edn.) 911 *et seq.*, and for cases see 43 DIGEST 704 *et seq.*

Cases referred to:

- (1) *Jones v. Jones*, [1874] W.N. 190; 31 L.T. 535; 23 W.R. 1; 43 Digest 659, 1001.
- (2) *Hales v. Cox* (1863), 32 Beav. 118; 1 New Rep. 344; 8 L.T. 134; 9 Jur.N.S. 1305; 11 W.R. 331; 55 E.R. 46; 23 Digest (Repl.) 536, 609.
- (3) *Milroy v. Lord* (1862), 4 De G.F. & J. 261; 31 L.J.Ch. 798; 7 L.T. 178; 8 Jur.N.S. 806; 45 E.R. 1185, L.J.J.; 40 Digest (Repl.) 576, 807.
- (4) *Thompson v. Leach* (1690), 2 Vent. 198; 86 E.R. 391; on appeal (1692), 2 Vent. 208; Holt, K.B. 357, 623; 2 Lev. 284; 3 Mod. 296; 2 Salk. 618, n.; 1 Show. 296; Carth. 211, 250; 90 E.R. 1097, H.L.; subsequent proceedings (1698), Show. Parl. Cas. 150; 25 Digest 518, 130.
- (5) *Siggers v. Evans* (1855), 5 E. & B. 367; 3 C.L.R. 1209; 24 L.J.Q.B. 303; 25 L.T.O.S. 213; 1 Jur.N.S. 851; 119 E.R. 518; 25 Digest 520, 135.
- (6) *Butler v. Baker* (1591), 3 Co. Rep. 25a; 1 And. 348; 3 Leon. 271; Popl. 87; Moore, K.B. 254; 76 E.R. 684; 25 Digest 519, 131.
- (7) *London and County Banking Co., Ltd. v. London and River Plate Bank* (1888), 21 Q.B.D. 535; 57 L.J.Q.B. 601; 61 L.T. 37; 37 W.R. 89; 4 T.L.R. 774, C.A.; 25 Digest 520, 134.
- (8) *Smith v. Wheeler* (1671), 1 Vent. 128; 86 E.R. 88; sub nom. *Scrymgeour v. Wheeler*, 2 Keb. 772; 43 Digest 700, 1393.
- (9) *Small v. Marwood* (1829), 9 B. & C. 200; 4 Man. & Ry. K.B. 181; 7 L.J.O.S.K.B. 197; 109 E.R. 112; 43 Digest 701, 1395.
- (10) *Standing v. Bowring* (1885), 31 Ch.D. 282; 55 L.J.Ch. 218; 54 L.T. 191; 34 W.R. 204; 2 T.L.R. 202, C.A.; 25 Digest 519, 133.

A **Special Case.** By a voluntary settlement of July 31, 1866, between Montague Joseph Fielden, the settlor, and William Carr, after reciting among other things that the settlor was entitled to certain hereditaments, furniture, railway stock, and effects, and that he was desirous of making a settlement on his wife and any child or children he might have by her, certain real estate was purported to be granted unto and to the use of William Carr, his heirs and assigns; and it was thereby declared that **B** William Carr, his heirs, executors, administrators, and assigns, should stand possessed of the hereditaments and effects, and of the sums of stock when respectively transferred to him or them, upon trusts for the settlor's wife, Alice Fielden, for life for her separate use without power of anticipation, and, after her decease, in trust for all and every the settlor's children or child by her who being sons or a son should attain twenty-one or being daughters or a daughter should attain that age or **C** marry, and if more than one as tenants in common, and their respective heirs, executors, administrators, and assigns for ever; and if there should be but one child, then the whole should be in trust for that one, his or her heirs, executors, administrators, and assigns.

The settlement contained the following covenant by the settlor for further assurance :

D "For himself, his heirs, executors, and administrators, with the said William Carr, his heirs, executors, administrators, and assigns, that the said Montague Joseph Fielden, his heirs, executors, and administrators, and every person claiming any estate or interest in or out of the said hereditaments and premises hereinbefore respectively granted and assigned or expressed and intended so to **E** be or any part thereof under or in trust for him, shall and will at all times hereafter at the request of the said William Carr, his heirs, executors, administrators, or assigns, at his or their costs, or at the cost of the trust hereditaments and premises, make, do, and execute all such further lawful acts, deeds, and assurances for the more perfectly granting, assigning, and confirming the said hereditaments and premises hereinbefore respectively granted and assigned, **F** or expressed and intended so to be, unto and to the use of William Carr, his heirs, executors, administrators, and assigns, respectively in manner aforesaid, and for enabling him or them to obtain possession of the said furniture."

This settlement was executed by the settlor but never by William Carr; and on Mar. 9, 1867, William Carr executed a deed-poll disclaiming the trusts of the settlement in the following terms :

G "The said William Carr doth hereby absolutely and irrevocably disclaim all the real and personal estate and effects whatsoever by the said indenture expressed to be granted or assigned unto or to the use of the said William Carr, his heirs, executors, administrators, or assigns, or to which he or they could or might in any manner become entitled under or by virtue of the same indenture, and also all trusts, powers, or authorities whatsoever expressed to be **H** reposed or given in or to him or them by the said indenture."

On April 5, 1867, the settlor executed a deed-poll reciting the settlement and that William Carr had never accepted the trusts or any of them, and that the settlor was desirous that the intended settlement should not take or have any effect; and the deed proceeded :

I "Now know ye that he, the said mortgagee, Joseph Fielden, doth hereby reclaim, withdraw, countermand, cancel, revoke, and make and declare imperfect, null and void, all and singular the trusts, powers, authorities, provisoes, agreements, and declarations therein respectively expressed, declared, or contained, as fully and entirely to all intents and purposes as if the said indenture had never been made or intended to be made."

By a mortgage of Feb. 11, 1888, the settlor purported to convey some of the hereditaments comprised in the settlement of 1866 to the mortgagee to secure £300

and interest at 4 per cent., and this deed contained the usual personal covenant by the antitor for the payment of the principal sum secured and interest thereon.

By a voluntary settlement of Jan. 17, 1866, between Montague Joseph Fielden, the settlor, and Montague Leyland Fielden, the settlor's only son, and Violet Wilson, the settlor purposed to convey the whole of the land and hereditaments comprised in the settlement of 1866 with other lands (subject to the mortgage of Feb. 11, 1888) unto Montague Leyland Fielden and Violet Wilson and their heirs, to the use of the settlor and his assigns for life, with remainder to the use of Montague Leyland Fielden for life, with remainder to the use of his first and other sons in tail male, with remainders over to other persons for life, with remainder to the use of such persons and for such estate as the settlor should by his will appoint, and in default to the use of the settlor, his heirs and assigns. On Oct. 16, 1868, Montague Joseph Fielden, the settlor, died, having made a will devising all his real and personal estate to trustees upon certain trusts. On Aug. 31, 1890, Alice Fielden, the testator's widow, died. On Dec. 5, 1890, Montague Leyland Fielden died without issue, having by his will left all his real and personal property to the plaintiff absolutely. As the only son of the settlor and Alice Fielden, his wife, Montague Leyland Fielden became absolutely entitled to the hereditaments comprised in the settlement of 1866, if it still subsisted. In Nov. 1899 a transfer of the £300 mortgage of Feb. 11, 1888, and all securities for the same, was executed in favour of the trustees and executors of the settlor for the purposes of his will, and in trust for his estate, the mortgagee being paid off out of the settlor's assets.

The real estate comprised in both settlements had recently been sold by arrangement between all the parties interested therein, and the proceeds of sale had been paid to a joint account. The plaintiff claimed to be entitled to the proceeds of sale so far as they represented hereditaments settled by the indenture of 1866. The defendants claimed, under the settlement of 1889 and the will of the testator, to be entitled to the whole of the proceeds of sale. Upon action being brought, a special case was stated to determine the interests and priorities of the two sets of claimants.

The case raised two questions: (i) Whether the trusts declared by the settlement of 1866 were still valid and binding, notwithstanding the deeds-poll of Mar. 9 and April 5, 1867; and, if so, (ii) whether the mortgage of Feb. 11, 1888, constituted a subsisting claim in favour of the settlor's executors in priority to persons claiming under the trusts of the settlement of 1866 in the said purchase moneys. It was admitted that the Voluntary Conveyances Act, 1893 was not applicable.

Rowden, K.C., and *Ashton Cross* for the plaintiff.

Levett, K.C., and *Northcote* for some of the defendants.

Eustace Smith and *Whinney* for other defendants.

Cur. adv. vult.

May 27, 1903. **BYRNE, J.**, stated the facts and continued:—I come to the first point: What was the operation of the deed supposed to constitute the original voluntary settlement? The question appears to be: Was there a duly constituted trust by the first deed? I need not again read the oft-quoted words of *TRINER, L.J.*, in *Milroy v. Lord* (3) (4 De G.F. & J. at p. 274) as to what is necessary to constitute a complete settlement. What is required of the settlor is that he should part with his property if he intends it to operate by way of a conveyance upon trust. And, moreover, it is an established rule, that the court cannot construe an incomplete gift as being a declaration of trust. The operation of this first deed was that of a common law assurance, and not that of an assurance under the Statute of Uses, because it was a conveyance unto and to the use of William Carr, his heirs and assigns. It is quite clear that the whole legal estate passed to William Carr, and continued in him up to the time of his disclaimer. *Thompson v. Leach* (4) is material on this point for the reasons given in the judgment of *VINERIS, J.* At the original hearing three of the judges differed from *VINERIS, J.*; and, on appeal, the Court of Appeal took the view of the majority of the judges in the court below; but when the matter

A finally went to the House of Lords, as is stated at the end of the report (2 Vent. at p. 208):

"This case was brought by Writ of Error into the House of Lords, and the judgment was there reversed upon the reasons in the aforesaid argument."

B I find from the report in SHOWERS' PARLIAMENTARY CASES (at p. 151) of the decision in a subsequent action that this case had been heard in the House of Lords, as stated in their memorandum at the end of the report in VENTRIS. MR. PRESTON, in his (7th) edition of SHEPPARD'S TOUCHSTONE, says (at p. 285):

C "The law presumes that every grant, etc., is for the benefit of the grantee, etc.; and, therefore, till the contrary is shown, supposes an agreement to the grant. From the moment there is evidence of disagreement, then in construction of law the grant is void ab initio, as if no grant had been made (see *Thompson v. Leach* (4)), and in intendment of law the freehold never passed from the grantor."

D There is a passage to somewhat similar effect in PRESTON'S ABSTRACTS (vol. 2, p. 226):

"In the first place, if a grant be made by one man to another, the estate will, in intendment of law, vest immediately in the grantee; but by refusal or disagreement the grant will be void ab initio.

This point was fully discussed, and received a determination in *Thompson v. Leach* (4)."

E I felt a little embarrassed by the use of the expression "void ab initio"; but I am satisfied now that the true meaning of that is not that, in regard to all persons and for all purposes is the case to be treated as though the legal estate had never passed, but that as regards the trustee and the person to whom the grant was made, he is, in respect of his liabilities, his burdens, and his rights, in exactly the same position as though no conveyance had ever been made to him, and I find that in *Thompson v. Leach* (4) the subject is expressly referred to. The learned judge says (2 Vent. at p. 202):

G "I do not cite authorities, which are plentiful enough in these matters, because they that have argued for the plaintiffs have in a manner agreed, that in conveyances at the common law, generally the estate passeth to the party, till he divests it by some disagreement."

I find also in *Siggers v. Evans* (5) (5 E. & B. at p. 380):

"There is no doubt that a grant of goods, like any other common law conveyance operating by grant, passes the property without assent. In *Butler v. Baker* (6) it is said:

H "The same law of a gift of goods and chattels, if the deed be delivered to the use of the donee, the goods and chattels are in the donee presently, before notice or agreement; but the donee may make refusal in pais, and by that property and interest will be divested."

I The question, as to whether the property passed by a surrender subject to be divested, or whether it did not pass until assent, was discussed and settled in the important case of *Thompson v. Leach* (4)."

Then he goes on to deal with that case.

So, in *London and County Banking Co., Ltd. v. London and River Plate Bank* (7), a case which did not involve this point, but in respect of which LINDLEY, L.J., thought there was sufficient analogy to justify a reference to these cases, he says (21 Q.B.D. at p. 541):

"This presumption is, I think, warranted by authority, for although the exact point has not been decided, an analogous point has. It was settled as

long ago as the time of Lord Coke, that the acceptance of a gift by a donee is to be presumed until his dissent is signified, even though the donee is not aware of the gift (*Butler v. Baker* (6)), and this doctrine has been applied even as against the Crown, and so as to defeat a title accruing to it before actual assent: *Smith v. Wheeler* (8), referred to at length in *Small v. Marwood* (9) and in *Siggers v. Essex* (5). In the last mentioned case the presumption was held to apply to a gift of an annuity annuity; and in *Harling v. Boaring* (10), the presumption was also held to apply to a gift which the donor desired to revoke before the donee knew that it had been made. The presumption of acceptance in such cases is artificial, but is founded on human nature."

The lord justice gives further reasons for it.

Under these circumstances I think that the trust was really created and the fact that the trustee subsequently disclaimed, did not destroy the trust, but that upon the re-vesting the settlor himself held in trust; that is not construing that which was intended to be a deed operating by a transmutation of possession and the creating a third person as trustee, as though it had been a declaration of trust, but it is construing it as having created the trust, and the settlor as having subsequently become trustee of it by reason of the action which took place. It is really imposing the trust on the legal owner in whom by operation of law the estate is re-vested after the creation of the trust.

There was another case referred to. I have not mentioned it before because I have nothing but a weekly note of it. I, therefore, refer to it subject to the observation that I do not take it as being an exact reproduction of the observations of the learned judge; but *Jones v. Jones* (1), if it is correctly stated in the *Weekly Notes* for 1874, at p. 190, appears to me to be very similar to this case in many respects. There one Jones had a general power of appointment over certain hereditaments, and appointed to Francis William Calder on certain trusts, and covenanted for further assurance. A deed was signed, sealed, and delivered by Jones, but was not communicated to or executed by Calder. Then the hereditaments were, subject to the power, limited to the use of Jones, his heirs and assigns for ever. In 1865 Jones made his will, not referring to the power, by which he devised his real estate upon the trusts therein contained. Then he died, and his will was proved by the plaintiff. It was not until 1872 that the existence of the deed and the trusts of it were communicated to Calder, who positively refused to undertake the trusts on account of his great age. The heir-at-law of Jones having claimed the real estate as having descended on him free from the trusts of the indenture, the plaintiff thereupon filed a bill, praying that the hereditaments in question were subject to the trusts of the deed, and for the appointment of new trustees. The report says [1874] W.N. at p. 190):

"The Vice-Chancellor said that this settlement was valid upon the face of it, and was believed to be such by the settlor up to the time of his death, though he never communicated the trust to the person named as trustee. It was said, however, that, in consequence of the person named in the deed declining to undertake the trusts, the settlement was inoperative, and that the court would not appoint a trustee. His Honour could not take that view. The case was not within the rule as to voluntary settlements [the expressions there are obviously very much shortened from what the judge probably used] this view was strengthened by the covenant for further assurance. The defendant must be overruled."

If that be the true view, there was a duly constituted settlement, and the testator had no power or right to create a second voluntary settlement as he purposed to do. I ought to pause to say that the attempt to reclaim (I refer to the document which is entitled a reclaimer and revocation by him) had no operation whatever in respect of this matter, because, if the trust was duly constituted, he had no right to revoke it.

A no power of revocation having been reserved in the deed itself. Then, after the lapse of years, he executes this second voluntary settlement, and that cannot prevail against the earlier voluntary settlement so far as it deals with the property comprised in the earlier settlement, unless by reason of Montague Leyland Fielden, the son, having accepted the trust and executed this second voluntary settlement, he is thereby estopped from saying that he or those claiming under him can take under the original voluntary settlement. I have considered that, and I have come to the conclusion that I cannot, on the facts as they are stated before me, find that there was any estoppel. There is not enough in the deed itself to show it. There is no recital and there is no grant creating an estoppel. If there were an estoppel it would be by his conduct in accepting, and the way he has dealt with it; but I have no evidence at all, and no statement showing that he had the slightest notion even of the existence of the original voluntary settlement. That disposes, I think, of the first point in the case. I think there was a duly constituted settlement, and that consequently the money representing the property settled by the first deed still goes under that deed.

D But there is a second question raised, which is, whether the amount of the mortgage of Feb. 11, 1888, ought to be thrown primarily on the unsettled estate. It appears that it ought. The case I was referred to of *Hales v. Cox* (2), so far as that part of the case is concerned, is, I think, an authority. In that case there was a voluntary settlement of real estate to uses in favour of four children, and a covenant for quiet enjoyment. The settlor afterwards mortgaged the settled estate with his own unsettled estates and died, and it was held that the children were entitled to throw the mortgages on the unsettled estate, and as against legatees to prove under the covenant against the settlor's assets for the damage they had sustained by the mortgage. As I read the case, the learned judge considered that the persons taking under the voluntary settlement as regards the subsequent mortgages, only took the property subject to those mortgages, but they had a right in virtue of the doctrine of marshalling to throw as much as possible upon the unsettled property, so as to liberate the settled property. I have not dealt with the second point referred to in *Hales v. Cox* (2).

Solicitors: *Alpe & Ward; Collyer-Bristow & Co., for Shuttleworth & Dallas, Preston; Hicks, Arnold & Mozley.*

[Reported by H. M. CHARTERS-MACPHERSON, Esq., Barrister-at-Law.]

Re GREENWOOD. GOODHART v. WOODHEAD

[COURT OF APPEAL (Sir Richard Henry Collins, M.R., RAMES and COZENS-HARDY, L.JJ.), January 21, 22, 1903]

[Reported [1903] 1 Ch. 749; 72 L.J.Ch. 281; 88 L.T. 212; 51 W.R. 358; 19 T.L.R. 180; 47 Sol. Jo. 238]

Will—Condition—Construction possible as condition precedent or subsequent—Condition subsequent to be preferred.

If a condition attached to a devise is capable of being construed either as a condition precedent or as a condition subsequent, the court will prefer the latter construction.

Will—Condition—Condition subsequent—Conditional gift to devisee on death of tenant for life—Death of devisee during life of tenant for life—Rights of persons claiming under devisee.

A testator, who died in 1853, devised his real estate upon trust for his daughter, born in 1843, during her life, and, after her decease, for her children or remoter issue born in her lifetime in such shares as she should by deed or will appoint, and, in default of such appointment for her children as tenants in common. If she had no children, the testator devised his real estate to a cousin on condition that he take and use the testator's name. The daughter married, but had no children, and the cousin died in 1855 without taking the name of the testator.

Held: on the construction of the will, the condition that the cousin take and use the name of the testator was a condition subsequent, and the cousin was not under any obligation to comply with it until on the death of the daughter he obtained possession of the property; the cousin having died before that event took place, the non-performance of the condition did not arise from his act or default; and, therefore, in the event of the daughter dying without issue, the devise to him would take effect.

Decision of JOYCE, J., [1902] 2 Ch. 198, reversed.

Notes. Referred to: *Bickersteth v. Shann*, [1936] 1 All E.R. 227; *Re Fry. Reynolds v. Denne*, [1945] 2 All E.R. 205.

As to conditions of a gift by will, see 34 HALSBURY'S LAWS (2nd Edn.) 103 et seq., and for cases see 44 DIGEST 1031 et seq.

Cases referred to in argument :

Woodhouse v. Herrick (1855), 1 K. & J. 352; 3 Eq. Rep. 817; 24 L.J.Ch. 649; 3 W.R. 303; 67 E.R. 494; 44 Digest 1032, 8901.

Lady Langdale v. Briggs (1856), 8 De G.M. & G. 391; 26 L.J.Ch. 27; 28 L.T.O.S. 73; 2 Jur.N.S. 982; 4 W.R. 703; 44 E.R. 441, L.JJ.; 44 Digest 544, 2614.

Studholme v. Mandell (1697), 1 Ld. Raym. 279; 1 Lat. 688; 91 E.R. 1083; 7 Digest (Repl.) 216, 533.

Anon. (1697), 1 Salk. 170; 91 E.R. 157; 7 Digest (Repl.) 216, 530.

Thomas v. Howell (1692), 1 Salk. 170; 2 Eq. Cas. Abr. 360; Holt, K.B. 225; 4 Mod. Rep. 66; Skin. 301; 91 E.R. 157; 44 Digest 477, 2949.

Egerton v. Earl Brownlow (1853), 4 H.L.Cas. 1; 8 State Tr.N.S. 193; 23 L.J.Ch. 348; 21 L.T.O.S. 306; 18 Jur. 71; 16 E.R. 359, H.L.; 44 Digest 460, 2806.

Re Farrer and Champion (1887), 4 T.L.R. 75; [1887] W.N. 202; 44 Digest 470, 2898.

Peyton v. Bury (1731), 2 P.Wms. 626; 24 E.R. 889; on appeal sub nom. *Painton v. Berry, etc.* (Administrators of Thornton) (1732), Kel.W. 37, L.C.; 44 Digest 488, 3078.

Galliner d. Corrie v. Ashby (1766) 4 Burr. 1930; 1 Wm. Bl. 607; 98 E.R. 4; 35 Digest 707, 68.

Appeal from JOYCE, J., on the construction of a will.

James Newsome Greenwood by his will, dated May 24, 1853, devised his real estate to trustees upon trust for his daughter Jane during her life for her separate use, and after her decease in trust for her children or remoter issue born in her lifetime as she should appoint, and, in default of appointment, in trust for all her children or her only child if but one. And if his said daughter should have no child, the testator devised all his real estate to his cousin William Alexander Newsome, his heirs and assigns,

"on condition nevertheless that, in case my said wife shall then be living, she shall have the use and enjoyment for the remainder of her life of the dwelling-house in which I now reside, . . . and on further condition nevertheless that he take and use the name of Greenwood only, but subject"

to the payment of certain legacies.

The testator died on Aug. 11, 1853, and his wife was also dead. The testator's daughter Jane was born on Jan. 30, 1843, and was married to J. W. Woodhead, but she had never had any issue. The testator's cousin W. A. Newsome died on Nov. 5, 1855 intestate without having assumed the name of Greenwood. He left an only son W. Newsome his heir-at-law, who died on July 26, 1900. His executors having also died, letters of administration with the will annexed were granted to the plaintiff, who took out a summons to which the trustees of the will of J. N. Greenwood and also Mrs. Woodhead and her husband were parties asking for a declaration that the plaintiff, as the legal personal representative of W. Newsome, would, in the event of Mrs. Woodhead having no children, be entitled to the real estate of the testator J. N. Greenwood. The summons was heard by JOYCE, J., who held that, even if the condition that W. A. Newsome should take and use the name of Greenwood only was a condition subsequent, the fact that he had not complied with the condition during his life disentitled the administrator to the property. The plaintiff appealed.

Hildane, K.C., Badcock, K.C., and E. S. Ford for the plaintiff.

Nerille, K.C., Hughes, K.C., and Edward Clayton for Mrs. Jane Woodhead.

SIR RICHARD HENN COLLINS, M.R.—This appeal from JOYCE, J., on the construction of a will turns upon what was the intention of the testator as disclosed by the terms in which he himself has imposed the condition which is the subject of this appeal, the question being in effect, was the condition a condition precedent or a condition subsequent; and, if a condition subsequent, subsequent to what date? If it was a condition precedent, it is admitted on all hands that it has not been performed, and, therefore, the devisee never obtained the benefit of the devise. If it is a condition subsequent, another point arises: What on the true construction of the will is the date to which it is subsequent?

[His LORDSHIP read the material part of the will.] The question is whether the devisee, having died within the lifetime of the tenant for life and not having taken the name of Greenwood, failed to perform the condition, and, therefore, took nothing under the devise. The learned judge has held the condition to be a condition subsequent, or at all events he has treated the condition as not being a condition precedent. If it was a condition precedent it is conceded that it has not been performed, and that the devisee never took the estate. But, treating it as a condition subsequent, the learned judge has nevertheless arrived at the conclusion that it was not performed, and that its performance was not excused by the act of God—namely, the death of the devisee during the lifetime of the tenant for life—the ground of his decision being that there was a vested estate in the devisee, and that he had it in his power at any time after the estate vested in him in remainder, although not in possession, if he had been so minded, to take the name; and that, therefore, he cannot be said to have been prevented by his own death, as he might have performed it at any time during his own lifetime, and therefore, this being a

condition subsequent which it cannot be averred that he was excused by the act of God from performing, he has failed to perform the condition, and accordingly that he has lost the estate.

That conclusion depends, in my opinion, entirely upon the construction of the will, the true intention of the testator in creating this condition. Upon the authorities cited it seems clear that even where the condition is one dealing with real estate, if it is framed in such terms that it is capable of being construed fairly as a condition subsequent and not as a condition precedent, the court ought to construe it as a condition subsequent. Where the intention of the testator as evidenced by the words used and the disposition he has made is more consistent with the inference that he did intend the condition to be a condition subsequent and not a condition precedent, then, if the words are capable of admitting both constructions, the court ought to hold it to be a condition subsequent. In this case the words themselves in which the condition is framed point to this, that the time the testator is dealing with is the death of the tenant for life. Then, and not till then does this condition come into force, and the testator obviously does not regard it as coming into force till that time. He is dealing first of all with what he calls a condition that the property is to be enjoyed by his wife if living at his death. Strictly speaking, that is not a condition at all, but it is material in so far as it points to the death of the tenant for life as the period of time which was present to the mind of the testator, because it is all one sentence and the time referred to in the first part, affecting that which is called a condition as to his wife's enjoyment, seems to me to be the same time as that which is dealt with in the subsequent part—namely, the condition affecting the right of the devisee to take the estate. He says:

"On condition nevertheless that in case my said wife shall then be living [clearly showing that the point of time in his mind is the death of the tenant for life] she shall then have the use and enjoyment for the then remainder of her life of the dwelling-house in which I now reside . . . and on further condition nevertheless that he take and use the name of Greenwood only."

That language points clearly to his taking and using the name as soon as and after he comes into possession of the property and not before. If that be the fair meaning, then, in my opinion, both according to the words used and common sense, his wish is that the person who takes his estate, not as the owner in remainder, but as the owner in possession, shall bear his name. That is the object the testator wishes to carry out. In my opinion, he could not have intended, and it is very unlikely that he did intend, that there should be any obligation or inducement whatever put upon the devisee to take his name before the occasion arose for taking it—that is, before he became entitled to hold this estate in possession. The devise is to take and use the name just as he is to take and use the estate, the two things being put together. He never did come into possession, but Joyce, J., held that it was competent for him to have taken the name before he came into possession, and that, therefore, he cannot say he was prevented by the act of God from taking it, because he might have taken it during his life.

It was admitted by counsel for Mrs. Woodhead, that if on the fair construction of this will the obligation to perform this condition did not arise until after possession was taken, then it was not ad rem to point to the fact that the devisee had the opportunity to take the name before the occasion for doing it arose. That is not a matter with which we are concerned at all. The obligation to take the name and the immunity from not doing it are both measured by the same standard—namely, What are the limits of the condition? In other words, when does the obligation arise under the condition? If the right conclusion is that the condition is meant to operate only after possession is taken, then the excuse for not performing it arises then and not till then, and it is immaterial to consider whether the devisee could have performed it at an earlier date. The question now is how excused by the

not of God from doing it within the time within which the testator contemplated that he should do it? If the time when the estate falls into possession is the standard, obviously the devisee was incapacitated from performing it because he had previously died. Therefore, on the true construction of the will this condition was a condition subsequent; the devisee was prevented from performing it by the act of God, and, therefore, the persons claiming under him are entitled to retain the estate. On these grounds, in my opinion, the appeal should be allowed.

ROMER, L.J.—I also am of opinion that upon this will the condition upon which the question the subject of this appeal turns was a condition subsequent in the true sense of the term: that is to say, it only contemplated Mr. W. A. Newsome doing something upon or after the death of the testator's daughter without leaving children. The wording of the condition supports that view and the position in which it is supports that view, because it appears among a series of conditions so called. Whether they are strictly conditions or not I need not pause to consider, because the gift is to Mr. W. A. Newsome, on the death of the testator's daughter without leaving children, on condition that in case the testator's wife shall be then living she shall have the use and enjoyment, for the then remainder of her life, of the dwelling-house in which the testator then resided, and then on further condition that "he take and use the name of Greenwood only," which points to something he is then to do. But, further, the testator continues: "And subject to the payment of the following legacies," again clearly pointing to something that he is to do after the death of the testator's daughter. The position and the wording of the condition show that it was strictly speaking a condition subsequent—that is to say, a condition solely intended to refer to and dealing with something that he was to do when he became possessor of the estate. That is borne out by considering this: What could be the object and intention of the testator in this case in requiring Mr. W. A. Newsome to take and use the name of Greenwood except that he contemplated his becoming the owner of the estate? He only wished him to use the name as owner of the estate. It does not appear to me that the testator contemplated anything with reference to Mr. W. A. Newsome at any time irrespective of the estate becoming an estate in possession. The testator was in nowise concerned with what Mr. Newsome might do with regard to using or abandoning the name before he came into possession of the estate. It was because Mr. Newsome was to come into possession of the estate that he required him then, as the possessor of that estate, to take and use the name, and that is borne out by the other considerations in the case. At any rate, on the construction of this will, that is what the testator meant and has said. A condition of this kind ought to be construed strictly, and, construing this condition accordingly, seeing this condition was one which under the circumstances could not have been complied with, the result is that the estate is held freed from the condition. I, therefore, think that this appeal ought to succeed, and that the decision of the learned judge in the court below should be reversed.

COZENS-HARDY, L.J.—I agree, and have little to add. Assuming that this is a condition subsequent, it is, as ROMER, L.J., has said, in the midst of a series of clauses directing certain things to be done when the estate fell into possession, not things to be done before possession was acquired, but things to be done after. If it was a condition subsequent, it was subsequent to what? Subsequent to the actual enjoyment in possession of the estate. There is no obligation whatever upon Mr. Newsome to do anything until after the event, which might never have happened, did happen—the event of the estate becoming an estate in possession—and I doubt whether any act done by Mr. Newsome before the estate came into possession would in any way be relevant to the performance of the condition. If, for instance, Mr. Newsome had in the daughter's lifetime taken the name of the testator and had then abandoned it and had survived the daughter and come into possession of the

estate, and had done nothing afterwards with regard to the matter, as he himself advised, I do not think the condition would have been satisfied. If that be so, it seems to me that it is plain there was a time within which this condition must not be complied with—namely, the whole period before the estate fell into possession. If that be the true construction, then the judgment of the court below must be reversed.

Solicitors: *Robins, Hay, Waters & Hay; Jaquet & Co., for Wallis & Son, Downtonbury.*

[Reported by W. C. BISS, Esq., Barrister-at-Law.]

Re DAVIS. HANNEN v. HILLYER

[CHANCERY DIVISION (Buckley, J.), February 25, 26, 1902]

[Reported [1902] 1 Ch. 876; 71 L.J.Ch. 459; 86 L.T. 292; 50 W.R. 378; 46 Sol. Jo. 317]

Charity—Cy-près doctrine—Gift to institution which never existed—General charitable intention—Division of residue among all beneficiaries including substitute for non-existent institution.

A testatrix made bequests to charitable institutions for the blind, orphans, deaf and dumb, sick, etc., among them being a legacy of £500 to "The Home for the Homeless," the address of which she gave as being in London. She declared that in the event of any question as to the designation of any of the charitable institutions mentioned, or of any doubt existing as to which of such institutions it was intended to benefit, the decision should rest with her executor, and she directed that the residue of her estate should be divided rateably among the various charitable institutions which were beneficiaries under her will. At the date of the will there was not, and there never had been, in London any charitable institution known as "The Home for the Homeless."

Held: (i) there was sufficient on the face of the will to show a general charitable intention on the part of the testatrix, so that the legacy did not lapse, but it must be administered cy-près; (ii) the residue was to be divided rateably among the institutions named in the will and the institution or authority which received the legacy of £500.

Notes. By s. 14 of the Charities Act, 1900 (40 HALSBRUY'S STATUTES (2nd Edn.) 139), property given for specific charitable purposes which fail shall be applicable cy-près as if given for charitable purposes generally where it belongs to a donor who cannot be identified or cannot be found or to a donor who has executed a written disclaimer of his right to have the property returned.

Distinguished: *Re Wilson, Twentymen v. Simpson* (1913), 82 L.J.Ch. 161. Considered: *Re Porshaw, Wallace v. Middlesex Hospital* (1934), 50 T.L.R. 473; *Re Harwood, Coleman v. Innes*, [1936] 2 Ch. 285. Distinguished: *Re Thackrah, Thackrah v. Wilson*, [1939] 2 All E.R. 4. Considered: *Re Thary, Longrigg v. People's Dispensary for Sick Animals of the Poor*, [1942] 2 All E.R. 358; *Re Goldschmidt, Commercial Union Assurance Co. v. Central British Fund for Jewish Relief and Rehabilitation*, [1957] 1 All E.R. 513. Referred to: *Re Pyne, Lilley v. A.G.*, [1903] 1 Ch. 83; *Re Monk, Giffen v. Wedd*, [1927] All E.R. Rep. 157; *Re Preston, Raby v. Port of Hull Society's Sailors' Orphans Homes*, [1951] 2 All E.R. 421.

A As to schemes where the donor's directions are indefinite, ambiguous or insufficient, see 4 HALSBURY'S LAWS (3rd Edn.) 326-329, and for cases see 8 DIGEST (Repl.) 408 et seq.

Cases referred to :

- B (1) *Clark v. Taylor* (1853), 1 Drew. 642; 1 Eq. Rep. 435; 21 L.T.O.S. 287; 1 W.R. 476; 61 E.R. 596; 8 Digest (Repl.) 419, 1104.
- (2) *Russell v. Kellott* (1855), 3 Sm. & G. 264; 26 L.T.O.S. 193; 20 J.P. 131; 2 Jur.N.S. 192; 65 E.R. 653; 8 Digest (Repl.) 444, 1336.
- (3) *Fisk v. A.-G.* (1867), L.R. 4 Eq. 521; 17 L.T. 27; 32 J.P. 52; 15 W.R. 1200; 8 Digest (Repl.) 401, 928.
- C (4) *Re Ovey, Broadbent v. Barrow* (1885), 29 Ch.D. 560; 54 L.J.Ch. 752; 52 L.T. 849; 33 W.R. 821; 1 T.L.R. 401; 8 Digest (Repl.) 420, 1107.
- (5) *Re Rymer, Rymer v. Stanfield*, [1895] 1 Ch. 19; 64 L.J.Ch. 86; 71 L.T. 590; 43 W.R. 87; 39 Sol. Jo. 26; 12 R. 22, C.A.; 8 Digest (Repl.) 420, 1108.
- (6) *Loscombe v. Wintringham* (1850), 13 Beav. 87; 51 E.R. 34; 8 Digest (Repl.) 417, 1084.
- (7) *Hoare v. Hoare* (1886), 56 L.T. 147; 8 Digest (Repl.) 358, 365.
- D (8) *Re Clergy Society* (1856), 2 K. & J. 615; 4 W.R. 664; 60 E.R. 928; 8 Digest (Repl.) 406, 984.
- (9) *Re Maguire* (1870), L.R. 9 Eq. 632; 39 L.J.Ch. 710; 18 W.R. 623; 8 Digest (Repl.) 411, 1035.
- (10) *Moggridge v. Thackwell* (1803), 7 Ves. 36; 32 E.R. 15, L.C.; affirmed (1807), 13 Ves. 416, H.L.; 8 Digest (Repl.) 450, 1462.
- E (11) *Mills v. Farmer* (1815), 1 Mer. 55; 19 Ves. 483; 35 E.R. 597, L.C.; 8 Digest (Repl.) 466, 1659.

Also referred to in argument :

- Marsh v. A.-G.* (1860), 2 John. & H. 61; 30 L.J.Ch. 233; 3 L.T. 615; 25 J.P. 180; 7 Jur.N.S. 184; 9 W.R. 179; 70 E.R. 971; 8 Digest (Repl.) 420, 1111.
- F *Re Slevin, Slevin v. Hepburn*, [1891] 2 Ch. 236; 60 L.J.Ch. 439; 64 L.T. 311; 39 W.R. 578; 7 T.L.R. 394, C.A.; 8 Digest (Repl.) 463, 1633.
- Re White's Trusts* (1886), 23 Ch.D. 449; 55 L.J.Ch. 701; 55 L.T. 162; 50 J.P. 695; 34 W.R. 771; 2 T.L.R. 830; 8 Digest (Repl.) 447, 1399.

Originating Summons as to a bequest made to a named, but non-existing, charitable institution.

G Sarah Davis, by her will, dated Mar. 30, 1894, bequeathed to the Consumption Hospital, Brompton, the sum of £500; to the School for the Indigent Blind, St. George's Fields, Southwark, £1,000; to the Royal Albert Orphan Asylum, Bagnshot, £500; to the Home for the Homeless, 27, Red Lion Square, London, £500; to St. Mary's Hospital, Cambridge Place, Paddington, £500; to the Female Orphan Asylum at Beddington, Surrey, £500; to the Deaf and Dumb H Asylum, Old Kent Road, £500; to the London Fever Hospital, Islington, £200; to the Smallpox Hospital, Highgate Hill, Upper Holloway, £100; and to the Hospital for Epilepsy and Paralysis, Portland Terrace, Regent's Park, £500. The testatrix declared that the receipt of the respective treasurers of the aforesaid institutions should be a sufficient discharge to her executor for the legacies; and further, that if any question arose as to the designation of any of the charitable I institutions, or if there were any doubt as to which institutions it was intended to benefit, the decision should rest with her executor. After making other pecuniary bequests to individuals, the testatrix declared that the residue of her estate, after payment of her funeral and testamentary expenses and debts, and after the payment in full, free of legacy duty, of all the legacies, should be "divided rateably among the various charitable institutions which are beneficiaries under this instrument." The testatrix died on Mar. 13, 1899, leaving property worth about £50,000. On June 8, 1899, the executor of the will took out an originating summons for the determination of questions which had arisen with regard to the legacy and share of

residue given to the Home for the Homeless, 27, Red Lion Square, London, and on Dec. 4, 1901, the master admitted that there was on Mar. 30, 1864 (the date of the will) or previously no charitable institution in London called or known as "the Home for the Homeless," or bearing a similar title; and that he was unable to verify what charitable institution was intended to be referred to by the testatrix under that designation.

H. M. Humphrey for the executor.

H. Terrell, K.C., and *W. M. Cann* for the testatrix's nephew.

J. M. Stone, for the Secretary of the School for the Indigent Blind.

M. Rymer for the Secretary of the British Asylum for Deaf and Dumb Females; whose claim to the legacy and share of residue in question had been disallowed.

R. J. Parker for the Attorney-General.

BUCKLEY, J. This testatrix bequeathed to "the Home for the Homeless, 27, Red Lion Square, London," the sum of £500. At the date of her will there was not, and there never had previously been, in London any charitable institution known as "the Home for the Homeless." The question, therefore, is whether upon the whole of this will there is a lapse by reason of that state of facts, or whether there is an indication of a general charitable intention, so that effect can be given to the gift, although the legatee named was and is non-existent.

There is one class of cases which deals with the state of facts in which a legacy is given to a charitable institution which has existed, but has ceased to exist. All of them have been cases where the charitable institution existed at the date of the will, but ceased to exist before the death of the testator. In that class of cases it has been held that there is a lapse. The earliest authorities upon that point are *Clark v. Taylor* (1), a decision of KINDERSLEY, V.-C., and *Russell v. Kellier* (2), a decision of STUART, V.-C. In *Fisk v. A.-G.* (3), WOOD, V.-C., said (L.R. 4 Eq. at pp. 527, 528):

"Then there is the other point which was argued by Mr. Widdows, as to the gift to the charity which no longer exists. I am far from saying that that argument may not some day or other require further consideration"

—that is to say, WOOD, V.-C., at that date doubted whether in such a state of facts as that you might not still be able to find a general charitable intention. However, since *Fisk v. A.-G.* (3), that matter came before the court in *Re Orey, Broadbent v. Barrow* (4), and before the Court of Appeal in *Re Rymer, Rymer v. Stanfield* (5), and it must now be taken that that doubt of WOOD, V.-C., has gone, and that the rule in *Clark v. Taylor* (1) is the right one. LORD HERSCHELL, in *Re Rymer, Rymer v. Stanfield* (5), says ([1895] 1 Ch. at p. 34), that the cases relied on by the appellants' counsel seem

"to lead to the conclusion that this case does not come within the class of cases, the first of which is *Clark v. Taylor* (1), decided forty years ago, but which has been often followed since, and that there is really no authority in any way conflicting with that series of decisions. Certainly on principle they seem to me to be sound."

So I start with this, that, if there be a gift to a charitable institution which existed, but has ceased to exist, there is a lapse. That is not the case with which I have to deal here. This gift is to a charitable institution which never existed at all. There are four decisions upon that class of case, and the principle which seems to underlie all of them is that where you find a gift to a charitable institution which never existed, the court, which always leans in favour of a charity, is more ready to infer a general charitable intention than to infer the contrary. It is perfectly possible to contemplate that a testator may have intended to benefit a particular institution which he thought existed, but which did not exist. But when I look at the four cases which I have referred to, I find that the court did not regard that as the more probable state of things, but

A regarded it as more probable that what the testator had in view was not the person but the purpose. There was no person such as he described, and the court there gave effect to the purpose which he described.

Of those four cases, I will take first the first and the last together, because they have less bearing on the point before me than the other two. The first is *Loscombe v. Wintringham* (6). The gift there was to the

B "governors, guardians, and trustees of a society instituted for the increase and encouragement of good servants, to the intent and purpose that the sum of £500 of lawful money of Great Britain might be paid to the governors, guardians, and trustees of the said society for the increase and encouragement of good servants."

C The first obvious comment upon that is that no society is named at all by name. The particular sort of society is pointed to and that is all. It was easy, in that case to arrive at the conclusion that the object of the testator was to give to a purpose and not to a person. What was held there was that there was a good charitable gift. The last case is *Hoare v. Hoare* (7). The facts there were that a settlor granted a certain rentcharge to provide for the payment of the salary of a priest in his private chapel; to apply a certain sum for the purpose of lighting and cleaning the chapel; another sum for the teaching and maintenance of ten boys as choristers in the chapel; another sum for the payment of a schoolmaster, teaching and educating the poor boys at the schoolhouse intended to be built; another sum for a schoolmistress; another sum for keeping the schools and almshouses in order; and another sum for the maintenance of poor labourers dwelling in such almshouses. The chapel was

D a private chapel and never had been consecrated or dedicated. The court held that there was not a general charitable purpose, but that his purpose was only to devote a sum of money to the maintenance of the chapel that was not a public chapel but his own private chapel on his own estate, and that, having regard to this definition of the purposes, that the purposes had failed. CHITTY, J., held that the trusts were invalid. It seems that that case turned on its own particular facts and does not

E assist one very much on general principles.

F There remain the other two cases, and it is from those the principle is to be deduced. The first is *Re Clergy Society* (8). There, there were legacies given in this order: to the Church Building Society, so much; the Clergy Society, so much; the Society for Promoting Christian Knowledge, so much; the Church Missionary Society, so much; and to the Clergy Orphan Society, so much. These were all to

G be institutions established in London. There was no such society which came forward to establish that it was the society mentioned as "The Clergy Society." There was a society in Gloucester to which the testator had been a contributor, but Wood, V.-C., thought that was excluded because it was not in London. As regards those that were in London, there was no society that could satisfy the description. The court nevertheless came to the conclusion that a good general charitable pur-

H pose had been declared, and what the court there proceeded upon, if one looks at 2 K. & J. at p. 622, is substantially this, that, having regard to the position in which the gift came with the other gifts which I have read, on either side of it, there was sufficient to show a general charitable purpose. Wood, V.-C., says (*ibid.*):

I "Then it was suggested that the bequest must be considered void for uncertainty, because no object can be found to answer the description. In the case before KNIGHT-BRUCE, L.J., there was a gift to a charity in Middlesex; and, there being none which exactly answered the description, it was held that the court had authority to direct a scheme, and in this case, this legacy being preceded by a legacy to the Church Building Society, and followed by legacies to the Church Missionary Society and to the Clergy Orphan Society, I think there is sufficient on the face of the will to show that the testatrix meant to confer a charitable benefit on the clergy of the Church of England."

That seems to me to have been the ratio decidendi in *Re Clergy Society* (6).

The other case is *Re Maguire* (9), a decision of James, V.C. That is, in my opinion, a very strong case. The gift upon which the question arose was one to the Church Pastoral Aid Society in Ireland. There was no such society. The immediate preceding gift was to the Church Pastoral Aid Society in England, and there was such a society. I should have thought even that evidently a person was meant, that in the former gift there was such a person, and that there would have been strong ground for saying that person and not purpose was quoted in the second gift. JAMES, V.C., thought not. There was a possible gift to a society, which did exist—namely, the Additional Curates' Aid Society in Ireland. There are all the material facts which I need state. The judgment of JAMES, V.C., is this (L.R. 9 Eq. at pp. 634, 635):

"The intention of the testatrix to devote this sum to charity, and also the particular object of the charity, are sufficiently indicated by the name of the society itself, and by the place in which the legacy is found among other legacies to charity. There can be no doubt of the intention of the testatrix to provide for the objects embraced by the Spiritual Aid Society (i.e. the Additional Curates' Aid Society, to which it had changed its name). And it follows from *Loscombe v. Wintringham* (6) and *Re Clergy Society* (8) that this is a perfectly good charitable bequest."

And further on, after referring to what WOOD, V.C., said in *Phib v. A. G.* (3) he says (*ibid.* at p. 635):

"I certainly do not intend myself to go further than WOOD, V.C., did, but in this case there is a clear intention by the testatrix to effect a particular object of charity—pastoral aid in Ireland—which is carried out by the society now claiming it. I apprehend the Attorney-General will not object, and there will be an order for payment of the legacy to the Spiritual Aid Society for Ireland to be applied for the purposes of Church pastoral aid in Ireland."

As I said, the Spiritual Aid Society was one to which there had been, beyond question, a gift made. From those two decisions the principle to be extracted is this: that the court will lean in this class of case, where there is a gift to a charity which never existed at all, and will take even a small indication on the face of the will for the purpose of seeing whether a purpose and not a person is intended.

Leaving that, I look at this will. I find, in the first place, that this gift is interpolated between other charitable gifts. To summarise those they are these: First, the blind; secondly, orphans; then comes the one in question, the home for the homeless; then hospitals; then orphans again; then the deaf and dumb; then fever, smallpox, and the hospital for epilepsy and paralysis. So that you find this gift to a non-existent charity called "The Home for the Homeless" interpolated between gifts to the blind and to orphans, to the deaf and dumb, and to the sick. I find one ground there that was relied upon in both *Re Clergy Society* (8) and *Re Maguire* (9). Then there follows this: The testatrix says,

"In the event of any question arising as to the designation of any of the charitable institutions hereinbefore mentioned, or of any doubt existing as to which one of two or more of such institutions it is intended to benefit, the decision shall rest absolutely with my executor."

It seems that this is the plainest indication that the testatrix intended that her charitable purposes should not fail because she had made some mistake as to the person to whom she had directed the legacy to be paid. There is this further, that when she comes to give the residue, she gives it in this way—that it shall be

"divided rateably among the various charitable institutions which are beneficiaries under this instrument."

A There is more room here than there was in *Re Clergy Society* (8) and *Re Maguire* (9), for the court, acting on the principle which, it seems to me, is the true one, to enter here a general charitable bequest. I, therefore, hold that this legacy is effectual.

For the purpose of putting all the authorities together, I desire to add that *Lescamhe v. Wintringham* (6), *Re Clergy Society* (8), and *Re Maguire* (9) were all considered by LORD HERSCHELL in *Re Rymer*, *Rymer v. Stanfield* (5), in which he says ([1895] 1 Ch. at p. 29):

C "The appellant contends that under those circumstances, and on the *cy-près* doctrine, the gift ought still to be treated as charitable, and to be applied to some cognate purpose. In support of this, when once the construction has been arrived at which I have put upon the will, I have been unable to find that they have cited a single authority in point. They placed reliance upon the decision of LORD ELDON in *Moggridge v. Thackwell* (10) and *Mills v. Farmer* (11)."

and from the latter case he read this language of LORD ELDON'S (1 Mer. at p. 94), which I think is useful for this purpose:

D "But, to give effect to a bequest in favour of charity, the court will . . . supply the place of an executor and carry into effect that which, in the case of individuals, must have failed altogether. This distinction has proceeded partly, perhaps, on principles in the Roman law which we do not at this time perfectly comprehend; and partly, no doubt, on the religious notions which formerly obtained in this country, according to which it fell to the ordinary's province to distribute in case of intestacy. A third principle, which it is now too late to call in question, is that in all cases in which the testator has expressed an intention to give to charitable purposes, if that intention is declared absolutely, and nothing is left uncertain but the mode in which it is to be carried into effect, the intention will be carried into execution by this court, which will then supply the mode which alone was left deficient."

E That is the principle upon which *Re Clergy Society* (8) and *Re Maguire* (9), in LORD HERSCHELL'S opinion, go.

F The question as to the division of the residue was then argued.

G The residue is given "to be divided rateably among the various charitable institutions which are beneficiaries under this instrument." It is argued that the authority which may have to effectuate the general charitable purpose as regards the legacy will not be within the words "charitable institutions which are beneficiaries under this instrument." If it be a question whether, having regard to what was said in *Moggridge v. Thackwell* (10), the purpose here described is a general indefinite purpose, in which case it would be for the King by sign manual to deal with the fund, or there is an object pointed out, in which case the fund would be administered by the court, as at present advised, it appears to me that here the object is not indefinite, but specific. It is the homeless that are to be benefited; but, whether it be the one or the other, I think it would be a most narrow construction to hold that the authority, whoever it is, that gives effect to the general charitable purpose, is not within the words "charitable institutions which are beneficiaries under this instrument." However this fund is administered, it must be administered by somebody or other in favour of a class of persons—that is, the homeless. The word "institutions" is large enough to cover whoever administers that fund. The residue, I think, goes rateably among the various charitable institutions that are benefited under this instrument, including the institution or authority which receives the legacy of £500. I give liberty to the Attorney-General to apply for a scheme or otherwise, as he may be advised, without serving any of the parties to the action.

I Solicitors: W. Jessop; Tippetts; Smith, Fawdon & Low; Cheston & Sons; Treasury Solicitor.

Reported by H. PROCTER, Esq., Barrister-at-Law.

HUBBARD (OTHERWISE ROGERS) v. HUBBARD

[Probate, Divorce and Admiralty Division (Sir Francis Jeune, P.), March 2, 1901]

[Reported 84 L.T. 441]

[Court of Appeal (Rigby, Vaughan Williams and Stirling, L.JJ.), March 27, 1901]

[Reported [1901] P. 157; 70 L.J.P. 34; 84 L.T. 441]

Variation of Settlement—"Settlement"—*Absolute assignment of leasehold property and furniture—Matrimonial Causes Act, 1859 (22 & 23 Vict., c. 61), s. 5.*

The parties were married on Oct. 22, 1891. On Oct. 3, 1892, the husband executed a deed which, after reciting his desire to make some provision for his wife and that he had agreed to make such assurance as was thereafter contained of a leasehold house (in which husband and wife were then living) and furniture, and for effectuating that desire, in pursuance of the agreement, and "in consideration of the natural love and affection which the [husband] bears towards his wife, and for divers and other good causes and considerations" the husband, as beneficial owner, assigned to a trustee the leasehold house for the unexpired residue of the lease, subject to the payment of the rent and the due performance of the lessee's covenants, and the furniture absolutely, on trust and to the intent that the trustee should by deed poll endorsed upon and intended to be of even date with, but to be executed immediately after, the husband's assignment, assign the house and furniture to the wife for her own absolute benefit. By deed poll of even date and endorsed on the assignment, the trustee assigned the house and furniture to the wife accordingly. On Oct. 10, 1900, a decree absolute of nullity was made upon the wife's petition. Subsequently, the husband presented a petition asking the court to deal with the assignment and deed poll as a "settlement" within s. 5 of the Matrimonial Causes Act, 1859, and for the property to be re-assigned to him.

Held: the assignment was not a "settlement" in any sense within s. 5 of the Matrimonial Causes Act, 1859, and the court had no jurisdiction to order a variation.

Notes. The Matrimonial Causes Act, 1859, has been repealed. For s. 5 of that Act see now s. 25 of the Matrimonial Causes Act, 1950 (29 Halsbury's Statutes (2nd Edn.) 412).

Considered: *Brown v. Brown*, [1936] 2 All E.R. 1616. Doubted: *Smith v. Smith*, [1945] 1 All E.R. 584; *Halpern v. Halpern*, [1951] 1 All E.R. 315; *Parrington v. Parrington*, [1951] 2 All E.R. 916. Followed: *Prescott (Otherwise Follows) v. Follows*, [1958] 3 All E.R. 55. Referred to: *Bosworthwick v. Bosworthwick*, [1926] All E.R. 198; *Gunner v. Gunner and Stirling*, [1948] 2 All E.R. 771; *Hindley v. Hindley*, [1957] 2 All E.R. 653; *Brown v. Brown*, [1959] 2 All E.R. 266.

As to variation of settlements after a decree for divorce, see 12 Halsbury's Laws (3rd Edn.) 451 et seq., and for cases see 27 Digest (Repl.) 645 et seq.

Cases referred to:

- (1) *Micklethwait v. Micklethwait* (1859), 4 C.B.N.S. 862; 29 L.J.C.P. 76; 5 Jur.N.S. 437; 7 W.R. 451; 140 E.R. 1332, Ex.Ch.; 44 Digest 1116, 9673.
- (2) *Re Player, Ex parte Harvey* (1885), 15 Q.B.D. 682; 54 L.J.Q.B. 534; 2 Morr. 265, D.C.; 5 Digest (Repl.) 900, 7483.
- (3) *Re Vansittart, Ex parte Brown*, [1893] 1 Q.B. 181; 62 L.J.Q.B. 277; 67 L.T. 592; 57 J.P. 132; 41 W.R. 32; 9 T.L.R. 14; 37 Sol. Jo. 12; 9 Morr. 280; 5 R. 38; 5 Digest (Repl.) 899, 7477.

(4) *Chalmers v. Chalmers* (1892), 68 L.T. 28; 1 R. 504; 27 Digest (Repl.) 645, 6089.

Also referred to in argument:

Stone v. Stone and Brownrigg (1864), 3 Sw. & Tr. 372; 33 L.J.P.M. & A. 95; 10 L.T. 140; 12 W.R. 1088; 164 E.R. 1319; 27 Digest (Repl.) 638, 6005.

Worsley v. Worsley and Wignall (1869), L.R. 1 P. & D. 648; 38 L.J.P. & M. 43; 20 L.T. 546; 17 W.R. 743; 27 Digest (Repl.) 245, 1980.

Re Tankard, Ex parte Official Receiver, [1899] 2 Q.B. 57; 68 L.J.Q.B. 670; 80 L.T. 500; 47 W.R. 624; 15 T.L.R. 332; 43 Sol. Jo. 440; 6 Mans. 188; 5 Digest (Repl.) 899, 7476.

Appeal by the wife from a decision of SIR FRANCIS JEUNE, P., expressed in the following judgment, which was read on Mar. 2, 1901.

SIR FRANCIS JEUNE, P.—The only matter that I need decide today is the question whether or not this instrument is a "settlement" within s. 5 of the Matrimonial Causes Act, 1859, and which, therefore, I am able to deal with. I think that there is hardly sufficient material before me, as to the respective means of the parties, to enable me to say whether, as a matter of discretion, this instrument, if it is a "settlement," should be dealt with in any particular way.

I confess that it appears to me, having regard to the whole of the authorities cited, that the term "settlement" is one which in the different branches of the law is employed in a somewhat different sense. The view which is presented to me is that established by *Micklethwait v. Micklethwait* (1). It would seem from that case that the meaning of the word "settlement" in the sense as understood by lawyers is that there should be some limitation placed on the ordinary powers of a holder of property in fee simple, or the absolute holder of freehold property. This is the phrase used in *Micklethwait v. Micklethwait* (1) where the court spoke of the ordinary powers of alienation being limited by the terms of the settlement. It would appear to me, apart from authority, that that was an ordinary legal definition. The difference between an absolute gift and a settlement is this: that an absolute gift places in the holder the power of being able to dispose of the property without restraint. But the settlement fixes the property in such a way that it cannot be absolutely disposed of by the person who, nevertheless, has an interest in it.

That is the sort of view taken in the authorities I have mentioned and by conveyancers. But when I look at the view taken with regard to the Bankruptcy Acts I find, no doubt, that a somewhat more limited view is insisted upon. I do not say that it is insisted upon in any of the provisions of the Bankruptcy Acts themselves. In both the cases to which I have been referred—viz., *Re Player, Ex parte Harvey* (2) and the well-known case of *Re Vansittart, Ex parte Brown v. Vansittart* (3)—reliance is not placed on the actual definition of any term "settlement" in the Bankruptcy Acts, because there is no such definition. The provision, which includes all terms of transfer and conveyance, does not contain the meaning of the term "settlement." But in these cases the judges appear to have held that the object of a settlement—the distinguishing characteristic of a settlement—is the preservation of the settled property for the enjoyment of the beneficiaries. I quote the words used by CAVE, J., in *Re Vansittart* (3). Certainly it was emphasised very much in that case because there was a gift there of purely personal property—not real property which is subject to be dealt with by conveyancers in the ordinary way. It was a gift of diamonds; but it seems to have impressed itself on the mind of the court that the donor contemplated the retention by the wife of the present he gave, and a contemplation not expressed in writing, or even in words, so far as I know. The intention was to be gathered from the nature of the gift and the relations

between the parties themselves. That, the judges held, was quite enough to show that the husband intended that the wife should keep that property—should keep it because she was his wife. Under those circumstances, they held that there was a sufficient compliance with the essential character of the settlement to render that which certainly looked a mere gift, a “settlement” within the meaning of the Bankruptcy Act. Whether you look at the matter as a provision of bankruptcy law—that is to say, a provision for the protection of creditors—or whether you look at it in a more general way—that is to say, as a term used by conveyancers—you have to give a somewhat different sense to the word “settlement,” or to look for a somewhat different test as a characteristic and crucial test of what constitutes a settlement.

In the case of divorce or nullity of marriage ought I, in construing s. 5, to give a larger or a narrower view to the word “settlement”? It appears to me that the larger view is the one that ought to be given. Section 5 is not a mere section on conveyances or anything of that kind; but it is a section of which the object is to provide that if a marriage comes to an end, either by process of dissolution by this court, or by a declaration that it is void, there should be power to deal with the settlements that have been made by the parties. That seems to me to show that there would be power in the court to deal with every transaction with regard to property made in consequence of and in view of the marriage, and of which, therefore, the whole object and purpose and end are stultified by the dissolution of a marriage or the declaration of its nullity. I am inclined, therefore, to think that the larger view—the view taken by judges in applying the bankruptcy law—is the truer test of what constitutes a “settlement” than the narrower or more peculiar view that I daresay would be taken by conveyancers. I think, therefore, that the test applied by judges in dealing with bankruptcy matters is practically the test that ought to be applied in dealing with s. 5. Although the form may have been one of a mere gift, and although, perhaps, the legal effect may have been to constitute a gift—that is to say, to give powers of alienation to the donee—still if you see in the circumstances constituted by the relations of the parties, and the nature of the subject matter itself, an intention on the part of the donor, shared no doubt by the donee, that the property should not be dealt with at the mere will and pleasure of the donee, but should remain and continue in a permanent condition for the benefit of the donee because of the marriage relations between them, then I should be prepared to say that the conditions have been fulfilled which render it a “settlement” within the meaning of s. 5.

In this case I think that it is indisputable that the gift was one fulfilling the characteristics which I have endeavoured to describe. It was the house that they lived in that was transferred. Looking at that, it appears to me that the court can only draw one inevitable inference. One sees that the object of the husband was that he and his wife should live together in that house so long as they chose to do so, or up to his death, and that after that she should have a place of abode to which she might resort. That is the natural and reasonable construction to my mind. He gave her the property because she was his wife and because he also believed that she intended to continue to be his wife and would be possessed of the house in that capacity. I have been referred to the evidence of the two parties, which is a great deal at variance. But it has this in common about it, that it clearly contemplated the continuance of matrimonial relations. The wife says that the husband made her that present on account of the unfortunate position in which she was placed, and the grief and pain of mind which she says it caused her, and that he gave the property to her on that footing. He denies he gave it to her in that way exactly. He says that he gave it to her because she was willing to continue to live with him, or something of that kind. That, I cannot help thinking, represents the true state of things.

The conclusion I should draw even from her affidavit, and also his affidavit, is that it was a gift by the husband to the wife with a view to the continuance of

A matrimonial relations between them. I am not for the moment saying whether that bound her in any way to continue those relations. I do not say that it did. But it is clear to my mind that the property was given to her because she was his wife, and because the husband hoped and believed that she would continue to remain his wife. That, I think, brings the matter entirely within the view taken of a "settlement" according to its ordinary term by the judges who have been sitting in and dealing with bankruptcy matters. That is the view I am inclined to take. I think that it comes within the fair principle of s. 5 of the Matrimonial Causes Act, 1859, namely, that it was a settlement of property, because it was intended to be a gift for the preservation of that property given in consequence of the matrimonial relations, and because of those matrimonial relations, and intended to preserve the property for the benefit of one of the parties to those relations. Under those circumstances the cases on the whole show that this ought to be considered a "settlement" within s. 5. I am not prepared at present to go further into this matter except to say that I do not think the fault, if you are to call it so, of the husband in this matter, is really a material consideration.

The conclusion, therefore, to which it is fair to come is that this matter ought not to be dealt with as one in which the husband was in fault in anything like the same sense in which a husband or a wife, found guilty of adultery or other misconduct, is in fault in a divorce case. If that be so, the proper way to look at this matter is on the general principle that this marriage, having come to an end, there ought to be a proper arrangement made of the pecuniary means of the parties so far as it can be legally done. It would be wrong to say that the wife should retain any benefit which she obtained during the marriage state and because of the marriage state, unless it is necessary for her maintenance. The wife under those circumstances ought to receive from her husband some proper means of maintenance. On the other hand—I may be, of course, wrong, for it is more a matter of opinion than law—I, at any rate, think that a wife who chooses after a great many years to insist upon her legal rights to have the marriage set aside, cannot afterwards reasonably claim to retain benefits which she obtained in the first instance as a wife, or obtained subsequently because of that position. She is entitled to maintenance, having regard to compensation for the position in which she has been placed. But she is not entitled to benefits as a wife when by her own act she has declared that she desires no longer to remain in that position. Those are the sort of general principles which ought to guide the court in coming to a conclusion as to how to deal in a proper manner with a "settlement" under s. 5. And I should have been glad to do so to-day if the whole of the circumstances had been properly before me. Therefore, the proper course to take is to decide that this is a settlement which can be dealt with under s. 5, but to reserve any expression of opinion as to how it ought to be dealt with until I am informed by the learned registrar as to what the respective means of the parties, apart from the settlement, are.

From that decision the wife appealed.

Mackarness for the wife.

Inderwick, K.C., and *Rudall* for the husband.

RIGBY, L.J.—In this case we think that the decision of the learned judge in the court below to the effect that the deed in question is a "settlement" within the meaning of s. 5 of the Matrimonial Causes Act, 1859, cannot be supported for the plain reason that the deed is not a "settlement" at all. If we were inquiring into the question whether it should be set aside as invalidated by s. 47 of the Bankruptcy Act, 1883 [see now s. 42 of the Bankruptcy Act, 1914], different considerations would apply—considerations totally irrelevant to this case would have to be regarded then. Speaking for myself I am inclined to say that the decision of SIR FRANCIS JUSTICE, P., in *Chalmers v. Chalmers* (4) is directly in point, and that it ought to be preferred to the decision which he has arrived at here, although I am bound to say I have not attended to all the circumstances in *Chalmers v. Chalmers* (4), and am

not resting on that case as an authority. I rest on the general view that this case is not a "settlement" in any sense, and, therefore, cannot be a "settlement" within the meaning of s. 5 of the Matrimonial Causes Act, 1859. In my opinion, therefore, the appeal ought to be allowed with costs.

VAUGHAN WILLIAMS, L.J.—I agree.

STIRLING, L.J.—I agree.

Appeal allowed.

Solicitors: *Borall & Boxall; Francis A. Rudall.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

THE WINKFIELD

[COURT OF APPEAL (Sir Richard Henn Collins, M.R., Stirling and Mathew, L.J.J.)
November 26, December 16, 1901]

[Reported [1902] P. 42; 71 L.J.P. 21; 85 L.T. 668; 50 W.R. 216; 18 T.L.R. 178;
46 Sol. Jo. 163; 9 Asp.M.L.C. 259]

Bailee—Loss of goods—Negligence of wrongdoer—Bailor in possession—No liability to bailor—Right of bailee to maintain action against wrongdoer—Obligation to account to bailor for sum recovered—Answer of wrongdoer to action by bailor.

Possession is absolute and complete title against a wrongdoer and he cannot set up the jus tertii unless he claims under it, and so the wrongdoer who is not defending under the title of a bailor is quite unconcerned with what the rights are as between the bailor and the bailee and must treat the person in possession of the goods bailed as their owner for all purposes irrespective of the rights and obligations as between that person and the bailor. Accordingly, in an action against a wrongdoer for the loss of goods caused by his negligence, a bailee in possession can recover the value of the goods lost, although he would have had a good answer to an action by the bailor for damages for the loss of the goods bailed. The bailee is, however, under an obligation to account to the bailor for what he has recovered. The wrongdoer, having paid full damages to the bailee, has an answer to any action by the bailor.

Claridge v. South Staffordshire Tramway Co. (1), [1892] 1 Q.B. 422, overruled.

Notes. Approved: *Glenwood Lumber Co. Ltd. v. Phillips*, [1904-7] All E.R. Rep. 203. Applied: *Plasgoed Collieries Co. v. Partridge Jones* (1912), 81 L.J.K.B. 723. Followed: *Eastern Construction Co. v. National Trust Co. and Schmidt*, [1914] A.C. 197. Considered: *The Rosalind* (1920), 90 L.J.P. 126. Applied: *The Jansons Fatts*, [1922] P. 92; *The Zelo*, [1922] P. 9. Considered: *Morrison Steamship Co. v. Grey-stoke Castle Steamship (Cargo Owners)*, [1946] 2 All E.R. 696. Referred to: *Elliott Steam Tug Co. v. Shipping Controller*, [1922] 1 K.B. 127; *Great Northern Rail. Co. v. L.E.P. Transport and Depository*, [1922] All E.R. Rep. 18; *Mersey Docks and Harbour Board v. Hay*, [1923] A.C. 345; *Reid v. Lyons & Co.*, [1945] 1 All E.R. 106; *Dollfus Mieg et Compagnie S.A. v. Bank of England*, [1950] 1 All E.R. 747.

As to the right of a bailee to sue a stranger, see 2 HALSBURY'S LAWS (3rd Edn.) 144, 145, and for cases see 3 DIGEST (Repl.) 111, 112, 117-124.

Cases referred to:

(1) *Claridge v. South Staffordshire Tramway Co.*, [1892] 1 Q.B. 422; 61 L.J.Q.B. 503; 66 L.T. 655; 56 L.P. 408; 8 T.L.R. 263, D.C.; 3 Digest (Repl.) 121, 401,

- A (2) *Armory v. Delamirie* (1722), 1 Stra. 505; 93 E.R. 664; 3 Digest (Repl.) 67, 83.
 (3) *Jeffries v. Great Western Rail. Co.* (1856), 5 E. & B. 802; 25 L.J.Q.B. 107; 26 L.T.O.S. 214; 2 Jur.N.S. 230; 119 E.R. 680; 3 Digest (Repl.) 120, 355.
 (4) *Wilbraham v. Snow* (1670), 2 Keb. 588; 1 Lev. 282; 1 Mod. Rep. 30; 1 Sid. 438; 2 Wms. Saund. 47; 84 E.R. 370; 41 Digest 121, 767.
 (5) *Burton v. Hughes* (1824), 2 Bing. 173; 9 Moore, C.P. 334; 3 L.J.O.S.C.P. 241; 130 E.R. 272; 3 Digest (Repl.) 120, 394.
 (6) *Sutton v. Buck* (1812), 2 Taunt. 302; 127 E.R. 1094; 3 Digest (Repl.) 120, 387.
 (7) *Swire v. Leach* (1865), 18 C.B.N.S. 479; 5 New Rep. 314; 34 L.J.C.P. 150; 11 L.T. 680; 11 Jur.N.S. 179; 13 W.R. 385; 144 E.R. 531; 18 Digest (Repl.) 281, 279.
 C (8) *Turner v. Hardeastle* (1862), 11 C.B.N.S. 683; 31 L.J.C.P. 193; 5 L.T. 748; 142 E.R. 964; 3 Digest (Repl.) 121, 399.
 (9) *Heydon v. Smith* (1610), 2 Brownl. 328; 13 Co. Rep. 67; Godb. 172; 123 E.R. 970; 43 Digest 417, 400.
 (10) *Coggs v. Bernard* (1703), 2 Ld. Raym. 909; 1 Com. 133; 92 E.R. 107; 3 Digest (Repl.) 55, 1.
 D (11) *Ullman v. Barnard* (1856), 73 Mass. 554.
 (12) *Parish v. Wheeler* (1860), 22 N.Y. 494.
 (13) *White v. Webb* (1842), 15 Day (Conn. Rep.) 302.
 (14) *Rooth v. Wilson* (1817), 1 B. & Ald. 59; 106 E.R. 22; 3 Digest (Repl.) 120, 390.
 E (15) *Mear v. Great Eastern Rail. Co.*, [1895] 2 Q.B. 387; 64 L.J.Q.B. 657; 73 L.T. 247; 59 J.P. 662; 43 W.R. 680; 11 T.L.R. 517; 39 Sol. Jo. 654; 14 R. 620, C.A.; 42 Digest 970, 20.

Also referred to in argument:

- The Minna* (1868), L.R. 2 A. & E. 97; 41 Digest 772, 6283.
Martini v. Coles (1813), 1 M. & S. 140; 105 E.R. 53; 41 Digest 386, 2307.
Lyle v. Barker (1813), 5 Binney (Pen.) 457.
Moore v. Robinson (1831), 2 B. & Ad. 817; 1 L.J.K.B. 4; 109 E.R. 1346; 41 Digest 255, 968.
Nicolls v. Bastard (1835), 2 Cr.M. & R. 659; 1 Gale, 295; sub nom. *Nicholls v. Bastard*, Tyr. & Gr. 156; 5 L.J.Ex. 7; 150 E.R. 279; 3 Digest (Repl.) 120, 391.
Waters v. Monarch Fire and Life Assurance Co. (1856), 5 E. & B. 870; 25 L.J.Q.B. 102; 26 L.T.O.S. 217; 2 Jur.N.S. 375; 4 W.R. 245; 119 E.R. 705; 3 Digest (Repl.) 112, 330.
London and North Western Rail. Co. v. Glyn (1859), 1 E. & E. 652; 28 L.J.Q.B. 188; 33 L.T.O.S. 199; 5 Jur.N.S. 1004; 7 W.R. 238; 120 E.R. 1054; 3 Digest (Repl.) 112, 331.
Dockwray v. Dickenson (1696), Comb. 366; Skin. 640; 90 E.R. 532; 41 Digest 206, 458.
Addison v. Overend (1796), 6 Term Rep. 766; 101 E.R. 816; 41 Digest 813, 6746.
Sedgworth v. Overend (1797), 7 Term Rep. 279; 101 E.R. 974; 41 Digest 813, 6747.

Appeal by the Postmaster-General from a decision of SIR FRANCIS JEUNE, P., confirming a report of a registrar.

On April 5, 1900, a collision occurred about eighty-six miles from Cape Town between the steamships *Mexican* and *Winkfield* in a fog. The *Mexican* was homeward bound from the Cape to England with passengers, mails, and a general cargo on board. The *Winkfield* was at the material time engaged as a transport, and was bringing out yeomanry and volunteers for service in South Africa, and horses and materials of war. In consequence of the collision the *Mexican* was so badly damaged that she sank a few hours afterwards. Her passengers were got on

board the *Winkfield*, but the greater portion of the mails and postal parcels on board of her, together with her cargo, were lost. The owners of the *Winkfield* admitted that their vessel was partly to blame for the collision, and, finding that the claims for loss or damage to ship and goods would exceed the amount of their statutory liability under the provisions of the Merchant Shipping Act, 1854, they obtained a decree limiting their liability to £8 per ton, and paid into court the sum of £32,514 17s. 10d. At the reference before the registrar and merchants to assess the amounts of the claims put forward against the fund in court, a large number of claims were made, among others one by the Postmaster-General on behalf of himself and the Postmaster-General of Cape Colony and Natal in respect of the loss of registered letters and parcels on board the *Mexican*, and lost by reason of the collision. These claims represented the amounts the Post-office had paid for claims put forward by owners of registered letters and parcels which had been lost. No question as to the liability of the Postmaster-General to pay these claims was raised, and they were admitted by consent of the other parties, and duly allowed in full by the registrar. The Postmaster-General, however, also claimed a further sum representing the estimated value of letters and parcels for which no claim had so far been put forward. The registrar refused to allow the claim on the ground that the Postmaster-General was not liable over to the senders, and, therefore, he could not sue as a bailee. On a motion by the Postmaster-General in objection to the registrar's report, SIR FRANCIS JEUNE, P., confirmed it, holding that he was bound by the decision of *Claridge v. South Staffordshire Tramway Co.* (1), and that in the face of that decision the claim of the Postmaster-General could not be sustained. The Postmaster-General appealed.

The Attorney-General (Sir Robert Finley, K.C.) and Acland for the Postmaster-General.

Pickford, K.C., and Batten for the respondents.

Scrutton, K.C., for the owners of the Mexican.

Christopher Head for the owners of the Winkfield.

Cur. adv. vult.

Dec. 16, 1901. **SIR RICHARD HENN COLLINS, M.R.**—This is an appeal from the order of SIR FRANCIS JEUNE, P., dismissing a motion made on behalf of the Postmaster-General in the case of the *Winkfield*. The question arises out of a collision which occurred on April 5, 1900, between the steamship *Mexican* and the steamship *Winkfield* and resulted in the loss of the former, with a portion of the mails which she was carrying at the time. The owners of the *Winkfield*, under a decree limiting their liability to £32,514 17s. 10d., paid that amount into court, and the claim in question was one by the Postmaster-General, on behalf of himself and the Postmaster-General of Cape Colony and Natal, to recover out of that sum the value of letters, parcels, etc., in his custody as bailee, and lost on board the *Mexican*. The case was dealt with by all parties in the court below as a claim by a bailee who was under no liability to his bailor for the loss in question, as to which it was admitted that the authority of *Claridge v. South Staffordshire Tramway Co.* (1) was conclusive, and the President, accordingly, without argument and in deference to that authority, dismissed the claim. The Postmaster-General now appeals.

The question for decision, therefore, is whether *Claridge's Case* (1) was well decided. I emphasise this because it disposes of a point which was faintly suggested by the respondents, and which, if good, could distinguish *Claridge's Case* (1)—namely, that the Postmaster-General was not himself in actual occupation of the things bailed at the time of the loss. This point was not taken below, and, having regard to the course followed by all parties on the hearing of the motion, I think it is not open to the respondents to make it now. I, therefore, deal with the case upon the footing upon which it was dealt on the motion—namely, that it is covered by *Claridge's Case* (1). I assume that the subject-matter of the bailment was in the custody of the Postmaster-General as bailee at the time of the accident. For the

reasons which I am about to state, I am of opinion that *Cluridge's Case* (1) was wrongly decided, and that the law is that in an action against a stranger for loss of goods caused by his negligence, the bailee in possession can recover the value of the goods, although he would have had a good answer to an action by the bailor for damages for the loss of the thing bailed. It seems to me that the principle that possession is good against a wrongdoer and that the latter cannot set up the *jus tertii* unless he claims under it, is well established in our law, and really concludes the present case against the respondents. As I shall show presently, a long series of authorities establishes this in actions of trover and trespass at the suit of a possessor. The principle being the same, it follows that he can equally recover the whole value of the goods in an action on the case for their loss through the tortious conduct of the defendant. I think it involves this also, that the wrongdoer who is not defending under the title of the bailor is quite unconcerned with what the rights are between the bailor and the bailee, and must treat the possessor as the owner of the goods for all purposes quite irrespective of the rights and obligations as between him and the bailor. I think this position is well established in our law, although it may be that reasons for its existence have been given in some of the cases which are not quite satisfactory.

I think also that the obligation of the bailee to the bailor to account for what he has received in respect of the destruction or conversion of the thing bailed has been admitted so often in decided cases that it cannot now be questioned, and, further, I think it can be shown that the right of the bailee to recover cannot be rested on the ground suggested in some of the cases-- namely, that he was liable over to the bailor for the loss of the goods converted or destroyed. It cannot be denied that since *Armory v. Delamirie* (2), not to mention earlier cases from the YEAR BOOKS onward, a mere finder may recover against a wrongdoer the full value of the thing converted. That decision involves the principle that as between possessor and wrongdoer the presumption of law is, in the words of LORD CAMPBELL in *Jeffries v. Great Western Rail. Co.* (3) (5 E. & B. at p. 806), "that the person who has possession has the property." In the same case he says (*ibid.* at p. 805):

"I am of opinion that the law is that a person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him, having no title in himself, is a wrongdoer, and cannot defend himself by showing that there was title in some third person, for against a wrongdoer possession is title. The law is so stated by the very learned annotator in his note to *Wilbraham v. Snow* (4) (2 Wms. Saund. 47 f.)."

Therefore, it is not open to the defendant, being a wrongdoer, to inquire into the nature of the limitation of the possessor's right, and, unless it is competent for him to do so, the question of his relations to, or liability towards, the true owner cannot come into the discussion at all; and, therefore, as between those two parties full damages have to be paid without any further inquiry.

The extent of the liability of the finder to the true owner not being relevant to the discussion between him and the wrongdoer, the facts which would ascertain it would not have been admissible in evidence, and, therefore, the right of the finder to recover full damages cannot be made to depend upon the extent of his liability over to the true owner. To hold otherwise would, it seems to me, be in effect to permit a wrongdoer to set up a *jus tertii* under which he cannot claim. But, if this be the fact in the case of a finder, why should it not be equally the fact in the case of a bailee? Why, as against a wrongdoer, should the nature of the plaintiff's interest in the thing converted be any more relevant to the inquiry, and, therefore, admissible in evidence, than in the case of a finder? It seems to me that neither in one case nor the other ought it to be competent for the defendant to go into evidence on that matter. I think this view is borne out by authority. For instance, in *Burton v. Hughes* (5) the plaintiff, who had borrowed furniture, and was, therefore, bailee, was held to be entitled to sue in trover wrongdoers who had

seized it, without giving in evidence the written agreement under which he held it. The point made for the defendants was that "the qualified interest having been obtained under a written agreement could not be proved except by the production of that agreement duly stamped." The argument on the other side was "that the existence of some kind of interest having been established, the precise nature of it or the terms upon which it was acquired were immaterial to the support of this action." BEST, C.J., in delivering judgment, says (2 Bing. at p. 175):

"If this had been a case between Kitchen and the plaintiff the agreement ought to have been produced, because that alone could decide the respective rights of these two parties; but it appears that Kitchen was to supply the plaintiff with furniture, and the question is whether, after he had obtained it, he had a sufficient interest to maintain this action. The case which has been referred to (*Sutton v. Buck* (6)) confirms what I had esteemed to be the law upon the subject—namely, that a simple bailee has a sufficient interest to sue in trover."

By holding, therefore, that the agreement defining the conditions of the plaintiff's interest was immaterial the court in effect decided that the right of the bailee in possession to sue could not depend upon the fact or extent of his liability over to the bailor, since the plaintiff was allowed to keep his verdict in trover, the agreement defining his interest and liability being excluded from the discussion.

In *Sutton v. Buck* (6), on the authority of which this case was decided, it was held that possession under a general bailment is sufficient title for the plaintiff in trover. The plaintiff had taken possession of a stranded ship under a transfer void for noncompliance with the Register Acts, and he sued the defendant in trover for portions of the timber, wood, and materials of which the defendant had wrongfully taken possession. SIR JAMES MANSFIELD, C.J., had nonsuited the plaintiff, on the ground that the transfer was defective without registration. On motion the nonsuit was set aside, SIR JAMES MANSFIELD being a member of the court, and a new trial ordered on the ground that the plaintiff had sufficient possession to maintain the action against the wrongdoer. It is true that CHAMBERLAIN, J., reserved his opinion as to the measure of damages, but on the new trial the plaintiff recovered a verdict apparently for the full value of the things converted, and on further motion for a new trial the only point argued was that the defendant was justified as lord of the manor in doing what he did, a contention which was rejected by the court. In *Swire v. Leach* (7) a pawnbroker, whose landlord had wrongfully taken in distress pledges in the custody of the pawnbroker, was held entitled to recover in an action against the landlord for conversion the full value of the pledges. This case was decided by a strong court, consisting of ERLE, C.J., WILLIAMS and KEATING, J.J., and has never, so far as I know, been questioned since. The duty of the bailee to account to the bailor was recognised as well established. See also *Turner v. Hardeastle* (8), a considered judgment of the Court of Common Pleas, which included WILLES, J., who had not been a party to *Swire v. Leach* (7), and where the bailee's right to recover full damages, and his obligation to account to the bailor is again affirmed.

The ground of the decision in *Claridge's Case* (1) was that the plaintiff in that case, being under no liability to his bailor, could recover no damages, and though for the reasons I have already given I think the position is untenable, it is necessary to follow it out a little further. There is no doubt that the reason given in *Haydon v. Smith* (9)—and itself drawn from the YEAR BOOKS—has been repeated in many subsequent cases. The words are these (13 Co. Rep. at p. 69):

"Clearly, the bailee, or he who hath a special property, shall have a general action of trespass against a stranger, and shall recover all in damages because that he is chargeable over."

It is now established that the bailee is accountable, as stated in the passage cited and repeated in many subsequent cases. But whether the obligation to account

A was a condition of his right to sue, or only an incident arising upon his recovery of damages, is a very different question, though it was easy to confound one view with the other. HOLMES, C.J., in his admirable lectures on the common law, in the chapter devoted to bailments, traces the origin of the bailee's right to sue and recover the whole value of chattels converted, and arrives at the clear conclusion that the bailee's obligation to account arose from the fact that he was originally the only person who could sue, though afterwards by an extension, not perhaps quite logical, the right to sue was conceded to the bailor also. He says at p. 167:

"At first the bailee was answerable to the owner because he was the only person who could sue; now it was said he could sue because he was answerable to the owner."

C Again at p. 170:

"The inverted explanation of Beaumanoir will be remembered, that the bailee could sue because he was answerable over, in place of the original rule that he was answerable over so strictly because only he could sue."

D This inversion, as he points out is traceable through the YEAR BOOKS, and has survived into modern times, though, as he shows, it has not been acted upon. POLLOCK AND MAITLAND'S HISTORY OF ENGLISH LAW, vol. 2, p. 170, puts the position thus:

E "Perhaps we come nearest to historical truth if we say that between the two old rules there was no logical priority. The bailee had the action because he was liable, and was liable because he had the action."

It may be that in early times the obligation of the bailee to the bailor was absolute—that is to say, he was an insurer. But long after the decision of *Coggs v. Bernard* (10), which classified the obligations of bailees, the bailee has, nevertheless, been allowed to recover full damages against a wrongdoer, where the facts would have afforded a complete answer for him against his bailor.

F The cases above cited are instances of this. In each of them the bailee would have had a good answer to an action by his bailor, for in none of them was it suggested that the act of the wrongdoer was traceable to negligence on the part of the bailee. I think, therefore, that the statement drawn, as I have said, from the YEAR BOOKS may be explained, as HOLMES, C.J., explains it, but whether that be the true view of it or not, it is clear that it has not been treated as law in our courts. Upon this, before the decision in *Claridge's Case* (1), there was a strong body of opinion in text-books, English and American, in favour of the bailee's unqualified right to sue the wrongdoer: see MAYNE ON DAMAGES (6th Edn.), p. 416, and cases there cited; SEDGWICK ON DAMAGES (7th Edn.), vol. 1, p. 61, note (a); STORY ON BAILMENTS (9th Edn.), s. 352; KENT'S COMMENTARIES (12th Edn.), vol. 2, p. 568, note (e); POLLOCK ON TORTS (6th Edn.), pp. 354, 355; ADDISON ON TORTS (7th Edn.), p. 523; and as I have already pointed out WILLIAMS, J., the editor of WILLIAMS' SACNDERS, was a party to the decision of *Swire v. Leach* (7). The bailee's right to recover has been affirmed in several American cases entirely without reference to the extent of the bailee's liability to the bailor for the tort, though his obligation to account is admitted: see them referred to in the passages cited, and in particular see *Ullman v. Barnard* (11); *Parish v. Wheeler* (12); and *White v. Webb* (13).

I *Roath v. Wilson* (14) is a clear authority that the right of the bailee in possession to recover against a wrongdoer is the same in an action on the case as in an action of trover, if indeed authority were required for what seems obvious in point of principle. There the gratuitous bailee of a horse was held entitled to recover the full value of the horse in an action on the case against a defendant by whose negligence the horse fell and was killed. The case was decided by LORD ELLENBOROUGH, C.J., BAYLEY, ABBOTT, and HOLROYD, JJ. The three latter seem to me

to put it wholly on the ground that the plaintiff was in possession and the defendant a wrongdoer. ABBOTT, J., says shortly (1 B. & Ald. at p. 62):

"I think that the same possession which would enable the plaintiff to maintain trespass would enable him to maintain this action."

BAYLEY, J., points out that case is a possessory action. But Lord Brougham undoubtedly rests his judgment on the view that the plaintiff would himself have been responsible in damages to his bailor to a commensurate amount. That, no doubt, was his personal view, but it was not the decision of the court, and, as I have pointed out, it has certainly not been acted upon in subsequent cases.

Therefore, as I said at the outset, and as I think I have now shown by authority, the root principle of the whole discussion is that, as against a wrongdoer, possession is title. The chattel that has been converted or damaged is deemed to be the chattel of the possessor and of no other, and, therefore, its loss or deterioration is his loss, and to him, if he demands it, it must be recouped. His obligation to account to the bailor is really not ad rem in the discussion. It only comes in after he has carried his legal position to its logical consequence against a wrongdoer, and serves to soothe a mind disconcerted by the notion that a person who is not himself the complete owner should be entitled to receive back the full value of the chattel converted or destroyed. There is no inconsistency between the two positions; the one is the complement of the other. As between bailor and stranger possession gives title—that is, not a limited interest, but absolute and complete ownership, and he is entitled to receive back a complete equivalent for the whole loss or deterioration of the thing itself. As between bailor and bailee the real interests of each must be inquired into, and, as the bailee has to account for the thing bailed, so he must account for that which has become its equivalent and now represents it. What he has received above his own interest he has received to the use of his bailor. The wrongdoer, having once paid full damages to the bailee, has an answer to any action by the bailor: see STORY ON BAILMENTS (9th Edn.), s. 352, and the numerous authorities there cited. The liability by the bailee to account is also well established (see the passage from LORD COKE and the cases cited in the earlier part of this judgment), and, therefore, it seems to me that there is no such preponderance of convenience in favour of limiting the right of the bailee as to make it desirable, much less obligatory, upon us to modify the law as it rested upon the authorities antecedent to *Claridge's Case* (1). I am aware that in two able text-books, BENTON'S NEGLIGENCE IN LAW (2nd Edn.), at p. 885, and CLERK AND LINSSELL ON TORTS (2nd Edn.), at p. 237, the decision in *Claridge's Case* (1) is approved, though it is there pointed out that the authorities bearing the other way were not fully considered. The reasons, however, which they give for their opinions seem to be largely based upon the supposed inconvenience of the opposite view; nor are the arguments by which they distinguish the position of bailees from that of other possessors to my mind satisfactory. *Claridge's Case* (1) was treated as open to question by the Master of the Rolls in *Meur v. Great Eastern Rail. Co.* (15), and, with the greatest deference to the eminent judges who decided it, it seems to me that it cannot be supported. It seems to have been argued before them upon very scanty materials. Before us the whole subject has been elaborately discussed, and all, or nearly all, the authorities brought before us in historical sequence. I think the appeal must be allowed.

STIRLING, L.J., and MATHEW, L.J., concurred.

Appeal allowed.

Solicitors: The Solicitor for the Post Office; Thomas Cooper & Co.; Messrs. Botterell & Roche; Winkfield, Thomas Cooper & Co.

[Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.]

DULIEU v. WHITE & SONS

KING'S BENCH DIVISION (Kennedy and Phillimore, JJ.), May 17, June 5, 1901

[Reported [1901] 2 K.B. 669; 70 L.J.K.B. 837; 85 L.T. 126; 50 W.R. 76;

17 T.L.R. 555; 45 Sol. Jo. 578]

Negligence—Damages—Mental shock—Proof of consequent physical injury—Duty of defendant not to frighten plaintiff by negligence.

By her statement of claim the plaintiff alleged that while she was sitting behind the bar of her husband's public-house (she then being pregnant) the defendants' servant negligently drove a pair-horse van belonging to the defendants into the public-house, in consequence of which she sustained a severe shock which made her seriously ill and led to her having a miscarriage.

Held: the statement of claim disclosed a good cause of action against the defendants.

Per KENNEDY, J.: Mere fright not followed by consequent physical damage will not support an action, but if it is followed by consequent physical damage, then, if the fright was the natural result of the defendants' negligence, an action lies, and the physical damage is not too remote to support it.

Per PHILLIMORE, J.: Where there is a legal duty on the defendant not to frighten the plaintiff by his negligence, then fright with consequent physical damage will support an action.

Victorian Railways Comrs. v. Coultas (1) (1888), 13 App. Cas. 222, questioned.

Damage—Remoteness—Absence of direct and natural causal sequence, not severance in point of time.

Per KENNEDY, J.: "Remoteness," as a legal ground for the exclusion of damage in an action of tort, surely means, not severance in point of time, but the absence of direct and natural causal sequence—the inability to trace, in regard to the damage, the proper hoc in a necessary or natural descent from the wrongful act.

Notes. The dictum of KENNEDY, J. (post p. 357), that shock, to give a cause of action, "must be one which arises from a fear of immediate personal injury to oneself" was disapproved in *Hambrook v. Stokes Bros.*: [1924] All E.R. Rep. 110. For the present law relating to the recovery of damages for shock, see 11 HALSBURY'S LAWS (3rd Edn.) 255, 270, 271, 278-280 and *ibid.*, vol. 28, pp. 97, 98, and cases at 17 DIGEST (Repl.) 122, 123, and 36 DIGEST (Repl.) 196-198.

Doubted: *Hambrook v. Stokes Bros.*, [1924] All E.R. Rep. 110. Considered: *Owens v. Liverpool Corp.*, [1938] 4 All E.R. 727. Referred to: *Willoughby v. Great Western Rail. Co.* (1904), 6 W.C.C. 28; *Yates v. South Kirkby Featherstone and Hemsworth Collieries* (1910), 103 L.T. 170; *The Rigel*, [1912] P. 99; *Brown v. John Watson, Ltd.*, [1914-15] All E.R. Rep. 461; *Janvier v. Sweeney*, [1918-19] All E.R. Rep. 1056; *Marriott v. Maltby Main Colliery*, [1920] All E.R. Rep. 193; *Hay or Bourhill v. Young*, [1942] 2 All E.R. 396.

Cases referred to:

- (1) *Victorian Railways Comrs. v. Coultas* (1888), 13 App. Cas. 222; 57 L.J.P.C. 69; 58 L.T. 390; 52 J.P. 500; 37 W.R. 129; 4 T.L.R. 286, P.C.; 17 Digest (Repl.) 122, 333.
- (2) *Mitchell v. Rochester Railroad Co.* (1896), 151 N.Y. 107.
- (3) *Wilkinson v. Downton*, [1897] 2 Q.B. 57; 66 L.J.Q.B. 493; 76 L.T. 493; 45 W.R. 525; 13 T.L.R. 388; 41 Sol. Jo. 493; 17 Digest (Repl.) 122, 334.
- (4) *Jones v. Boyce* (1816), 1 Stark. 493, N.P.; 36 Digest (Repl.) 23, 101.
- (5) *Harris v. Mobbs* (1878), 3 Ex.D. 268; 39 L.T. 164; 42 J.P. 759; 27 W.R. 154; 36 Digest (Repl.) 39, 194.

- (6) *Williams v. Day* (1883), 12 Q.B.D. 110; 49 L.T. 309; 45 J.P. 6; 33 W.R. 123; D.C.; 36 Digest (Repl.) 209, 1105.
- (7) *Byrne v. Great Southern and Western Rail. Co. of Ireland* (1884), cited in 26 L.R.Ir. 428; 36 Digest (Repl.) 197, *1851.
- (8) *Bell v. Great Northern Rail. Co. of Ireland* (1890), 26 L.R.Ir. 428; 36 Digest (Repl.) 197, *1852.
- (9) *Smith v. Johnson & Co.* (1897), cited in, [1897] 2 Q.B. p. 61; 66 L.J.Q.B. p. 496; 76 L.T. p. 494; 45 W.R. p. 626; 13 T.L.R. p. 300; 41 Sol. Jo. 403; D.C.; 36 Digest (Repl.) 197, 1036.
- (10) *Vaughan v. Taff Vale Rail. Co.* (1860), 5 H. & N. 673; 29 L.J.P. 247; 2 L.T. 394; 24 J.P. 453; 6 Jur.N.S. 899; 8 W.R. 549; 157 E.R. 1351, Ex. Ch.; 36 Digest (Repl.) 6, 8.
- (11) *Pugh v. London, Brighton and South Coast Rail. Co.*, (1896) 2 Q.B. 248; 65 L.J.Q.B. 521; 74 L.T. 724; 44 W.R. 627; 12 T.L.R. 448; 40 Sol. Jo. 565; C.A.; 29 Digest 401, 3178.
- (12) *Spade v. Lynn and Boston Railroad Co.* (1897), 60 Am. St. Rep. 393; 168 Mass. 285.
- (13) *Adams v. Lancashire and Yorkshire Rail. Co.* (1869), L.R. 4 C.P. 709; 38 L.J.C.P. 277; 20 L.T. 850; 17 W.R. 884; 36 Digest (Repl.) 191, 1010.
- (14) *The Bywell Castle* (1879), 4 P.D. 219; 41 L.T. 747; 28 W.R. 293; 4 Asp. M.L.C. 207, C.A.; 36 Digest (Repl.) 190, 1006.
- (15) *Holmes v. Mather* (1875), L.R. 10 Exch. 261; 44 L.J.Ex. 176; 23 L.T. 361; 39 J.P. 567; 23 W.R. 869; 43 Digest 431, 567.

Also referred to in argument :

Scott v. Shepherd (1773), 2 Wm. Bl. 892; 3 Wils. 403; 96 E.R. 525; 36 Digest (Repl.) 23, 100.

The City of Lincoln (1889), 15 P.D. 15; 59 L.J.P. 1; 62 L.T. 49; 38 W.R. 345; 6 Asp.M.L.C. 475, C.A.; 36 Digest (Repl.) 40, 196.

Point of Law raised on the pleadings ordered to be set down for hearing before the trial of the action pursuant to R.S.C., Ord. 25, r. 2.

The material allegations in the statement of claim were as follows. The plaintiff was the wife of Arthur David Dulieu, who carried on the business of a licensed victualler at the Bonner Arms, Bonner Street, Bethnal Green, London. On July 20, 1900, the plaintiff was behind the bar of her husband's public-house, she being then pregnant, when the defendants by their servant so negligently drove a pair horse van as to drive it into the public-house. The plaintiff in consequence sustained a severe shock and was and continued to be seriously ill, and on Sept. 29, 1900, she gave premature birth to a child. In consequence of the shock sustained by the plaintiff the child was born an idiot. The plaintiff claimed damages in respect of these matters. In their defence the defendants submitted as a matter of law that the damages sought to be recovered were too remote, and that the statement of claim disclosed no cause of action.

Spencer Bower for the defendants.

Ritter for the plaintiff.

Cur. adv. vult.

June 5, 1901. The following judgments were read.

KENNEDY, J.—In this case the only question for the judgment of the court is in the nature of a demurrer. The defendants have pleaded, as a matter of law, that the damages sought to be recovered are too remote and that the statement of claim upon its face discloses no cause of action. The statement of claim alleges that on July 20, 1900, the plaintiff, then being in a state of pregnancy, was behind the bar of her husband's public-house, and that the defendants, by their servant, negligently drove a pair-horse van into the public-house. It goes on to allege that the plaintiff in

A consequence sustained a severe shock and was seriously ill, that on Sept. 29 following she gave premature birth to a child, and that in consequence of the shock sustained by the plaintiff the child was born an idiot. Then follows the claim for damages.

The only matter we have to decide is whether, if it is proved at the trial that the defendants' servant did negligently drive a pair-horse van, and by reason of his negligence drove it into the public-house where the plaintiff was, and did thereby cause her such a nervous shock as to make her ill in body and suffer bodily pain in the way alleged, the plaintiff has a good cause of action for damages on those grounds. The head of damage relating to the condition of the child is rightly treated by the plaintiff's counsel as untenable. The defendants' counsel summed up his contention against the legal validity of the plaintiff's claim in the statement that no action for negligence will lie when there is no immediate physical injury resulting to the plaintiff. He has argued that bodily harm, which in the present case resulted to the plaintiff through the shock received by her through the inroad of the van and horses into the room in which she was, and which so acted upon her, in her then state of health, as to produce the bodily harm, was in point of law too remote a consequence of the negligence of the defendants' servant. My brother PHILLIMORE and I agree that this contention ought not to be upheld; but as we arrive at the result by somewhat different courses of reasoning, and the case is, upon the authorities, not free from difficulty and raises points of general interest, I think I ought to state the considerations which have led me to my conclusion.

This is an action on the case for negligence—that is to say, for a breach on the part of the defendants' servant of the duty to use reasonable and proper care and skill in the management of the defendants' van. In order to succeed the plaintiff has to prove resulting damage to herself, and “a natural and continuous sequence uninterruptedly connecting the breach of duty with the damage as cause and effect”: SHEARMAN AND REDFIELD ON NEGLIGENCE, cited in BEVEN, NEGLIGENCE IN LAW (2nd Edn.), p. 7. In regard to the existence of the duty here there can, I think, be no question. The driver of a van and horses in a highway owes a duty to use reasonable and proper care and skill so as not to injure either persons lawfully using the highway or property adjoining the highway, or persons who, like the plaintiff, are lawfully occupying that property. His legal duty towards all appears to me to be probably identical in character and in degree. I understood the plaintiff's counsel to suggest that there might exist a higher degree of duty toward the plaintiff sitting in a house than would have existed had she been in the street. I am not at all satisfied that this is so. The wayfarer in the street, as it seems to me, has as much right of redress if he is injured in person or in property by the negligence of another as the man who is lawfully sitting on a side wall or in an adjoining house. “The whole law of negligence assumes the principle *volenti non fit injuria* not to be applicable” for reasons which SIR FREDERICK POLLOCK points out in his work on TORTS (6th Edn.), pp. 166, 167, in a passage which follows the quotation which I have just made. There is no legal reason why because A. is using the street as he has a right to do instead of sitting indoors that B. should claim to be entitled to drive his van negligently over A.'s body or to destroy his clothing by negligently bespattering it with mud. The legal obligations of the driver of horses are the same, I think, towards the man indoors or the man out of doors; the only question here is whether there is an actionable breach of those obligations if the man in either case is made ill in body by negligent driving which does not break his ribs but shocks his nerves.

Before proceeding to consider the objections to the maintenance of such a claim as that of the present plaintiff, it is, I think, desirable for clearness sake to see exactly what are the facts which ought to be assumed for the purposes of the argument. We must assume all that consistently with the allegations of the statement of claim can be assumed in her favour. We must, therefore, take it as proved to the satisfaction of a jury that the negligent driving of the defendants'

servant reasonably and actually caused a nervous or mental shock to the plaintiff by her reasonable apprehension of immediate bodily hurt, and that the premature childbirth, with the physical pain and suffering which accompanied it, was a natural and a direct consequence of the shock. I may just say, in passing, that I use the words "nervous" or "mental" as interchangeable epithets on the authority of the judgment of the Privy Council in *Victorian Railways Commissioners v. Coultas* (1), but I venture to think "nervous" is probably the more correct epithet where nature operates through parts of the physical organism to produce miscarriage and illness, and where, as in the present case, these physical injuries are produced by the shock. The use of the epithet "mental," as I am led to think from a perusal of some of the relevant cases, requires caution, in view of the undoubted rule that merely mental pain, unaccompanied by any injury to the person, cannot sustain an action of this kind: *BEVEN ON LAW OF NEGLIGENCE* (2nd Edn.), p. 77.

These being the assumed facts, what are the defendants' arguments against the right to recover damages in this action? First of all, it is argued that fright caused by negligence is not in itself a cause of action; ergo, none of its consequences can give a cause of action. In *Mitchell v. Rochester Railroad Co.* (2) the point is put thus (151 N.Y. at pp. 109, 110):

"That the result may be nervous disease, blindness, insanity, or even a miscarriage, in no way changes the principle. These results merely show the degree of fright or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright."

With all respect to the learned judges who have so held, I feel a difficulty in following this reasoning. No doubt damage is an essential element in a right of action for negligence. I cannot successfully sue him who has failed in his duty of using reasonable skill and care towards me unless I can prove some material and measurable damages. If his negligence has caused me neither injury to property nor physical mischief, but only an unpleasant emotion of more or less transient duration, an essential constituent of a right of action for negligence is lacking. As *SIR FREDERICK POLLOCK* has stated in his work on *TORTS* (6th Edn.), p. 51:

"Fear falls short of being actual damage, not because it is a remote or unlikely consequence, but because it can be proved and measured only by physical effects."

It may, I conceive, be truly said that, viewed in relation to an action for negligence, direct bodily impact is without resulting damage as insufficient a ground of legal claim as the infliction of fright. That fright—where physical injury is directly produced by it—cannot be a ground of action merely because of the absence of any accompanying "impact" appears to me to be a contention both unreasonable and contrary to the weight of authority.

Leaving out of sight as perhaps involving special considerations cases of wilful wrongdoing, such as *Wilkinson v. Downton* (3), decided by my brother *WRIGHT* in a civil court, and the authorities as to criminal responsibility which are cited in *MR. BEVEN'S* work (*NEGLIGENCE IN LAW* (2nd Edn.), pp. 81 and 82), we have, as reported, decisions which go far, at any rate, in my judgment, to negative the correctness of any such contention: *Jones v. Boyce* (4), *Harris v. Mobbs* (5), and *Wilkins v. Day* (6). All the three cases are cited by *WRIGHT, J.*, in his judgment in *Wilkinson v. Downton* (3), and he there explains the judgment given in favour of the plaintiff in each of them on the ground that the fright occasioned by the defendant's wrongdoing—to the passenger in the earliest case and to the horse in the two later cases—properly ought in the circumstances to be regarded as the direct and immediate cause of the damage which ensued. In other words, an action was held to lie though the only physical injury did not accompany, but was occasioned by, the fright. Further, we have directly in point the decision given in 1882 by the Common Pleas Division in Ireland under the presidency of the present Lord

MORRIS in the unreported case of *Byrne v. Great Southern and Western Rail. Co. of Ireland* (7), and affirmed on appeal (1884) in a judgment delivered by the late SIR EDWARD SULLIVAN, and the approval of the last mentioned case in 1890 by the Exchequer Division in *Bell v. Great Northern Rail. Co. of Ireland* (8). In the course of his judgment PALLES, C.B., expressly points out (26 L.R.Ir. at p. 442) that in the circumstances of *Byrne v. Great Southern and Western Rail. Co. of Ireland* (7) there was nothing in the nature of impact, and the parts of the evidence which he quotes clearly show that this was so. In *Victorian Railways Comrs. v. Coultas* (1), which was much relied upon by the defendants in the argument before us and which I shall have to refer to later on more fully, the Privy Council expressly declined to decide that "impact" was necessary.

But if "impact" be not necessary, and if, as must be assumed here, the fear is proved to have naturally and directly produced the physical effects, so that the ill results of the negligence which caused the fear are as measurable in damages as the same results would be if they arose from an actual impact, why should not an action for those damages lie just as well as it lies where there has been actual impact? It is not, however, to be taken that, in my view, every nervous shock occasioned by negligence and producing physical injury to the sufferer gives a cause of action. There is, I think, one important limitation. The shock, in order to give a cause of action, must be one which arises from a fear of immediate personal injury to oneself [see note *supra*, p. 353]. A. has, I conceive, no legal duty not to shock B.'s nerves by the exhibition of negligence towards C. or towards the property of C. That limitation was applied by BRUCE and WRIGHT, JJ., in the unreported case of *Smith v. Johnson & Co.* (9). In *Smith v. Johnson & Co.* (9) a man was killed negligently by the defendant in the sight of the plaintiff, and the plaintiff became ill, not from the shock produced by fear of harm to himself, but from the shock of seeing another person killed. The court held that this harm was too remote a consequence of negligence. I should myself, as I have already indicated, have gone a step further and said, upon the facts in *Smith v. Johnson & Co.* (9), that, as the defendants neither intended to affect the plaintiff nor did anything to affect him, there was no evidence of any legal duty towards the plaintiff, or of that absence of care according to the circumstances by which WILLES, J., in *Vaughan v. Taff Vale Rail. Co.* (10) (5 H. & N. at p. 688) defines negligence.

I observe that SIR FREDERICK POLLOCK begins the passage in his work on TORTS (6th Edn.), p. 50, in which he discusses the point at issue before us, with a question which expresses it. The learned author puts the inquiry in this form:

"Where a wrongful or negligent act of A. threatening Z. with immediate bodily hurt, but not causing such hurt, produces in Z. a sudden terror or nervous shock from which bodily illness afterwards ensues, is this damage too remote to enter into the measure of damages if A.'s act was an absolute wrong, or to give Z. a cause of action, if actual damage is the gist of the action?"

In order to illustrate my meaning in the concrete, I will say in regard to the present case that I should not be prepared to hold that the plaintiff was entitled to maintain this action if the nervous shock was produced, not by the fear of bodily injury to herself, but by sorrow or vexation arising from the sight of mischief being threatened or done either to some other person or to her own or to her husband's property by the intrusion of the defendants' van and horses. The cause of the nervous shock is one of the things which in my view the jury will have to determine at the trial.

It remains to consider the second and somewhat different form in which the defendants' counsel put his objection to the right of the plaintiff to maintain this action. He contends that the damages are too remote, and relies much upon the decision of the Privy Council in *Victorian Railways Comrs. v. Coultas* (1), to which I have had occasion to make a passing reference. In that case the principal circumstances were that the appellants' gatekeeper negligently invited the male plaintiff and his wife, who were driving in a buggy, to enter the gate at a

crossing when a train was approaching, and, though there was an actual collision with the train, the escape was so narrow and the danger so alarming that the lady fainted and suffered a severe nervous shock which produced illness and a miscarriage. The colonial court had entered judgment for the plaintiff for the amount found by the jury at the trial of the action brought against the appellants for negligence. The Privy Council reversed this decision. The principal ground of their judgment is formulated in the following sentence :

"Damages arising from mere sudden terror, unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances, their Lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper."

A judgment of the Privy Council ought, of course, to be treated by this court as entitled to very great weight indeed, but it is not binding upon us; and in venturing, most respectfully, not to follow it in the present case, I am fortified by the fact that its correctness was treated by Lord ESHER, M.R., in his judgment in *Pugh v. London, Brighton and South Coast Rail. Co.* (11), as open to question; that it was disapproved by the Exchequer Division in Ireland in *Bell v. Great Northern Rail. Co. of Ireland* (8), where in the course of his judgment PALLES, C.B., gives a reasoned criticism of the Privy Council judgment which, with all respect, I entirely adopt; and, lastly, by the fact that I find that the judgment has been unfavourably reviewed by legal authors of recognised weight, such as Mr. SEDGWICK : see his work on DAMAGES (8th Edn.), p. 811; SIR FREDERICK POLLOCK (LAW OF TORTS (6th Edn.), pp. 50-52), and Mr. BEVEN (LAW OF NEGLIGENCE (2nd Edn.), pp. 76-83).

Why, I venture to ask, is the "accompaniment of physical injury" essential, as, if I read aright the passage which I have quoted, the Privy Council asserts it to be? For my own part, I should not like to assume it to be scientifically true that a nervous shock which causes serious bodily illness is not actually accompanied by physical injury, although it may be impossible, or at least difficult, to detect the injury at the time in the living subject. I should not be surprised if the surgeon or physiologist told us that nervous shock is in itself truly an affection of the physical organism. Let it be assumed, however, that the physical injury follows the shock, and that the jury are satisfied upon proper and sufficient medical evidence that it follows the shock as its direct and natural effect, is there any legal reason for saying that the damage is less proximate than damage which arises contemporaneously? In *Bell v. Great Northern Rail. Co. of Ireland* (8), PALLES, C.B., said (26 L.R.Ir. at p. 439) :

"As well might it be said that a death caused by poison is not to be attributed to the person who administered it, because the mortal effect is not produced contemporaneously with its administration."

"Remoteness," as a legal ground for the exclusion of damage in an action of tort, surely means, not severance in point of time, but the absence of direct and natural causal sequence—the inability to trace, in regard to the damage, the proper *hoc* in a necessary or natural descent from the wrongful act. As a matter of experience, I should say that the injury to health which forms the main ground of damages in an action of negligence, either in cases of railway accidents or in "running down cases," frequently is proved, not as a concomitant of the occurrence, but as one of the sequelæ.

To one other point only in the judgment will I now refer. The judgment proceeds :

"If it were held that they can, it appears to their Lordships that it would be extending the liability for negligence much beyond what that liability has hitherto been held to be. Not only in such a case as the present, but in every case where an accident caused by negligence had given a person a serious nervous shock, there might be a claim for damages on account of mental injury."

I find, with all respect, a difficulty in appreciating this argument, because in that case, as is to be assumed in this, there was evidence of actual physical illness and not only of a mental pain, and the defendants, if the verdict on this part of the case was against the weight of evidence, should have moved for a new trial. The case standing as it did, it is difficult to see how a decision on the appeal in favour of the respondents would have sanctioned the maintenance of an action for merely mental hurt.

Counsel for the defendants on the argument before us referred also to two American cases. One I have already mentioned—*Mitchell v. Rochester Railroad Co.* (2). The Court of Appeals of the State of New York did, no doubt, there hold both, as I have already stated, that no recovery may be had for fright, and also that it could not properly be said that the plaintiff's miscarriage in that case was the proximate result of the defendants' negligence. Shortly, the facts there were that the plaintiff, while waiting for a tramcar, was nearly run over by the negligent management of the defendants' servant of a car drawn by a pair of horses, and, owing to terror so caused, fainted and lost consciousness, and subsequently had a miscarriage and consequent illness. The court, upon the present point, based their decision, to use their own language, upon a view that the injuries

"were plainly the result of an accidental or unusual combination of circumstances which could not have been reasonably anticipated and over which the defendant had no control."

I can only say, with due deference to the learned judges who so decided, that I cannot assent to the view they thus took upon the assumed state of facts, which was that the defendants' driver by negligent driving threatened the plaintiff with immediate bodily injury, and by that threat caused her terror which caused the physical injuries above mentioned. Whether the terror was, in the circumstances, a natural and reasonable result of the threat was a question of fact for the jury. It must be taken, I think, that they found so. But if the damage thus occasioned ought to be held not to be proximate, it seems to me to be difficult to maintain the correctness of the decisions in *Jones v. Boyce* (4), *Wilkins v. Day* (6), and *Harris v. Mobbs* (5). It may be admitted that the plaintiff, as regards the personal injuries, would not have suffered exactly as she did, and probably not to the same extent as she did, if she had not been pregnant at the time; and no doubt the driver of the defendants' horses could not anticipate that she was in this condition. But what does that fact matter? If a man is negligently run over or otherwise negligently injured it is no answer to the sufferer's claim for damages that he would have suffered less injury or no injury at all if he had not had an unusually thin skull or an unusually weak heart.

The other American case cited for the defendants is *Spade v. Lynn and Boston Railroad Co.* (12), decided by the Supreme Judicial Court of Massachusetts in 1897. The court there held, as expressed in the headnote of the report, that in an action to recover damages for an injury sustained through the negligence of another there can be no recovery for a bodily injury caused by mere fright and mental disturbance. But while the decision is thus, in the result, in accord with the New York case, it is given upon very different grounds. In his full and interesting judgment ALLEN, J., who delivered the decision of the court, admits fully that which, as I have just pointed out, the New York court denied—viz., that damages for physical injury caused through fright which is occasioned by negligent conduct are not in principle too remote. He says (60 Am. St. Rep. at p. 395):

"A physical injury may be directly traceable to fright, and so may be caused by it. We cannot say, therefore, that such consequences may not flow proximately from unintentional negligence, and, if compensation in damages

may be recovered for a physical injury so caused, it is hard on principle to say why there should not be also a recovery for the mere mental suffering when not accompanied by any perceptible physical effects."

This reasoning obviously considers more than the present plaintiff's case, for she asks to be compensated in damages only if she proves physical injury. The learned judge then proceeds to state why the right to recover, which on principle ought to exist, is in his view properly refused. He says:

"It would seem, therefore, that the real reason for refusing damages sustained from mere fright must be something different, and it probably rests on the ground that in practice it is impossible satisfactorily to administer any other rule."

He goes on to develop his argument on the ground of public policy—the hardship of holding persons bound to anticipate and guard against anything but “the probable consequences to ordinary people” (in which it is clear he considers the consequences of fright should not be included), and the risk of opening “a wide door for unjust claims which could not be successfully met.” He refers, among other cases, to the *Victorian Railways Comrs. v. Coultas* (1), and it will be seen on a reference to the report of that case (13 App. Cas. at p. 226), that, while the judgment of the Privy Council proceeds mainly upon the view that the damages are too remote, it does also claim justification from the requirements of public policy and the danger which would arise from a contrary decision on account of “a wide field opened for imaginary claims.”

Naturally one is diffident of one's opinion when one finds that it is not in accord with those which have been expressed by such judicial authorities as those to which I have just referred. But certainly, if, as is admitted, and I think rightly admitted, by the Massachusetts judgment, a claim for damages for physical injuries naturally and directly resulting from nervous shock which is due to the negligence of another in causing fear of immediate bodily hurt is in principle not too remote to be recoverable in law, I should be sorry to adopt a rule which would bar all such claims on grounds of policy, and in order to repress the possible prosecution of unrighteous or groundless actions of the like character. Such a course involves the risk of denial of justice to meritorious claims, and it necessarily implies a certain degree of distrust, which I do not share, in the capacity of legal tribunals to get at the truth in this class of case. So far as I am entitled to speak from experience, I see no reason to suppose that a jury would really have more difficulty in weighing the judicial evidence as to the effects of nervous shock through fright than in weighing the like evidence as to the effects of nervous shock through a railway collision or a road-car accident where, as often happens, no palpable injury, or very slight palpable injury, has been occasioned at the time.

I have now, I think, dealt with authorities and the arguments upon which the defendants rely, and I have done so at greater length than I should have wished to do, but for the general interest of the points involved and the difficulties which the conflicting authorities undoubtedly present. In the conflict I prefer the decisions of the Irish courts; they seem to me to constitute strong and clear authorities for the plaintiff's contention. It is suggested on the part of the defendants that the applicability of the judgment in *Bell v. Great Northern Rail. Co. of Ireland* (8) is impaired by the fact that the female plaintiff in that action was a passenger on the defendants' railway and as such had contractual rights. It appears to me that this can make no practical difference whatever. There was no special contract: no notice to the railway when they accepted her as a passenger that she was particularly delicate or peculiarly nervous and liable to fright. The contractual duty existed, as it often does exist, concurrently with the duty apart from the contract; but the one is in such circumstances practically co-extensive with the other in the rights which it gives and the correlative liabilities which it imposes. I hold that if on the trial of the action the jury find the issues left to them as

the jury found them in *Bell v. Great Northern Rail. Co. of Ireland* (8), after the direction of ANDREWS, J., which was approved by the Exchequer Division, the plaintiff will have made out a good cause of action.

PHILLIMORE, J.—The discussion in this case has ranged over wide ground, and many points have been brought to our notice. It will not, I hope, be thought that these matters have been omitted from consideration or not materially considered because I am able to put my conclusions into a comparatively narrow compass.

I think there may be cases in which A. owes a duty to B. not to inflict a mental shock on him or her, and that in such a case, if A. does inflict such a shock upon B., as by terrifying B., and physical damage thereby ensues, B. may have an action for the physical damage, though the medium through which it has been inflicted is the mind. I think, for example, that it may well be, as the Exchequer Division in Ireland held in *Bell v. Great Northern Rail. Co. of Ireland* (8), that a railway company has a duty to its passengers to use its best endeavours to convey them, not merely safely, but securely in the etymological sense of the word; and that, when it fails and physical damage accrues to a passenger through the fright which its failure occasions, the passenger may have an action. I cordially accept the decision of my brother WRIGHT in *Wilkinson v. Downton* (3) that everyone has a legal right to his personal safety, and that it is a tort to destroy this safety by wilfully false statements, and thereby to cause a physical injury to the sufferer. In that case it will be observed that the only physical action of the wrongdoer was that of speech. I think there is some assistance to be got from the cases where fear of impending danger has induced a passenger to take means of escape which have, in the result, proved injurious to him, and where the carrier has been held liable for these injuries, as in *Jones v. Boyce* (4). The limit of the application of this principle is shown in *Adams v. Lancashire and Yorkshire Rail. Co.* (13). These principles and cases seem to establish that terror wrongfully induced and inducing physical mischief gives a cause of action. Against them is to be set the weighty authority of the *Victorian Railways Comrs. v. Coullas* (1). This is an authority to be treated with the utmost respect, but no more binding upon us than it was upon the Exchequer Division in Ireland. Still less are the special reasons for the decision binding. I do not know whether I should or should not have come unaided to the same conclusion as that which was in that case arrived at; but I think it possible that I should, though not for the reasons which have prominence in the judgment.

It must be conceded on behalf of the plaintiff that to give rise to a cause of action the act which terrifies must be either wilful or negligent. Negligence is a breach of duty owed to the person complaining. It is not certain that as between people travelling on highways there is any duty so carefully to conduct yourself or your vehicle as not to frighten others. It is a duty so carefully to conduct yourself or your vehicle as not to cause collision or some other form of direct physical damage. The gatekeeper in the *Victorian Rail. Case* (1) was careless in opening the gate, and would have rendered his railway company liable if there had been actual impact, even if the actual impact was produced by a wrong manoeuvre taken under the influence of fear: see per JAMES, L.J., in *The Bywell Castle* (14). But it may be, nevertheless, that in such circumstances a railway is not liable if there be escape of actual impact, however narrowly. There are dangers sometimes from the traffic at Charing Cross which might frighten, not only an inexperienced and elderly country woman, but an experienced and cool citizen, the ideal *vir constans* for whom *ἐντροπία* makes *ἀνδρεία*. But if physical consequences were induced by terror so produced, it may be that there would be no cause of action. This principle is suggested, though in language perhaps open to criticism, by BRAMWELL, B., in *Holmes v. Mather* (15). It may be—I do not say it is—a person venturing into the streets takes his chance of terror. If not fit for the streets at hours of crowded

trifle, he or she should not go there. But if a person, being so afflicted, without permanently or temporarily, stays at home, he or she may well have a right to his or her personal safety, giving to these merely the meaning given by my brother WILKENTON; and willfully or negligently to invade this right, and so to cause physical damage, may give rise to an action. In the case before us, the plaintiff, a pregnant woman, was in her house. It is said that she was not the tenant in possession, and could not maintain trespass quare clausum freit if this had been a direct act of the defendant and not of his servant. This is true; her husband was in possession. But none the less it was her home, where she had a right and on some occasions a duty to be; and it seems to me that if the tenant himself could maintain an action his wife or child could do likewise. It is averred that, by reason of the careless driving of the defendants' servant, a pair-horse van came some way into the room, and so frightened her that serious physical consequences thereby befell her. If these averments be proved, I think there was a breach of duty to her for which she can have damages.

The difficulty of these cases is, to my mind, not one as to the remoteness of the damage, but to the uncertainty of there being any duty. Once get the duty and the physical damage following on the breach of duty, and I hold that the fact of one link in the chain of causation being mental only makes no difference. The learned counsel for the plaintiff has put it that every link is physical in the narrow sense. That may or may not be. For myself it is unimportant. The American cases to which we have been referred are worthy of much attention and respect. As to the decision of the Court of Appeals in *Mitchell v. Rochester Railroad Co.* (2), I would make the same observations as I have made on the *Victorian Railways Case* (1). I accept the reasoning in the later case of *Spade v. Lynn and Boston* (12), and I think I should have come to the same decision, but I should not have expressed it in such broad and sweeping language. The following passage, which I only discovered after I had written the first part of my judgment, exactly expresses what I mean up to a certain point:

"Not only the transportation of passengers and the running of trains, but the general conduct of business and of the ordinary affairs of life must be done on the assumption that persons who are liable to be affected thereby are not peculiarly sensitive and are of ordinary physical and mental strength. If, for example, a traveller is sick or infirm, delicate in health, specially nervous or emotional, liable to be upset by slight causes, and thereby requiring precautions which are not usual or practicable for travellers in general, notice should be given, so that, if reasonably practicable, arrangements may be made accordingly and extra care be observed. But, as a general rule, a carrier of passengers is not bound to anticipate or to guard against an injurious result which would only happen to a person of peculiar sensitiveness."

Aliter in this case, where the plaintiff is not a passenger or a traveller. Our judgment must be for the plaintiff with costs.

Solicitors: *H. Dade & Co.; William Hurd & Sons.*

[Reported by J. A. STRAHAN, Esq., Barrister-at-Law.]

DORMER (OTHERWISE WARD) v. WARD

COURT OF APPEAL (The Earl of Halsbury, L.C., A. L. Smith, M.R., and Vaughan Williams, L.J.), August 1, November 5, 1900]

Reported [1901] P. 20; 69 L.J.P. 144; 83 L.T. 556; 49 W.R. 149; 17 T.L.R. 12]

Variation of Settlement—Nullity—Jurisdiction of court to vary settlement—Covenant by "husband" to pay £300 a year to trustees for use of "wife"—Appointment to "wife" of yearly rentcharge if surviving "husband"—Appointment of hereditaments to raise fund with "husband's" consent—Matrimonial Causes Act, 1859 (22 & 23 Vict., c. 61), s. 5—Matrimonial Causes Act, 1878 (41 & 42 Vict., c. 19), s. 3.

Upon a decree of nullity of marriage the court has jurisdiction under the Matrimonial Causes Acts to inquire into the existence of settlements existing at the time of pronouncing the decree absolute, and to make orders with reference to the application of the settled property, as though that which the court has held to be no marriage was a valid marriage.

By a settlement in consideration of his intended marriage with the petitioner, the respondent covenanted to pay to the trustees during the joint life of himself and the petitioner a yearly sum of £200, to be paid by them to the petitioner. The marriage was solemnised, but the petitioner subsequently obtained a decree of nullity of marriage on the ground of the respondent's impotence.

Held: the court had jurisdiction to make, and should make, an order for the application for the benefit of the petitioner of so much of the £200 as to the court should seem right.

Decision of GORELL BARNES, J., [1900] P. 180, reversed.

By the same settlement (a) the respondent limited and appointed to the petitioner a yearly rentcharge of £1,300 in case the intended marriage should take place and she should survive him, and to secure the rentcharge he appointed certain hereditaments to the use of the trustees for the term of 1,000 years to commence upon his death. He also (b) appointed certain other hereditaments to the use of the trustees for 1,200 years to commence from the solemnisation of the intended marriage upon trust to raise £20,000, provided that no part of that sum should be raised during his life without his consent in writing. This consent he did not give.

Held: as to (a) the court had no jurisdiction to make any order varying the settlement under the Matrimonial Causes Acts, 1859 and 1878, because it could not ignore the condition that the jointure and term could not begin until after the death of the respondent and, as to (b) the fund could not be raised during the lifetime of the respondent without his consent, which had not been given.

Notes. Section 5 of the Matrimonial Causes Act, 1859, and s. 3 of the Matrimonial Causes Act, 1878, have been replaced by s. 25 of the Matrimonial Causes Act, 1950 (29 HALSBURY'S STATUTES (2nd Edn.) 388).

Considered: *Nepcan (otherwise Lee-Warner) v. Nepcan*, [1925] All E.R. Rep. 166. Followed: *Bosworthick v. Bosworthick*, [1926] All E.R. Rep. 425. Considered: *Brown v. Brown*, [1936] 2 All E.R. 1616; *Dodworth v. Dalc*, [1936] 2 All E.R. 440; *Lort-Williams v. Lort-Williams*, [1951] 2 All E.R. 241; *Halpern v. Halpern*, [1951] 1 All E.R. 315. Referred to: *E. v. E. (otherwise T.)* (1902), 50 W.R. 607; *Attwood v. Attwood*, [1903] P. 7; *Re Garnett, Richardson v. Greenup*, [1904-7] All E.R. Rep. 479; *Sharpe v. Sharpe*, [1909] P. 20; *Re Wombwell's Settlement, Clarke v. Menzies*, [1922] All E.R. Rep.

116; *Jacob v. Jacob*, [1912] 2 All E.R. 471; *Re Amos Settlement, Doreville v. Amos*, [1946] 1 All E.R. 689; *Re Deuchrat, Flower v. Deuchrat*, [1949] 1 All E.R. 117; *Gunner v. Gunner and Stirling*, [1948] 2 All E.R. 711, *Prescott v. Tallman*, [1958] 3 All E.R. 55.

As to variation of settlements, see 12 HALSBURY'S LAWS (3rd Edn), 451-460, and for cases see 27 Digest (Repl.) 641 et seq.

Cases referred to :

- (1) *Thomas v. Thomas* (1860), 2 Sw. & Tr. 89; 2 L.T. 438; 8 W.R. 501.
- (2) *Bird v. Bird* (1866), L.R. 1 P. & D. 231; 35 L.J.P. & M. 102; 14 L.T. 860; 14 W.R. 1023.
- (3) *Corrance v. Corrance and Lowe* (1868), L.R. 1 P. & D. 495; 37 L.J.P. & M. 44; 18 L.T. 535; 16 W.R. 893; 27 Digest (Repl.) 662, 6253.
- (4) *Farrington v. Farrington and Schooles* (1886), 11 P.D. 84; 55 L.J.P. 69; 27 Digest (Repl.) 662, 6266.
- (5) *A. v. M.* (1884), 10 P.D. 178; 54 L.J.P. 31; sub nom. *Addington (falsely called Mellor) v. Mellor*, 33 W.R. 232; 27 Digest (Repl.) 658, 6197.
- (6) *Meredyth v. Meredyth and Leigh*, [1895] P. 92; 64 L.J.P. 54; 72 L.T. 898; 43 W.R. 304; 11 T.L.R. 186; 11 R. 651; 27 Digest (Repl.) 643, 6066.
- (7) *Wigney v. Wigney* (1882), 7 P.D. 177; 51 L.J.P. 60; 46 L.T. 441; 30 W.R. 722, C.A.; 27 Digest (Repl.) 653, 6150.
- (8) *Ponsonby v. Ponsonby* (1884), 9 P.D. 122; 53 L.J.P. 112; 51 L.T. 174; 32 W.R. 746, C.A.; 27 Digest (Repl.) 641, 6035.
- (9) *Chapman v. Bradley* (1863), 4 De G.J. & Sm. 71; 3 New Rep. 182; 9 L.T. 495; 10 Jur.N.S. 5; 12 W.R. 140; 46 E.R. 842, L.J.J.; 40 Digest (Repl.) 571, 762.
- (10) *Pawson v. Brown* (1879), 13 Ch.D. 202; 49 L.J.Ch. 193; 41 L.T. 339; 44 J.P. 233; 28 W.R. 652; 40 Digest (Repl.) 571, 768.

Also referred to in argument :

- Elliott v. Gurr* (1812), 2 Phillim. 16; 161 E.R. 1064; 27 Digest (Repl.) 269, 2157.
Worsley v. Worsley and Wignall (1869), L.R. 1 P. & D. 648; 38 L.J.P. & M. 43; 20 L.T. 546; 17 W.R. 743; 27 Digest (Repl.) 245, 1980.
Jump v. Jump (1883), 8 P.D. 159; 52 L.J.P. 71; 31 W.R. 956; 27 Digest 245, 1982.
Clifford v. Clifford (1884), 9 P.D. 76; 53 L.J.P. 68; 50 L.T. 650; 32 W.R. 747, C.A.; 27 Digest (Repl.) 246, 1983.

Appeal by the petitioner from a decision of GORELL BARNES, J., refusing to make an order under the Matrimonial Causes Acts, 1859 and 1878, for the variation of a marriage settlement.

Under an indenture of settlement dated Dec. 8, 1874, made between the respondent's father (who died before the date of the marriage settlement) and the respondent and certain trustees, the lands and hereditaments comprised in the schedules to the marriage settlement of May 27, 1885, together with other hereditaments, were limited (subject as to part to a jointure rentcharge of £1,200 payable thereout to the respondent's mother during her life, and to a term of 500 years securing the same) to such uses, upon such trusts, and with and under such powers, agreements, and declarations as the respondent should by any deed or deeds, with or without power of revocation and new appointment to be executed by him after his father's death, or by his will or any codicil or codicils thereto, from time to time appoint, but subject and without prejudice to any lease and every contract for a lease or leases subsisting at the date of the said indenture of settlement, and, subject thereto, to the use of the respondent and his assigns for his life without impeachment of waste, with divers remainders over. In the same indenture was contained a power for the respondent, after his father's decease, by deed or will to charge the settled premises with the payment to himself or any other person of any money not exceeding £8,000 and interest, as therein mentioned, and to appoint all or any part of the same premises for any term or terms of years for securing the same. This

A power had not at the time of the marriage settlement been exercised. In the indenture was also contained a power for the respondent, either before or after his marriage with any woman, by deed with or without power of revocation and new appointment, or by will or codicil, to appoint to any woman whom he might marry, for life or for any less period, as from the day of his death if she should survive him, any yearly rentcharge or rentcharges of any amount whatsoever payable after his father's death, whether the respondent should survive him or not, such rentcharge or rentcharges to be in bar or not to be in bar of dower and freebench as to the respondent should seem fit, and to be charged upon and payable out of all or any of the premises by the said indenture of settlement assessed without any deduction, and to be paid at such times and in such manner as to the respondent should seem meet, and to appoint to such woman the usual powers and remedies for recovering and enforcing the same, and to appoint the premises so charged to any person or persons for any term or terms of years with or without impeachment of waste upon trust for better securing payment of the rentcharge or rentcharges by mortgage (with a power of sale if thought fit) or otherwise as to the respondent should seem fit.

By the marriage settlement, dated May 27, 1885, made between the respondent, the petitioner, her father, and certain trustees, the respondent, in consideration of the intended marriage, covenanted with the trustees that if the intended marriage should take place the respondent would, during the joint lives of himself and the petitioner, pay to the trustees a yearly sum of £200, to accrue from day to day, but to be payable by equal quarterly payments, the first of such payments to be made on such of the quarterly days as should happen next after the solemnisation of the intended marriage, and the trustees were to pay the annual sum of £200 as the same should become due so long as the same should continue payable to the petitioner, but so that she should not have any power of anticipation [restraint on anticipation was abolished by the Married Women (Restraint upon Anticipation) Act, 1949]. In consideration of the intended marriage, and in exercise of the special power vested in him by the settlement of Dec. 8, 1874, the respondent limited and appointed to the use of the petitioner and her assigns during her life, in case the intended marriage should take effect and she should survive him, the rentcharges following, that is to say, if and so long as his mother should be living, the yearly rentcharge of £1,300, and from and after her death the yearly rentcharge of £1,600, the rentcharges or such of them as should take effect to be in full for her jointure and in lieu of all dower and freebench whatsoever, and to be charged upon and issuing out of all the hereditaments and premises comprised in the first schedule thereto (subject, as to part of the hereditaments to the yearly rentcharge of £1,200 and the term of 500 years, and subject, as to all the hereditaments to the powers of leasing and sale and exchange and management contained in the indenture of settlement), such rentcharges to be considered as accruing from day to day, but to be payable quarterly without any deduction except succession duty, if any, the first of such payments, as to the rentcharge of £1,300 to be payable at the end of three calendar months after the death of the respondent if the petitioner and the respondent's mother should then both be living, and as to the rentcharge of £1,600 to be made at the end of three calendar months after the death of the survivor of the respondent and his mother, if the petitioner should then be living. And in consideration of the intended marriage and in exercise of the special power vested in him for that purpose by the indenture of settlement, the respondent as beneficial owner appointed the hereditaments and premises thereinbefore charged with the jointure rentcharges (subject nevertheless as last aforesaid) unto and to the use of the trustees for the term of 1,000 years, to commence from the death of the respondent, to secure the payment of the rentcharges. And in consideration of the intended marriage and in exercise of the general power of appointment vested in him by the indenture of settlement and of all or any other power in that behalf him enabling, the respondent, as beneficial owner, appointed the hereditaments and premises comprised in the second schedule to the marriage settlement to the use

of the trustees for the term of 1,200 years, to commence from the solemnisation of the intended marriage, without impeachment of waste (that subject as therein mentioned) upon trust to raise the sum of £20,000 with interest for the same at 4 per cent. per annum computed from the solemnisation of the intended marriage, and to stand possessed thereof upon trust for investment and to pay the interest and annual produce to the respondent and his assigns during his life, and after his decease, as to the corpus of the fund and the annual produce thereof, in years for the issue of the marriage as the respondent should appoint, and in default as the petitioner should after the respondent's death appoint, and in default of issue attaining a vested interest, in trust for the respondent. The deed contained a proviso that no part of the £20,000 or of the interest thereof should be raised during the lifetime of the respondent except with his consent in writing.

The marriage was solemnised on May 28, 1885. On Dec. 21, 1896, the wife obtained a decree nisi for the nullity of the marriage on the ground of the husband's impotence. The decree was made absolute on June 28, 1897. On June 12, 1899, the wife, by leave, presented the present petition for a variation of the marriage settlement. The respondent's mother had died before those proceedings. *GOUGH BARNES, J.*, held that under the Matrimonial Causes Act, 1859 and 1878, he had jurisdiction to deal with the marriage settlement, but he further held that, having regard to the terms of the settlement there was no "property settled" within s. 5 of the Matrimonial Causes Act, 1859, which the court could in the circumstances order to be applied for the benefit of the petitioner, and he, accordingly, dismissed the petition. The petitioner appealed.

By the Matrimonial Causes Act, 1859, s. 5 :

"The court after a final decree of nullity of marriage, or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the court shall seem fit."

By the Matrimonial Causes Act, 1878, s. 3 :

"The court may exercise the powers vested in it by the provisions of s. 5 of 22 & 23 Vict., c. 61, notwithstanding there are no children of the marriage."

Danckwerts, Q.C., and *Frank Russell* for the petitioner.

Renshaw, Q.C., and *R. J. Parker (Jelf, Q.C.*, and *Priestley* with them) for the respondent.

Cur. adv. vult.

Nov. 5, 1900. **YAUGHAN WILLIAMS, L.J.**, read the following judgment:—The first question to be decided in this case is whether the court has or has not jurisdiction to make an order under s. 5 of the Matrimonial Causes Act, 1859, as amended by s. 3 of the Matrimonial Causes Act, 1878, in a case in which there has been a decree of nullity of marriage on the ground of impotence.

It was decided in *Thomas v. Thomas* (1), before the full court, that in a case where there were no children of the marriage the court had no jurisdiction to make an order under s. 5 of the Act of 1859. It was decided in *Bird v. Bird* (2) that the court had no power to make an order under s. 5 unless there was issue living at the time when the motion for the order was made. This was followed in *Carrence v. Carrence* (3)—a decision of the full court, with the slight, though not unimportant, variation that the time of the decree, and not the time of the motion is made the crucial time. These cases were all cases of dissolution of marriage. The ground of the decisions was the words "for the benefit of the children of the marriage or of their respective parents." It was said that this language clearly showed that the legislature did not intend the power under this section to come into effect where there were living

A children for whom provision might and ought to be made. If there were such children, then and then only the court had power to make orders for them or their parents. MONTAGUE SMITH, J., said (L.R. 1 P. & D. at p. 499):

"It might in some cases be prudent and convenient, where a home is broken up, that provision should be made for the children not only directly by giving them it to them, but also indirectly by giving a benefit to their parents."

Then comes the Act of 1878, s. 3, which provides that the court may exercise the powers of s. 5 of the Act of 1859 notwithstanding that there are no children of the marriage. This provision renders inapplicable so much of the reasoning of the court as is based on the assumption that the power to make orders for the benefit of parents was subsidiary to the governing object of the legislature—viz., to enable the court to make a provision for the children of the marriage. The section is by the amending Act to apply in cases where there is no parent because there is no child. Nevertheless, the word "parent" remains in the section.

What does it mean? Does it mean to include under the word "parent" only a person who has been a parent, but no longer is so by reason of the death of the child, or does it mean also to include every party to a marriage irrespective of whether he or she ever has been a parent or could so become? The word "parent" in this section must, in my opinion, mean the same in relation to dissolution of marriage as it does in relation to nullity of marriage. Can the power under s. 5 arise in a case where there is a divorce, and there neither has been nor is issue of the marriage? I do not think anything turns on impotency. It would seem that in several cases orders have been made for the benefit of one of the parties to a marriage of which there has not been any issue. *Farrington v. Farrington and Schooles* (4); *A. v. M.* (5), a nullity case; and *Meredyth v. Meredyth and Leigh* (6) are all cases to show that the court has exercised the power under s. 5 of the Act of 1859 in cases where there never had been issue of the marriage. In these cases the point does not seem to have been much, if at all, discussed; but in *Wigney v. Wigney* (7) the question was directly raised and argued, and, according to SIR GEORGE JESSEL, the amendment contained in the latter section was not expressed in the most artistic way, because, where there were no children of the marriage there could be no parent to whom the former section could in terms apply, but what was meant, of course, was, that where there were no children the persons to be benefited were the divorced husband and wife. This seems a direct decision by the Court of Appeal on the point; it was followed by the Court of Appeal in *Ponsonby v. Ponsonby* (8). If, then, the word "parent" includes divorced persons who have never had children, I cannot see why it should not include parties to a marriage avoided on the ground of nullity in a like case, especially as s. 5 expressly applies after a decree of nullity of marriage.

Assuming that the court has jurisdiction under s. 5 to make orders with reference to the application of the settled property, notwithstanding the fact that the parties to the avoided marriage have never had any child, it still remains to consider the question whether there is in this case any property settled as to which the court can exercise its jurisdiction by making an order with reference to the application of it. Generally, no doubt, it is true that the section only gives power to make orders with reference to the application of property settled, and does not give the court power to vary the settlement by treating as settled property which is not settled; but it is obvious that, inasmuch as the section applies to decrees of nullity of marriage, there must, if the section is to apply at all to nullity cases, be a power not only to make orders with reference to the application of the property settled among the beneficiaries contemplated by the settlement, but also for application of the property settled in favour of persons outside the settlement and under conditions outside the settlement. In other words, the court must read in the settlement child or children as meaning a child or children who are not issue of a marriage, and who are, therefore, illegitimate, and must read marriage as including

a connection which is no marriage at all, being a voidable marriage which has been avoided. The section says the court may inquire into the existence of settlements. Existence at what time? I think this means the existence of settlements at the time of pronouncing the decree: *Corrance v. Corrance* (3).

I propose to read this settlement in the light of these conclusions. I find that at the time of the pronouncing of the decree a settlement existed between Mr. and Mrs. Ward. I do not find that the settlement continued in force after the decree. In my opinion, this settlement did not do so. But I think that the court has power to make orders with reference to the application of the property settled by the settlement in existence at the time of the decree, and I think that, on a motion for an order for the application of property settled, the court, in the case of a decree of nullity, must, for the purpose of the order (if the section is to be applied to cases of nullity at all), read the settlement as if extended and varied so as to make the words "parties whose marriage" connote parties whose marriage was no marriage, and, as must be necessary in a case where the decree of nullity was not based on impotency, "children" and "respective parents" connote illegitimate children and their unmarried father and mother. This is not merely to make an order for the application of "property settled," but to vary the settlement by making those beneficiaries under the settlement who, but for the order of the court, would take no benefit under it. Unless one does this one makes the section a dead letter and of no effect in a nullity case.

This settlement begins with the recital of the intended marriage and witnesseth that, in consideration of the intended marriage E. G. Ward covenants with R. H. Few and H. V. Higgins, the trustees, that he will during the joint lives of himself and G. J. Dormer pay them a yearly sum of £200, to be payable by quarterly payments on Aug. 28, Nov. 28, Feb. 28, and May 28, and the first of such payments to be made on such of the same days as shall happen next after the solemnisation of the said intended marriage, and that the trustees shall pay the said £200 to G. J. Dormer without power of anticipation. In my judgment, the whole of this clause, and, indeed, the whole settlement, is according to its terms conditional upon a valid marriage taking place; and, although it is true that until the declaration of nullity this marriage was voidable only and not void, and that, therefore, that which has been done under the settlement cannot be undone, I yet think that this covenant in the settlement cannot be enforced after the decree of nullity without an order under s. 5; and I do not agree with the argument approved by GORILL BARNES, J., that the covenant was either still in force or at an end, and that the petitioner must accept one of these alternatives, and, therefore, could only ask the court to enforce a legal right which has nothing to do with an application under s. 5. I think that there was a third course open to the petitioner, who, I think, had no legal right which she could enforce; for, in my opinion, the declaration of nullity would be a complete answer to an action on the covenant. It seems to me that the right, and the only right, of the petitioner in respect of this covenant is to apply to the court under s. 5 to make an order for the application of this £200 for her benefit. This, of course, is pro tanto to vary the settlement, because, unless there was a valid marriage, she, in my judgment, is not entitled to the benefit of the covenant. She could not recover on the covenant unless varied, but I think, for reasons which I have already given, that the court in case of a decree of nullity can and ought to vary the settlement, treating for the purpose of the order that which was no marriage as if it had been a valid marriage, and make the order for application for the benefit of a woman not a wife of this yearly sum of £200.

The next subject-matter which can be considered as property settled by the marriage settlement is the jointure rentcharge limited and appointed to the petitioner and the term of 1,000 years to secure it. It is said that the jointure rentcharge and term could only come into force if the marriage should take effect, and that, as the marriage has been declared void, it did not take effect, and the jointure rentcharge and term cannot come into force, and the settlement was

A without consideration. GORELL BARNES, J., says that *Chapman v. Bradley* (9) and *Pherson v. Broten* (10) support these reasons. I agree with him as to the effect of these cases, except that, as a deed does not require consideration, I should rather have said the condition had not happened on which the deed was to take effect than that the deed was without consideration. But I do not agree with him as to the result, for, as I have already said, inasmuch as all marriage settlements B are subject to the condition of marriage, if one were to hold that the court cannot under s. 5 apply settled property for the benefit of the wife and children unless there has been a valid marriage, it would amount to saying that the powers of s. 5 can never be exercised in the case of a decree of nullity, but the section says that the powers may be exercised in such a case. This, in my opinion, by necessary implication, gives the court the power to vary the settlement to this extent.

But there is a further objection to making an order in respect to this jointure rentcharge and term which seems to me practically fatal—that is, that the jointure and term could not commence till after the death of the respondent. I do not think that the court by the exercise of its powers under s. 5 can vary the settlement by ignoring this condition. The reasons which I have given for holding that the court D in the case of nullity has the power to vary the settlement by extending the connotation of the words “marriage” and “children” have no application to such a condition of the settlement. It may be that the court could make an order subject to the petitioner surviving Mr. Ward to take effect after his death, but, even if the court can, I do not think they ought to do so. The court might, however, give power to renew the application.

E With regard to the power to raise the £20,000, my view is substantially the same as that with reference to the jointure rentcharge and term. I do not agree with GORELL BARNES, J., that this is not “property settled” because there has been no valid marriage, or because the consideration has failed or the condition of marriage not fulfilled, but I do think that we cannot vary the settlement by ignoring the condition that this fund cannot be raised during the lifetime of the respondent F without his written consent, which has not been given. I agree with what I understand to be the opinion of GORELL BARNES, J., that what has been brought into settlement here, so far as the charges are concerned, is not the property upon which the charges are made, but the charges themselves.

But there is one argument which was brought before us by counsel for the petitioner, and was also urged by him before GORELL BARNES, J., with which I have yet to deal. It is this, that the whole of the hereditaments and premises comprised in the schedules to the marriage settlement were properly settled by that settlement, and that the court could, therefore, under the terms of s. 5, which gives the court power to make orders with reference to the application of the whole or a portion of the property settled for the benefit of children or their respective H parents, order that the whole or a portion of the hereditaments and premises be applied for the benefit of the petitioner. GORELL BARNES, J., answers this by saying:

I “It seems a very extraordinary proposition that, because a charge, it may be a very small one, is created on a large real estate by a marriage settlement, the whole estate can be dealt with by the court under the powers created by the sections aforesaid.”

I agree with GORELL BARNES, J., as to this, but this is not the argument which was urged before us by counsel for the petitioner. On the contrary, he expressly admitted before us that such an argument could not be supported.

What he did urge before us was that the result of the settlement of 1885 was that Mr. Ward no longer took the rents and profits of the scheduled estates and premises under his original title, the settlement of 1874, but takes them under the settlement of 1885, and that, therefore, the court can make an order for the application of

divine rents and profits. The clause on which counsel for the petitioner relied was the clause relating to the 1,200 years' term. It could not relate to the 1,000 years' term, because that was only to commence from the death of Mr. Ward, and the surplus, after paying the outcharge charged upon it was to go to the person or persons for the time being entitled to the reversion immediately expectant on the said term to the premises therein comprised—that is, the persons entitled after the death of Mr. Ward, for the term was only to commence after his death. But the 1,200 years' term was to commence from the solemnization of the said intended marriage, and it is said did commence, although it might be voidable. The trustees of that term were to raise and stand possessed of the sum of £20,000, which £20,000 has not been raised, because it could only be raised in the lifetime of Mr. Ward by his written consent, which has not been given. The trust then goes on:

"Provided always that subject to the trust hereinbefore declared concerning each of the said terms [i.e., the trust in favour of Mr. Ward's mother, who was dead before the declaration of nullity] and to the rights of the trustees and trustee for the time being of such respective terms to raise by any of the means aforesaid, and to pay or reimburse themselves or himself all costs, charges, and expenses in relation to the said several trusts, the rents and profits of the hereditaments and premises comprised in each of such terms respectively, or each part thereof as shall from time to time remain after satisfying the said trusts shall be taken and received by the person or persons for the time being entitled to the said premises in reversion immediately expectant on such respective terms."

It is said that the term of 1,200 years is still in existence, or, at all events, was in existence immediately before, and at the time of, the declaration of nullity, and that the duty of the court is to inquire into the existence of settlements made on the parties whose marriage is the subject of the decree. It is said that "in existence" means in existence at the date of the decree, and that, although the inquiry is to be made after the decree, it is to be made as of the date of the decree, and that the court having regard to s. 5 must be taken in making the decree to have reserved to itself the right to deal with the settlement as of that date.

If this is right—and I am inclined to think it is—the only question would be whether Mr. Ward immediately before and at the date of the decree was taking and receiving the rents and profits of the hereditaments and premises comprised in the term under, and by virtue of, the marriage settlement of 1885. This point was not dealt with at any length by the counsel for Mr. Ward, but the answer as I understood it was twofold—first, the only effect of these words in the events which have happened was to except these rents and profits from the operation of the settlement save in so far as they should be required for the purpose of satisfying the trusts. The proviso was likened to the ordinary proviso in a marriage settlement that the settlor shall be entitled to receive the rents and profits unless and until the intended marriage takes place.

Secondly, it was said that this proviso had at the date of the decree no operation whatever, because at that date there were no trusts whatever to be performed by the trustees: Mr. Ward, senior, was dead, and the £20,000 had not been raised, and, in the absence of the written consent or death of Mr. Ward, could not be raised; in other words, the proviso had no application excepting in the case of surplus profits after satisfying the trusts, and that there was none. On the whole, I think, notwithstanding these answers made on behalf of the respondent, that Mr. Ward at the date of the decree of nullity was receiving the rents and profits under and by virtue of the settlement of 1885, and I am justified in this view because at the date of the settlement Mr. Ward was not the owner in fee of the estates mentioned in the second schedule, but only in receipt of the rents and profits under and by virtue of the settlement of 1874, and had at most only an equitable life estate. He then, by the settlement of 1885, exercised the powers of appointment conferred

upon him by the settlement of 1874, and from that time forward it seems to me that his right to receive the rents and profits was based upon the settlement of 1885.

I think that this appeal should be allowed, and that the matter should be sent back to GORELL BARNES, J., with an intimation that we think that an order should be made for the application for the benefit of the appellant of so much of the £200 and the rent and profits as to him may seem right.

A. L. SMITH, M.R.—THE LORD CHANCELLOR and I agree in the judgment that has just been delivered.

Appeal allowed.

Solicitors: *Witham, Roskell, Munster & Weld; Few & Co.*

[*Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.*]

Re HALL. FOSTER v. METCALFE

COURT OF APPEAL (Vaughan Williams, Romer and Cozens-Hardy, L.JJ.), May 5, 1908]

[*Reported* [1903] 2 Ch. 226; 72 L.J.Ch. 554; 88 L.T. 619; 51 W.R. 529; 47 Sol. Jo. 514]

Administration of Estates—Legacy—Payment on contingency—No provision for payment of interest meanwhile—Investment of amount of legacy—Appropriation to legacy—Depreciation of investment.

A legacy was given contingent on the attainment of the age of twenty-one years by the legatee. No provision was made for the payment of interest in the meantime. Without the consent of the legatee the executors set apart and invested the amount of the legacy and appropriated the investment to satisfy the legacy. The investment depreciated in value.

Held: an investment made in such circumstances remained part of the testator's estate, and the legatee was entitled on the happening of the contingency to receive the full amount of the legacy in cash.

Decision of **KEKEWICH, J.**, 87 L.T. 560, reversed.

Notes. Applied: *Re Kirkley, Halligey v. Kirkley* (1918), 87 L.J.Ch. 247.

Considered: *Re Somech, Westminster Bank, Ltd. v. Phillips*, [1956] 3 All E.R. 523. Referred to: *Re Salaman, De Pass v. Sonnenthal*, [1907] 2 Ch. 46; *Re Salomons, Public Trustee v. Wortley*, [1920] All E.R. Rep. 768.

As to the power of a personal representative to appropriate, see 16 **HALSBURY'S LAWS** (3rd Edn.) 372-376, and for cases see 23 **DIGEST** (Repl.) 407.

I Cases referred to:

(1) *Webber v. Webber* (1823), 1 Sm. & St. 311; 1 L.J.O.S.Ch. 219; 57 E.R. 126; 23 **Digest** (Repl.) 407, 4778.

(2) *Johnson v. Mills* (1749), 1 Ves. Sen. 282; 27 E.R. 1033, L.C.; 23 **Digest** (Repl.) 370, 4408.

(3) *Green v. Pigot* (1781), 1 Bro. C.C. 103; 2 Dick. 585; 28 E.R. 1013, L.C.; 24 **Digest** (Repl.) 648, 6392.

(4) *King v. Malcott* (1852), 9 Hare, 692; 22 L.J.Ch. 157; 19 L.T.O.S. 19; 16 Jur. 237; 68 E.R. 691; 23 **Digest** (Repl.) 372, 4419.

Also referred to in argument :

Albansen v. Whitfall (1867), L.R. 4 Eq. 235; 36 L.J.Ch. 929; 16 L.T. 636,
23 Digest (Repl.) 475, 5450.

Burgess v. Robinson (1817), 3 Mer. 7; 36 L.R. 3; *proham proceedings* (1816),
1 Madd. 172; 44 Digest 475, 2938.

Rock v. Hardman (1819), 4 Madd. 253; 56 E.R. 699; 24 Digest (Repl.) 643, 6497.

Hutchinson v. Hammond (1790), 3 Bro. C.C. 128; 29 E.R. 449, L.C.; 44 Digest
378, 2129.

Sitwell v. Bernard (1801), 6 Ves. 520; 31 E.R. 1174, L.C.; 23 Digest (Repl.)
421, 4919.

Appeal from a decision of KEKEWICH, J.

The testator, William S. Hall, who died on Oct. 14, 1897, by his will, dated Nov. 26, 1896, gave to each of his four godchildren, Phyllis Chalmers, Ellen Foster, Barbara Hall, and Harold Hall, who should survive him and who being a male should attain the age of twenty-one years, or being a female should attain that age or marry under that age, the sum of £1,000 free of legacy duty, but without interest in the meantime, and, subject to these and certain other legacies, the testator devised and bequeathed the residue of his property as therein mentioned. In 1899 the executors of the will invested the sum of £1,000 in the purchase of £700 Great Eastern Railway Irredeemable Four per Cent. Stock, and appropriated the same to meet the legacy to Phyllis Chalmers, one of the godchildren, who was then an infant and unmarried. On May 29, 1902, Phyllis Chalmers attained the age of twenty-one years, and demanded payment of her legacy in cash or in securities of equal value, refusing to accept the Great Eastern stock in satisfaction of her legacy, as that stock had in the meantime considerably depreciated in value, contending that the executors were not entitled to appropriate a given sum of stock to meet a contingent legacy. Ellen Foster had already received her £1,000 in full and the two other godchildren were still infants. Thereupon a summons was taken out by the sole surviving executor of the will, which raised the question (inter alia) whether the executors had the power to appropriate the particular stock in satisfaction of the legacy. The summons was adjourned into court and came on to be heard before KEKEWICH, J., on Nov. 13, 1902, when his Lordship decided that the executors had rightly made the appropriation, as the decision in *Webber v. Webber* (1), only amounted to this, that a contingent legatee could not demand an appropriation, not that trustees were not entitled to make one if they so thought fit with the consent of the residuary legatees. His Lordship ordered the costs to be paid by the legatee. From that decision Phyllis Chalmers appealed.

Buckmaster, K.C., and *Baildon* for the legatee, Phyllis Chalmers.

Warrington, K.C., and *G. R. Northcote*, for the respondents the residuary legatees.

Clauson for the two infant godchildren.

Talbot Crossfield for the executor.

VAUGHAN WILLIAMS, L.J.—The order of the learned judge in the court below in this case cannot be supported. The question is whether the executors had any right to make such an appropriation as they have made in this case without the consent of the legatee, Miss Chalmers, and then say that the loss arising from the depreciation of the stock which they appropriated must be borne by her. In my opinion it is not true to say that they could make such an appropriation and then throw the loss upon the legatee. The question one has to ask oneself in such case when the investment which it is sought to appropriate is made is this: Whose property is it? Does it become the property of the legatee, or does it remain a portion of the estate? If one asks oneself that question in the present case, in which the legacy was contingent and the legatee was to take the legacy without interest in the meanwhile, the answer must be that this investment did not become in any sense the property of the legatee, but remained a portion of the estate. In

my judgment there was no such appropriation here as would have caused the legatee to bear the loss or entitle her to take the profit arising on the appropriation. The legacy was of such a character that as soon as this investment was made the interest thereon became a part of the estate of the testator, and, in the event of it not being wanted to satisfy legacies or debts or obligations of the testator, it would come to the residuary legatees by falling into the residue. There has been some little confusion in the argument between a legacy payable in futuro, and a contingent legacy. If you have got a vested gift which certainly will be payable in futuro, I take it that the legatee has an absolute right to go to the trustee or executor and say, "Although my legacy is a legacy payable in futuro it is a vested legacy, and I require you to invest the amount of it." Not only would the legatee have the right to require that, but he could insist upon it. And when it was done that would be really appropriating in the strict sense of the word, and the gain or loss on the investment, as the case might be, would go to or fall upon the legatee.

That is what I understand LORD HARDWICKE meant when he said in *Johnson v. Mills* (2) (1 Ves. Sen. at p. 283):

"I thought nothing was better settled than what is now endeavoured to be made a question: that wherever a demand was made out of assets, certainly due but payable at a future time, the person entitled thereto might come against the executor, to have it secured for his benefit, and set apart in the meantime, that he might not be obliged to pursue these assets through several hands."

But that has no application to a case where not only is the legacy contingent, but the interest in the meantime does not go to the legatee, but remains part of the estate. In *Green v. Pigot* (3), LORD THURLOW probably thought that the legatee took a vested interest defeasible if she did not attain twenty-one. But interest was given to her in the meantime, and there was no difficulty in making an appropriation, because the contingent legatee might at the time be treated as owner of the investment, she taking the interest in the meantime. In the present case, however, the contingent legatee does not take the interest in the meantime, and that interest is part of the estate. In these circumstances I have not heard any authority cited leading to the conclusion that the executors had any right to do anything more than retain as prudent executors and as part of the estate a sufficient sum to answer this legacy if it should become necessary to do so on the happening of the contingency. The executors would have to deal reasonably with that part of the estate, and in fact would have to invest it, but as part of the estate generally, and not as something appropriated to any particular purpose.

It is not necessary to say any more. There is no authority for the proposition that the executors are entitled at their own will to take this portion of the estate which they are holding to answer the contingent legacy and turn it into a trust fund with the contingent legatee as cestui que trust. It could, no doubt, be done if the court thought fit to make an order to that effect, and which might be done by arrangement. All I say here is that the executors under this will had no authority to make this appropriation, and the loss in value cannot fall upon the legatee. She is entitled to £1,000 in full without any deduction.

ROMER. L.J.—I am of the same opinion. If executors have to provide for a vested legacy and there is no one who can give a receipt for it undoubtedly both the executors and the court could set apart money and invest it to meet the legacy. Further, if you find that a legacy is settled upon trust the same course would apply. And even if you find a contingent legacy and in the will you find that some income is to arise and go to the legatee from the legacy before the contingency happens and the legacy becomes payable, then you may properly infer that the testator meant that a fund should be set aside to answer it. No doubt in that case the executor and the court would have power to set apart and invest a sum to answer it. Again, even if you have a case of a purely contingent legacy and there is

no provision as to the application of the interest in the meantime, then that mere fact does not paralyse the administration of the estate. It does not prevent the executor or the court parting with the residue after setting apart a sufficient sum to answer the legacy, and after doing that the court would divide the residue among the residuary legatees. It is also possible that if in a similar case an executor without going to the court could prove that he had acted reasonably and had set aside such a sum as would reasonably answer the legacy and then proceeded to distribute the residue he would not be held personally liable if afterwards it turned out that the sum set apart was not sufficient to answer the contingent legacy. But the setting apart would be a setting apart of a fund, not as the legacy, but to answer the legacy, though still the money would remain as part of the estate and the income ought properly to be paid as part of the residue, for the sum set apart is still part of the estate.

But there is no authority in the court and executor, and certainly none in the executor unaided, which would justify dealing with the fund as if it were to be treated as a separate settled fund to be held on trust to invest and as regards income to be paid to the residuary legatee until the contingency happens and the time of payment of the legacy is ascertained, and, subject to that, for the contingent legatee if the legacy becomes payable and otherwise over. The testator has not created such a trust, nor has he indicated that any such fund should be set apart, nor has the court power to infer such a trust in a case where there is no reference to income at all. Neither the court nor the executor has jurisdiction to create such a trust. There are inconveniences, and it may be that there are several; but it is sufficient to say that the court has no jurisdiction to create such a trust. There is always this dilemma, that if the fund is set apart as on a special trust there is no jurisdiction, and, if it is not so set apart, in what way does the income go to the residuary legatee except on the footing that the fund still remains part of the general estate? In this case the legacy was contingent, and there is not a word in the will as to the income before it became payable. The executor had clearly no power to set apart a fund, as he purported to do, and invest it and hold it on trust. The fund here was not set apart to answer the contingent legacy, but really held upon trust. If it was not held upon trust, but was set apart simply as an indemnity fund, then this appeal ought to succeed. In this case the fund, to my mind, purporting to be set apart without any consent of the legatee, must be held to be still part of the estate. And if the executor purports to hold it as more than that, there was no power for him to turn himself into a trustee or hold the fund in any way to the prejudice of the legatee. For these considerations I am of opinion that the appeal must succeed, and that the legatee is entitled to have the balance of the legacy of £1,000 claimed made good to her out of the residuary estate.

COZENS-HARDY, L.J.—I am of the same opinion. The decision of the learned judge in the court below cannot be supported either on principle or on authority. The fund never ceased, till the contingent legatee attained the age of twenty-one years, to be part of the estate to the income of which the residuary legatee was entitled, because the fund still remained part of the estate. And if the residue had been settled the tenant for life would have been entitled to the income. That is so because the income still remains part of the estate. Where there is a contingent legacy of a sum of cash and there is no direction either express or implied for the investment of it, the legatee cannot require the sum to be appropriated. That was the view of TURNER, L.J., in *King v. Malcott* (4). He said (9 Hare, at p. 696):

"Even in the case of a contingent legacy, the legatee is not, as it was assumed at the bar, entitled to have a sum actually retained or appropriated, to answer the legacy when the contingency arises. That is not an unusual way of

providing for the legacy, but it is a matter of arrangement, not of right; and in strictness the legatee is only entitled to have security for the payment of the sum, should the contingency arise. *Webber v. Webber* (1) illustrates the distinction.

If the legatee is not entitled to require the sum to be set aside, it would be strange if the executor, without the sanction of the court, had the right to make the appropriation which might be detrimental to the legatee. It seems to me that what has been done here has really been to create a settlement of £1,000 on the contingent legatee until twenty-one years of age and then over. And for that I can find no authority, and there is no principle upon which it can be supported. Therefore, the appeal must be allowed. The declaration will be that each of the two infants is entitled to £1,000 when his or her legacy becomes payable, and that the legatee, Phyllis Chalmers, is entitled to interest at 4 per cent. on the balance of her legacy beyond the amount of the stock taken over by her valued as at the time of her attaining the age of twenty-one years.

Appeal allowed.

Solicitors: *Edgar Robins & Clark; Collyer-Bristow, Hill, Curtis, Dods & Booth, for Watson, Sons & Carrick, Hull; J. A. Bartrum.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

MERCIER v. MERCIER

COURT OF APPEAL (Vaughan Williams, Romer and Cozens-Hardy, L.JJ.), April 28, 29, 1903]

[*Reported* [1903] 2 Ch. 98; 72 L.J.Ch. 511; 88 L.T. 516; 51 W.R. 611; 47 Sol. Jo. 492]

Husband and Wife—Wife's property—Purchase of land with wife's money—Conveyance in name of husband.

There is no authority for the proposition that one presumption arises if money received by a husband belonging to his wife comes from corpus, and another if it comes from income, there being no such inherent distinction between capital and income. In every case where money of the wife comes to the husband, whether from capital or income, the only question is whether a gift was intended or not.

In 1883 the parties were married, and thereafter they kept a joint banking account which was almost entirely composed of money received by the wife as capital or income. On this account they both drew. In 1891 they bought some land which was paid for out of the joint account and conveyed to the husband. He died intestate in 1901, and the heir-at-law claimed the land.

Held: the inference was to be drawn from the evidence that the wife had not made a gift of the purchase money to her husband, and, therefore, the land belonged to her.

Notes. Referred to: *Hunt v. Hunt* (1908), 25 T.L.R. 132.

As to gifts between husband and wife, see 19 HALSBURY'S LAWS (3rd Edn.) 831-837, and for cases see 27 DIGEST (Repl.) 156-164.

Case referred to :

(1) *Alexander v. Barnhill* (1888), 21 L.R.Ir. 511; 27 Digest (Repl.) 163, *611

Also referred to in argument :

Calon v. Rudeval (1849), 1 Mac. & G. 509; 2 H. & T. 33; 15 L.T.O.R. 407; 41 E.R. 1397, L.C.; 27 Digest (Repl.) 160, 1167.

Edward v. Cheyne (No. 2) (1888), 13 App. Cas. 385, H.L.; 27 Digest (Repl.) 160, 1168.

Baxter v. Brown (1845), 7 Man. & G. 198; 135 E.R. 86; sub nom. *Baxter v. Newman*, Bar. & Arn. 493; Cox & Atk. 86; 1 Lut. Reg. Cas. 287; Pig. & R. 182; 8 Scott, N.R. 1019; 14 L.J.C.P. 193; 5 L.T.O.S. 129; 9 J.P. 744; 9 Jur. 829; 36 Digest (Repl.) 506, 722.

Appeal from decision of BUCKLEY, J.

The defendant was married to the deceased in 1883, and was at the time of her marriage entitled to considerable property, but the deceased was not at that time in possession of large means. After the marriage the defendant and the deceased kept a joint banking account, which consisted partially of her money. All capital sums and income belonging to her went into that account. The deceased and the defendant both had power to draw on the account. In 1891 they purchased a piece of land at Bournemouth out of money belonging to the defendant, the conveyance being taken in the name of the deceased. Subsequently they laid out the ground and built a house upon it. The money expended on this amounted to about £10,000, and it all came from the joint account. Up to the time of his death in 1901 the deceased and the defendant had lived together in the house. Letters of administration of the deceased's estate had been granted to the defendant.

The action was brought by the eldest son and heir-at-law of the deceased husband, claiming a declaration that the freehold hereditaments in question belonged to and formed part of the estate of the deceased at the time of his death, and a conveyance of the same by the defendant for all her estate and interest therein as the administratrix of the estate of the deceased.

BUCKLEY, J., held that the property was bought with the defendant's money; that there was a resulting trust in her favour; and that the deceased was only a trustee for her. The plaintiff appealed.

Butcher, K.C. (with him *Edward Ford*), for the plaintiff.

Henry Terrell, K.C., and *MacSwinney*, for the defendant.

VAUGHAN WILLIAMS, L.J.—In my judgment we ought to affirm the decision of BUCKLEY, J. The question of law which the plaintiff's counsel has argued in this case need not be gone into. It seems that when the matter comes to be threshed out the question is a mere question of the inference to be drawn from the facts of the case. [His Lordship then reviewed the evidence, and continued:] On the evidence I am of opinion that it was not intended that there should be a gift to the husband. There was, therefore, a resulting trust in favour of the wife, and the appeal ought to be dismissed.

ROMER, L.J., was also of opinion that the appeal failed. His Lordship said that there were several things in the evidence in favour of the defendant's contention, and the plaintiff had not brought evidence sufficient to rebut the presumption in her favour. In the course of his judgment the learned judge made the following observations: It has been suggested that one presumption arises if the money comes from corpus of the wife and another if it comes from her income. In my opinion, that is not the law, and there is no authority for it. The only thing which lends colour to the suggestion are the observations which have been referred to in *Alexander v. Barnhill* (1) (21 L.R.Ir. at p. 515) by CHATTERTON, V.-C., which form the only groundwork for the proposition, and which have been misunderstood. The Vice-Chancellor did not intend to lay down any such general proposition.

There is no such inherent distinction between capital and income. For example, if a wife had a separate account and she being a wealthy woman drew a cheque for £5,000 and gave it to her husband it is not true that there would be any different presumption according to the result of an inquiry as to whether the account was made up of capital or income. There is no real difference between capital and income except in degree. In every case where money of the wife comes to the husband, whether from capital or income, the only question is whether a gift was intended or not. In certain cases in considering whether a gift was intended the fact of the money having been income received by him with her consent may be material, and there is no other distinction between capital and income.

COZENS-HARDY, L.J.—I am of the same opinion. I adopt entirely all that has fallen from ROMER, L.J., with reference to the alleged distinction whether in a case like this the money comes from a banking account consisting solely of income of the wife or from one consisting wholly or partly of capital. To my mind there is no difference in principle though there may be in the importance to be attached to drawings from the fund, but that is a difference of degree and not of principle.

Appeal dismissed.

Solicitors: *J. E. Churchill; Smiles & Litchfield.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

Re RILEYS, LTD. HARPER v. RILEYS

[CHANCERY DIVISION (Byrne, J.), July 9, 1903]

[Reported [1903] 2 Ch. 590; 72 L.J.Ch. 678; 89 L.T. 529; 51 W.R. 681; 10 Mans. 314]

Bankruptcy—Deed of arrangement—Application to company of—Deeds of Arrangement Act, 1887 (50 & 51 Vict., c. 57).

An agreement was made between a company and its creditors that the debts due to them by the company be paid by instalments through a trustee, but it was not registered under the Deeds of Arrangement Act, 1887. After certain payments had been made the company defaulted. At the date of the agreement there were many creditors of the company besides those who had notice of the agreement, and the company had been insolvent when it was executed, but was not in liquidation.

Held: (i) the Deeds of Arrangement Act, 1887, did not apply to deeds executed by limited companies, and, therefore, the agreement was not void for want of registration; and (ii) all the creditors were entitled to come in under the agreement.

General Furnishing and Upholstery Co. v. Venn (1) (1863), 2 H. & C. 153, followed.

Notes. The Deeds of Arrangement Act, 1887, has been repealed. For ss. 4, 5, 6, 7, 9, 17, of that Act, see now the Deeds of Arrangement Act, 1914, ss. 1, 2, 5, 6, 7, 24 (3), respectively, 2 HALSBURY'S STATUTES (2nd Edn.) 308, 309, 311, 312, 313, 319. Section 8 of the Act of 1887 has not been replaced.

As to registration of deeds of arrangements, see 2 HALSBURY'S LAWS (3rd Edn.) 612-617, and for cases see 5 DIGEST (Repl.) 1151-1156.

Case referred to :

(1) *General Furnishing and Upholstery Co. v. Venn* (1863), 2 H. & C. 135; 3 New Rep. 177; 32 L.J.Q.B. 220; 8 L.T. 432; 9 Jur.N.S. 550; 11 W.R. 750; 149 E.R. 64; 7 Digest (Repl.) 27, 128.

Also referred to in argument :

Re Standard Manufacturing Co., [1891] 1 Ch. 627; 60 L.J.Q.B. 209; 64 L.T. 457; 39 W.R. 269; 7 T.L.R. 282; 2 Mod. 418, O.A.; 7 Digest (Repl.) 32, 163.
Re Phillips, Ex parte Barton, [1900] 2 Q.B. 329, 49 W.R. 16; and *same, Re Phillips, Ex parte Phillips*, 69 L.J.Q.B. 604; 82 L.T. 691; 44 Mod. Jo. 409; 7 Mans. 277, D.C.; 4 Digest (Repl.) 54, 456.
Latter v. White (1872), L.R. 5 H.L. 578; 41 L.J.Q.B. 342, H.L.; 5 Digest (Repl.) 1200, 9656.

Adjourned Summons as to the validity of an unregistered agreement providing for the payment by a limited company of its creditors.

Rileys, Ltd. was registered on Oct. 20, 1900, and on Nov. 21, 1900, a trust deed was executed to secure debentures about to be issued by the company, by which the company mortgaged certain leasehold property to and charged the whole of its undertaking and assets, including uncalled capital, in favour of the trustee, a Mr. Harper, as a floating charge. In May, 1902, the company was being pressed by some of its creditors, and Mr. Harper called a meeting of these creditors, after which an agreement was executed between the company, the persons named in the schedule to the agreement, and Mr. Harper. By this the company was to pay the creditors the whole of their claims by three equal quarterly instalments, and for this purpose were to pay to Mr. Harper a weekly sum of £24, and interest at 5 per cent.; at the end of three months Mr. Harper was to pay over the money to the creditors pro rata; all proceedings by the creditors against the company were to be stayed; goods supplied were to be paid for in cash; if the company made default in any weekly payment the agreement was to be at an end, and the rights of the creditors were to revert to them. This agreement was sealed by the company but not registered under the Deeds of Arrangement Act, 1887, and it was executed in duplicate by eight of the creditors on June 4, 1902. Mr. Harper had notice of thirty-five creditors with debts amounting to £933 10s. 4d., and nearly all of them signed or assented to the agreement. In pursuance of the agreement the company paid £216 to Mr. Harper by weekly payments; but on Aug. 11, 1902, it made default, and nothing further had since been paid. On Oct. 29, 1902, a receiver was appointed in a debenture-holders' action against the company. At the date of the agreement there were many creditors of the company besides those who had notice of the agreement, and the company was insolvent when it was executed. These additional debts amounted to about £2,500. It was stated that the receiver had disposed of the business, but that the company was not being wound-up, and there was no question of fraudulent preference. Upon this summons being taken out the question arose whether the £216 belonged to (i) the creditors who had signed or assented to the agreement; (ii) all the creditors, including those who had not done so; or (iii) the debenture-holders.

Whinney for a creditor who had signed the agreement and for Mr. Harper.

A. Whitaker for the debenture-holders.

J. G. Wood for creditors not included in the list given to Mr. Harper.

BYRNE, J., after stating the facts, said:—The first question is whether the agreement is void for want of registration under the Deeds of Arrangement Act, 1887; and that turns on whether or not the Act applies to deeds executed by limited companies. The Act of 1887 belongs to a line of legislation having reference to the bankruptcy laws. After the passing of the Bankruptcy Act, 1883, which repealed the sections of the Bankruptcy Act, 1869 which except in certain

specified cases: authorised composition deeds, statutory compositions did not exist; and in that state of circumstances a practice became prevalent that composition deeds should be executed outside the jurisdiction of the court, and a great deal of winding-up of bankrupt estates was carried on through private hands, without any interference from the legal authorities. Then in 1887 a new Deeds of Arrangement Act was passed. Prior to this the Companies Act, 1862, had already contained provisions as to deeds of arrangement by companies. By s. 164 it is enacted that

"any conveyance or assignment made by any company formed under this Act of all its estate and effects to trustees for the benefit of all its creditors shall be void to all intents."

When one examines the Act of 1887 one cannot fail to be impressed with this—the various expressions used seem to be referable to arrangements by individuals rather than by limited companies. That this document may be a deed of arrangement within the Act is admitted.

The definition clause (s. 4 (2)) provides that a deed of arrangement shall include instruments made by "a debtor for the benefit of his creditors generally (otherwise than in pursuance of the law for the time being in force relating to bankruptcy)" and "cases where creditors of a debtor obtain any control over his property or business" are also provided for. Section 5 avoids unregistered deeds of arrangement. Section 6 prescribes the mode of registration; it directs that a true copy of the deed shall be filed with the registrar in like manner as a bill of sale,

"together with an affidavit verifying the time of execution and containing a description of the residence and occupation of the debtor and of the place or places where his business is carried on and an affidavit by the debtor stating the total estimated amount of property and liabilities included under the deed, the total amount of the composition (if any) payable thereunder, and the names and addresses of his creditors."

The residence and occupation of the debtor have to be described, and an affidavit must be filed by him and none of these things appear to be applicable to limited companies.

By s. 7 the registrar is to keep a register wherein shall be entered

"(b) the name, address, and description of the debtor and the place and places where his business is carried on, and the title of the firm or firms under which the debtor carries on business, and the name and address of the trustee under the deed";

and

"(c) the amount of property and liabilities included under the deed as estimated by the debtor."

By s. 8 the registrar of bills of sale is to be the registrar for the purposes of this Act. Section 9 speaks of the "name, residence, and description of any person"—words which would include those of the debtor. Section 16 is as follows:

"The 3rd sub-section, paragraph (g), of the 28th section of the Bankruptcy Act, 1883, which enacts, among other things, that one of the facts on proof of which the court shall either refuse an order of discharge to a bankrupt, or suspend the operation of the order for a specified time, or grant the bankrupt an order of discharge subject to the conditions mentioned in the section, is that the bankrupt has on any previous occasion made a statutory composition or arrangement with his creditors, shall be read and construed with the word statutory omitted therefrom."

That section has the effect of bringing deeds executed under the Act of 1857 within the scope of s. 28 of the Bankruptcy Act, 1883. Then s. 17 says that nothing in the Act is to affect the provisions of the law of bankruptcy; and s. 18 gives power to make rules. The interpretation section of the Act contains no definition of the word "debtor," but it defines a "person" as including a "body of persons corporate or incorporate." In the interpretation clause of the rules I find "debtor" defined as

"any person by, for, and in respect of whose affairs a deed of arrangement, as defined by the Act, shall be made or entered into, and includes a firm of persons in copartnership."

Sub-clause 3 provides that

"any terms and expressions defined by the Act shall in these rules have the meaning assigned to them by the Act."

Counsel for the debenture-holders says that I must look back to the Act to find out what "person" means; that I shall there find that it means a body of persons corporate or incorporate; that that definition includes a company; and, therefore, that, by the rules, "debtor" includes a company. That is his strongest point; but I do not think it is sufficient to do away with the inferences I have already referred to. The forms given in the appendix to the rules cannot apply to companies, and by rule 10:

"The county court registrar shall keep an index, alphabetically arranged, in which he shall enter, under the first letter of the surname of the debtor, such surname, with his Christian name, address, and description."

There is another clause of the Act which I should refer to—viz., s. 13—by which, where the place of business of the debtor is situate outside the London bankruptcy district, the registrar is to transmit a copy of the deed to the registrar of the county court in the district where the place of business is situate, with an affidavit in the form given in the appendix to the rules, and that, again, is not suitable to companies.

From first to last, looking at these provisions, and bearing in mind that there have been two lines of legislation—one dealing with Bankruptcy and the other with Companies—and the facts which led to the passing of the Act of 1857, all tending to show that what was dealt with by that Act were deeds executed by those who under the Act of 1869 came under the bankruptcy law, I am led to the conclusion that the Act of 1887 was not intended to and does not apply to deeds of arrangement by limited companies.

Coming, then, to the agreement itself. So far as the debenture-holders are concerned, it was contended that the deed was invalid, and their right to come in under it was not insisted on. There is the body of creditors whose names were given to Mr. Harper and also the outside creditors who claim to take advantage of the agreement. The argument on behalf of the latter was put in this way: It was said that a deed or agreement in this form was meant or adapted to include all creditors who desired to take the benefit of it, and was not confined to those whose names appeared in the schedule to the agreement as having assented to it. One of the arguments addressed to me with the object of restricting the effect of the agreement as much as possible was this—that, if the company paid up their instalments of £24 a week for three-quarters of a year, the sum produced would just about equal the amount required to pay off the creditors whose names were given to Mr. Harper; but that is an argument against confining the scope of the deed to the creditors actually named in the schedule. *General Furnishing and Upholstery Co. v. Venn* (1) was cited, in which the deed was not exactly in this form. It was a deed-poll to which the subscribing creditors agreed to accept a composition from the debtor, and it was held to be for the benefit of all those willing

A to accept the composition. I cannot see any substantial distinction between the nature of the document in that case and the agreement now in question for the purpose of confining its benefit to those who signed it rather than of extending it to all who choose to come in under it. In my opinion, therefore, all the creditors who like to take advantage of the deed are entitled to share in the £216.

B Solicitors: Lumley & Lumley; J. Arscott Bartrum; Guscotte & Fowler.

[Reported by H. M. CHARTERS-MACPHERSON, Esq., Barrister-at-Law.]

Re ERMEN. TATHAM v. ERMEN

D [CHANCERY DIVISION (Farwell, J.), March 28, 1903]

[Reported [1903] 2 Ch. 156; 72 L.J.Ch. 492; 88 L.T. 353; 51 W.R. 475; 47 Sol. Jo. 494]

E Costs—Taxation—Discretion of master—Allowance of charge in excess of scale—Instructions for originating summons—R.S.C., Ord. 65, r. 27 (29), Appendix N, No. 65.

The effect of the alteration made in Ord. 65, r. 27 (29), by r. 10 of Rules of the Supreme Court, January, 1902, is to confer a discretion on the taxing master in matters arising thereunder.

F The plaintiffs' solicitors had made a charge of £5 5s. for taking instructions for an originating summons. On taxation the master was of opinion the charge was reasonable.

Held: the master had a discretion under Ord. 65, r. 27 (29), to allow the charge, and was not limited to the charge of £1 1s. fixed for rating such instructions by R.S.C., Appendix N, No. 65.

McIver & Co., Ltd. v. Tate Steamers, Ltd. (1), [1902] 2 K.B. 184, applied.

G **Notes.** The discretion of the Rules of the Supreme Court, Order 65, r. 27 (29), is now conferred by the Supreme Court Costs Rules, 1959, r. 32 (2).

Considered: *Gibbs v. Gibbs*, [1952] 1 All E.R. 942; *Re Mercury Model Aircraft Supplies, Ltd.*, [1956] 2 All E.R. 885. Referred to: *White v. Altrincham U.D.C.*, [1936] 1 All E.R. 923; *W. F. Marshall, Ltd. v. Barnes and Fitzpatrick*, [1953] 1 All E.R. 970.

H As to taxation of costs, see 30 HALSBURY'S LAWS (3rd Edn.) 426-439, and for cases see DIGEST (Practice) 946 et seq.

Case referred to:

I (1) *McIver & Co., Ltd. v. Tate Steamers, Ltd.*, [1902] 2 K.B. 184; 71 L.J.K.B. 717; 87 L.T. 320; 50 W.R. 642; 18 T.L.R. 653; 46 Sol. Jo. 569, C.A.; Digest (Practice) 948, 4879.

Also referred to in argument:

Re Harrison (1886), 33 Ch.D. 52; 55 L.J.Ch. 768; 55 L.T. 72; 50 J.P. 372; 34 W.R. 645; 2 T.L.R. 671, C.A.; Digest (Practice) 936, 4753.

Application to review a taxation of costs.

The proceedings out of which the application arose were commenced by originating summons in 1901, and were for the purpose of determining certain questions under the will of F. J. Ermen, deceased. By an order, dated Aug. 15, 1901, the costs

of all parties were directed to be taxed as between solicitor and client. The plaintiff included in their costs the sum of £5 5s. for taking instructions for the issue of the originating summons, and of this a sum of £1 4s. was disallowed on taxation by the registrar of the Manchester District Registry on the ground that, having regard to the rules and the sum fixed as a maximum in Appendix N, No. 65, he had no discretion to allow more, but he added that he thought the charges in the circumstances were a proper one, and that if he had such a discretion he should have allowed it.

Haldane, K.C., and Roby for the summons.

George Lawrence in support of the certificate.

FARWELL, J. The registrar, after consulting one of the taxing masters, has considered that he has no jurisdiction, that is to say, no discretion to allow more than the maximum fee of a guinea prescribed by Appendix N, Order 65; or (and) by the rules; although, if he had such discretion, he considers that a fee of five guineas was a proper one and might reasonably be allowed. In my opinion, on consideration of the rules apart from authority, the registrar and taxing master have not taken the right view. Order 65, r. 8, is a rule of old standing, and contains negative words, as follows:

"In causes and matters commenced after these rules come into operation solicitors should be entitled to charge and be allowed the fee set forth in the column headed 'lower scale' in Appendix N in all causes and matters, and no higher fees shall be allowed in any case except such as are by this order otherwise provided for."

Turning now to what is "otherwise provided for," I find a fasciculus of clauses dealing with that—r. 27 and sub-rules, particularly sub-r. (29). Under the old rules before January, 1902, sub-r. (29) was simply expressed in a negative form:

"As to costs to be paid or borne by another party no costs are to be allowed which do not appear to the taxing officer to have been necessary or proper for the attainment of justice or defending the rights of the party."

In January, 1902, it was thought fit to alter that rule, and it is now put in the affirmative form. I think it is a fair statement to say that when eminent persons such as the rule committee alter the phraseology of a rule they mean to alter the substance also. When you find, as here, a set of sub-clauses which refer to the matter involved by exception in the negative words of r. 8 that "no such costs shall be allowed," and that as to the matters referred to in such and such clauses they shall be allowed, the consequence was that the masters could not under that exceed the maximum limit fixed by Appendix N. But now they are made in the affirmative and confer an express power having regard to the collocation.

"On every taxation the taxing master shall allow all such costs, charges, and expenses as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party . . ."

with certain exceptions which are not now material.

If I adopt the taxing master's view as to the words "shall allow all such costs set forth in the column headed 'lower scale' in Appendix N," this omits one set of clauses which are referred to as exceptions. I see no difficulty in dealing with the general discretion reposed in the officers of the court, although it may be that for the assistance and guidance of these officers there should be the ordinary application of a maximum and minimum. I see no reason why the new rules should not have full effect. In general now the masters are to allow "all such costs as appear to them necessary and proper for attaining the ends of justice." On these two rules it seems to me true to say that there is nothing contradictory in them to *sub-r. (37)*. The object of the rule was this. It was said that the

A costs allowed in the King's Bench Division were not the same, and that it was desirable, therefore, that those in both divisions should be assimilated, so that suitors should not have a preference of one division over another. According to sub-r. (37), which had preserved the old original rules and practice of the old courts, new words are added,

B "shall have power to revise and regulate the practice in regard to taxation of costs and to the allowance of fees so as to assimilate the allowances for costs and to secure uniformity upon all taxations so far as may be practicable and expedient."

C There are no words there authorising taxing masters to fix a maximum or minimum, and deprive themselves of the discretion which I hold they have under sub-r. (29). It is somewhat extraordinary if it gave the taxing master no discretion and no greater power than the limit contained in Appendix N. In my opinion, the intention was to enable the taxing masters to secure uniformity as a general rule, following the same lines as are set out in the ordinary rules to be the guide, but leaving them an unfettered discretion under sub-r. (29).

D This is my own opinion on consideration: but perhaps it is not necessary for me to give this judgment. I consider that I am bound by the decision of the Court of Appeal in *McIver & Co., Ltd. v. Tate's Steamers, Ltd.* (1). The arguments presented there were the same as we have heard here. The question there turned on the allowances to a country solicitor under No. 147 in Appendix N, "not to exceed two guineas"; the words were the same as are relied on here. Whether there were or were not other items in that case is not for me to consider. **MATHEW**, L.J., says there ([1902] 2 K.B. at p. 187):

E "It is argued that under the rules the master had no discretion to allow these costs. According to the practice as to taxation of costs between party and party prior to the rules of January, 1902, the scale given in Appendix N was no doubt binding on the master, and this allowance could not have been made. But on consideration of the objections to this rule, it was thought desirable to modify it to some extent, and accordingly the new r. 10 of Rules of the Supreme Court, January, 1902, was made, by which regulation 29 was annulled. [His LORDSHIP read the new rule, and continued (*ibid.* at p. 188)] We are asked to construe this rule as meaning that the taxing master should allow no costs, charges, or expenses beyond those provided for by the scale given in Appendix N. The new regulation was framed with full knowledge of the terms of the old regulations and of the scale, and it cannot, I think, be doubted that it ought to be construed according to its terms—namely, as giving the master on 'every taxation' discretion to allow such costs, charges, and expenses as appear to him to have been necessary or proper for the attainment of justice."

H The altered words extend now to every taxation, and not only to party and party costs. But that is not to my mind the only part, or indeed the gist, of the alteration which was the making an affirmative power create an exception within r. 8 in place of the old negative words which gave no such discretion. **COZENS-HARDY**, L.J.'s, judgment is to the same effect. And in any case I am bound by them. I do not understand the taxing master's explanation of that case. The result is that I allow the summons. There will be a declaration that the taxing master has such a discretion. I understand that the costs are agreed; and as the taxing master was willing to allow the charge if he had such a discretion, I allow it now without any reference back to him.

Solicitors: *Wheally, Son & Daniel*, for *Cobbett, Wheeler & Cobbett*, Manchester.

[Reported by **A. W. CHASTER**, Esq., Barrister-at-Law.]

MONTEFIORE v. GUEDALLA

[CHANCERY DIVISION (Buckley, J.), October 26, 1903]

Reported 1903 2 Ch. 723; 73 L.J.Ch. 13; 89 L.T. 472; 52 W.R. 151;
47 Sol. Jo. 877]*Trustee—New trustees—Power to appoint—Appointment by donees of power of appointing of themselves.*

Where the appointment of one of themselves to be a trustee by the donees of a power to appoint new trustees is not excluded by the terms of the power itself, there is no general rule that such an appointment is invalid or a nullity. It is, however, usually improper, though it may be sanctioned under special circumstances.

Tempest v. Lord Camoys (1) (1888), 58 L.T. 221, followed.*Re Skeats' Settlement, Skeats v. Evans* (2) (1889), 42 Ch.D. 522, explained.

Notes. Distinguished: *Re Sampson, Sampson v. Sampson*, [1900] 1 Ch. 435. Referred to: *Re Power's Settlement Trusts, Power v. Power*, [1951] 2 All E.R. 513.

As to who may be appointed trustees, see 38 HALSBURY'S LAWS (3rd Edn.) 920 et seq.; and for cases see 43 DIGEST 677-679.

Cases referred to:

- (1) *Tempest v. Lord Camoys* (1888), 58 L.T. 221; 52 J.P. 532; 43 Digest 678, 1083.
- (2) *Re Skeats' Settlement, Skeats v. Evans* (1889), 42 Ch.D. 522; 58 L.J.Ch. 656; 61 L.T. 500; sub nom. *Skeats v. Allen*, 37 W.R. 778; 43 Digest 678, 1084.
- (3) *Re Newen, Newen v. Barnes*, [1894] 2 Ch. 297; 63 L.J.Ch. 763; 70 L.T. 653; 58 J.P. 767; 43 W.R. 58; 8 R. 309; 43 Digest 678, 1085.

Summons in an administration action raising the question whether the executors of a surviving trustee could and ought to exercise their power of appointing new trustees by appointing one of themselves.

Under the will of Judah Guedalla, who died in 1858, his residuary estate was left to trustees upon trusts which were still subsisting, and it was provided that "it should be lawful for the executors of the last acting trustee to appoint a new trustee or trustees" in the place of any trustee dying. Shortly after the death of the testator, an administration action was instituted, which was still pending, and in which a considerable sum of money had been paid into court. Sir Joseph Sebag Montefiore, the surviving trustee of the will, died in 1903, having by his own will appointed four executors, of whom Mr. Cecil Montefiore was one. Mr. Cecil Montefiore was a near relation of the gentleman principally interested in the fund, and was a man of business and eminently desirable as a trustee. He was not beneficially interested in the trusts, and it was desired by all the executors to appoint him, together with two other gentlemen, to be a trustee of the testator's will. The executors took out this summons, asking for liberty to make the appointment.

Jessel for the applicants.*G. S. Alexander* for beneficiaries.

BUCKLEY, J., stated the facts, and continued.—The questions to be decided are, Is it competent for the executors to appoint one of themselves a trustee and ought I to sanction the appointment? Counsel for the applicants has very properly called my attention to certain adverse authorities to see whether it has now been decided that the donees of a power cannot appoint one of themselves, as apart from the question whether it is proper so to do. The court has never laid down any such general rule as that the donees cannot appoint himself. First,

A you must look to the words of the power. It, as in *Re Skeels' Settlement*, *Skeels v. Evans* (2), the words are "to appoint any other person or persons," then there is a limited class of possible appointees only, for the power is to appoint some person other than the appointor. That is not so in the present case, so that the class does not necessarily exclude the appointor. In my opinion, apart from the wording of the power itself, the cases do not decide that the appointor lies outside the class of persons who can be appointed, but merely that the appointment by donees of a power of one of themselves is, as a general rule, improper; and I think that the headnote in *Re Skeels' Settlement*, *Skeels v. Evans* (2) (42 Ch.D. 522) does not accurately represent the judgment; the word "cannot" is wrong. KAY, J., only meant to say that the appointment in that case was improper. If he meant more than that, then he is differing from the decision of CHITTY, J., in the previous case of *Tempest v. Lord Camoys* (1). Then again, in *Re Newen*, *Newen v. Barnes* (3), KEKEWICH, J., held that an appointment by a donee of a power of himself was improper, but the order made in that case was that the trustee so appointed should retire, which shows that in the learned judge's opinion the appointment was not void or a nullity; the trustee had obtained the office, but ought not to be allowed to retain it. In my opinion, therefore, it follows that the donees of the power can do what they wish, but that they ought not to do so unless the circumstances justify it. [HIS LORDSHIP then referred to the state of the family and the position of the beneficiary, and sanctioned the appointment of Mr. Cecil Montefiore with the two other proposed gentlemen to be new trustees of the will of J. Guedalla.]

E Solicitors: *Emmanuel & Simmonds*.

[Reported by A. L. MORRIS, ESQ., Barrister-at-Law.]

**TOLHURST v. ASSOCIATED CEMENT MANUFACTURERS
(1900), LTD., AND ANOTHER**

[House of Lords (The Earl of Halsbury, L.C., Lord Macnaghten, Lord Shand, Lord Robertson and Lord Lindley), July 7, 13, August 6, 1903]

[Reported [1903] A.C. 414; 72 L.J.K.B. 834; 89 L.T. 196; 52 W.R. 143;
19 T.L.R. 677]

Chose in Action—Assignment—Contract—Contract for supply of chalk to cement manufacturers—Tol for cement works sold by supplier to cement company—Right of cement company to assign contract.

The appellant, the owner of a quarry, contracted with a limited company, to whom he sold land adjoining the quarry for them to erect cement works thereon, to supply them with a fixed quantity of chalk per week for a period extending over 25 to 50 years, to be delivered in such daily quantities as the company should require. Two years after the date of the contract the company went into voluntary liquidation, and assigned all its assets and business, including the contract in question, to the respondent company, which carried on the same kind of business on a larger scale.

Held (Lord Robertson dissenting): while the contracting company could not, by alienation or otherwise, increase the burdens which the appellant had undertaken to bear under the contract and while their right to have chalk from the appellant's quarry could not be assigned apart from their land and cement works, there was no question of personal skill or confidence involved in the contract and, therefore, they were entitled to assign, and had in fact validly assigned, their interest under the contract to the respondent company.

Decision of the Court of Appeal, [1902] 2 K.B. 660, affirmed.

Notes. Distinguished: *Kemp v. Baerselman*, [1906] 2 K.B. 604. Considered: *Cooper v. Mickfield Coal and Lime Co.*, *Cooper v. Rayner* (1912), 107 L.T. 457; *Whiteley v. Hill*, [1918] 2 K.B. 808; *Nokes v. Doncaster Amalgamated Collieries Co.*, [1940] 3 All E.R. 549; *Edwards v. Newland*, [1950] 1 All E.R. 1072. Referred to: *Dawson v. Great Northern Rail. Co.*, [1904-7] All E.R. Rep. 913; *Hubbard v. Weldon* (1909), 25 T.L.R. 356; *Bennett v. White*, [1908-10] All E.R. Rep. 704; *Fratelli Sorrentino v. Buerger*, [1915] 1 K.B. 307; *County Hotel and Wine Co. v. London and North Western Rail. Co.*, [1918] 2 K.B. 251; *Ellis v. Torrington*, [1918-19] All E.R. Rep. 1132; *Public Trustee v. Elder*, [1926] Ch. 776; *National Carbonising Co. v. British Coal Distillation, Ltd.*, [1936] 2 All E.R. 1012.

As to assignment of contracts and other choses in action, see 4 HALSBURY'S LAWS (3rd Edn.) 483 et seq. and *ibid.* vol. 8, pp. 257-262, and for cases see 8 DIGEST (Repl.) 547 et seq. and 12 DIGEST (Repl.) 665, 666, 669 et seq.

Cases referred to:

(1) *Castellan v. Hobson* (1870), L.R. 10 Eq. 47; 39 L.J.Ch. 490; 22 L.T. 575; 18 W.R. 731; 43 Digest 762, 2050.

(2) *Buckland v. Popillon* (1866), L.R. 1 Eq. 477; 35 L.J.Ch. 387; 13 L.T. 736; 12 Jur.N.S. 155; affirmed, 2 Ch. App. 67; 36 L.J.Ch. 81; 15 L.T. 378; 12 Jur.N.S. 992; 15 W.R. 92, L.C.; 31 Digest (Repl.) 70, 2767.

(3) *British Waggon Co. v. Lea* (1880), 5 Q.B.D. 149; 49 L.J.Q.B. 321; 42 L.T. 437; 44 J.P. 440; 28 W.R. 349, D.C.; 12 Digest (Repl.) 662, 5748.

Also referred to in argument:

Liberty Wallpaper Co. v. Stower Wallpaper Co., 59 N.Y. App. Dec., 353.
Arkansas Valley Smelting Co. v. Golden Mining Co. (1888), 127 U.S. 379.

A *Coffish v. Towers Publishing Co., Ltd. and Mansfield*, 1897 1 Ch. 21; 66 L.J.Ch. 12; 75 L.T. 330; 45 W.R. 73; 13 T.L.R. 9; 41 Sol. Jo. 29; 12 Digest (Repl.) 662, 5133.

Phillips v. Alhambra Palace Co., [1901] 1 K.B. 59; 70 L.J.Q.B. 26; 83 L.T. 431; 17 T.L.R. 40; 45 Sol. Jo. 81; 49 W.R. 223, D.C.; 12 Digest (Repl.) 663, 5133.

B *Wentworth v. Cook* (1839), 10 Ad. & El. 42; 2 Per. & Day. 251; 8 L.J.Q.B. 230; 3 Jur. 340; 118 E.R. 17; 39 Digest 654, 2476.

Consolidated Appeals from decisions of the Court of Appeal (SIR RICHARD HENN COLLINS, M.R., SIR FRANCIS JEUNE, P., and COZENS-HARDY, L.J.), [1902] 2 K.B. 610, reversing decisions of MATHEW, J., in the Commercial Court, [1901] 2 K.B. 811.

C In one action the appellant claimed from the respondents £1,785, the price of goods supplied by him to the respondents, and a declaration that he was not bound to supply the respondents with any further goods. In the second action the respondents claimed a declaration that he was so bound.

Pickford, K.C., and *George Wallace* for the appellant.

Younger, K.C., *Bremner*, and *H. E. Wright*, for the respondents.

D Their Lordships took time for consideration.

Aug. 6, 1903. **THE EARL OF HALSBURY, L.C.**—I was inclined during the argument of this case to take a view favourable to the appellant, but on consideration I have, with some hesitation, come to agree with the opinions about to be delivered by my noble and learned friends, LORD MACNAGHTEN and LORD LINDLEY.

E The following opinions were then read.

LORD MACNAGHTEN.—The question, as it seems to me, depends simply and solely on the true meaning and effect of the contract of Jan. 5, 1898, made between Alfred Tolhurst, of the one part, and the Imperial Portland Cement Co., Ltd., of the other. Two alternative constructions have been proposed. One follows the letter of the instrument and adheres to it closely; the other favours a more liberal interpretation, supplying, it is said, nothing more than what is required in order to carry out the obvious intention of the parties. The question is, Which of these two constructions is to be adopted? When that matter is once determined there cannot, I think, be any further difficulty. There are contracts, of course, which are not to be performed vicariously, to use an expression of KNIGHT BRUCE, L.J. There may be an element of personal skill or an element of personal confidence to which, for the purposes of the contract, a stranger cannot make any pretensions. But no one, I suppose, would seriously argue that a contract for delivery of chalk from particular quarries for the use of particular cement works cannot be performed by any person for the time being possessed of the quarries, or that it can make the slightest difference to anybody who the proprietors of the cement works or the actual manufacturers may be, provided that they are in a position to carry out the terms of the original contract.

H Tolhurst was the owner of property at Northfleet, in Kent, containing extensive and valuable chalk quarries. He sold a piece of his land there known as the Little Dockyard to the Imperial company, and that company bought another piece of land from the British White Lead Co., who also derived title from Tolhurst. The main object for which the Imperial company was formed was to establish cement works at Northfleet and carry on there the business of Portland cement manufacturers. It was, of course, important for Tolhurst to secure a regular market for his chalk, and it was equally important for the Imperial company to secure a regular supply of chalk for their works. The effect of the contract of January, 1898, may be stated shortly. Tolhurst had made a tramway to the boundary of the land bought by the Imperial company from the White Lead Co., and the Imperial company was to make a tramway continuing Tolhurst's tramway to a

convenient spot on its land in order to enable him to bring chalk to the company's works. On completion of this tramway the contract provides, in cl. 2, that

"the said Alfred Tolhurst will, for a term of fifty years, to be computed from Dec. 25, 1897, or for such shorter period (not being less than thirty-five years) as he shall be possessed of chalk available and suitable for the manufacture of Portland cement, and capable of being quarried and got in the usual manner above water level, supply to the company, and the company will take and buy of the said Alfred Tolhurst, at least 750 tons per week, and so much more, if any, as the company shall require for the whole of their manufacture of Portland cement upon their said land."

Tolhurst was to provide rolling stock and traction power, carry the chalk over the company's tramway, and deliver it alongside the company's stores, but he was not to be precluded from supplying other persons. Delivery orders were to be sent in before four o'clock for the next day. The price was to be 1s. 3d. per ton, to be paid in cash monthly. The average monthly payment for any year after 1898 was to be not less than £188. Then there was a clause providing for the case of strikes and unavoidable stoppages, and authorising the company at its own expense to procure chalk elsewhere in the event of Tolhurst being thereby prevented from supplying the quantity required.

In 1900 the Imperial company sold its undertaking to the respondents, the Associated company, and went into voluntary liquidation. Its affairs were fully wound-up, and all its assets have been distributed. Tolhurst brought in no claim in the liquidation. He stood by while the Imperial company was in process of dissolution. Tolhurst's case now is that by parting with its undertaking and going into liquidation the Imperial company rescinded or put an end to the contract of January, 1898, and that he is not bound under or in accordance with that contract to furnish supplies of chalk to the Associated company for the purposes of the works at Northfleet which formerly belonged to the Imperial company, whether the Associated company requires delivery in its own name or in the name of the Imperial company.

What is the meaning of the contract of January, 1898? I cannot think that there is much difficulty about it. It is expressed to be made between Alfred Tolhurst and the Imperial company. They, and they only, are named as the persons to perform the contract. From beginning to end of the instrument, if the contract be taken literally, there is not one word pointing to the continued existence of the contract in the hands of any other person either by succession or substitution. The obligations and benefits of the contract on the one side begin and end with Alfred Tolhurst; on the other, they begin and end with the Imperial company. And yet the contract is to endure for a period of fifty years, or, if the supply of chalk in the quarries does not hold out so long, it is to last for thirty-five years at least. When it is borne in mind that the Imperial company must have been induced to establish its works at Northfleet by the prospect of the advantages flowing from immediate connection with Tolhurst's quarries, and that the contract in substance amounts to a contract for the sale of all the chalk in those quarries by periodical deliveries (less what Tolhurst might sell elsewhere), it is plain that it could not have been within the contemplation of the parties that the company would lose the benefit of the contract if anything happened to Tolhurst, or that Tolhurst would lose the benefit of the market which the contract provided for him at his very door in the event of the company parting with its undertaking, as it was authorised to do by its memorandum. Counsel for Tolhurst said, and said truly, that those powers in the memorandum to which his attention was called placed the company in the position of an individual. That is so. But if the contract had been between two individuals—between Alfred Tolhurst and John Smith—I do not think there would have been any doubt about the matter. It is, I think, the introduction of a company—a body with perpetual succession,

A land capital, and specified objects—as one party to the contract, that creates or suggests the difficulty—the use of the words “their,” “their manufacture,” “upon their land.” But the word “their” in the case of the company must not be taken too literally any more than the word “his” in the case of Tolhurst, where the contract speaks of “his” land. Something more is comprehended than the particular company and the individual Tolhurst.

B If seems to me that the contract is to be read and construed as if it contained an interpretation clause saying that the expression “Tolhurst” should include Tolhurst and his heirs, executors, administrators, and assigns, owners and occupiers of the Northfleet quarries, that the expression “company” should include the company and its successors and assigns, owners and occupiers of the Northfleet Cement Works, and that the words “his” and “their” should have a corresponding meaning. That, I think, was the plain intention of the parties. The contract is a contract for the mutual benefit and accommodation of the chalk quarries and the cement works, and of Tolhurst and the company as the owners and occupiers of those two properties. Construed fairly, the provision in cl. 2 of the contract [ante p. 388], about which there was so much argument, means, I think, nothing more than this—that the Imperial company was to take the whole of the supply of chalk required for the Northfleet works (the quantity to be ascertained by daily orders, but guaranteed not to be less than 750 tons per week) from Tolhurst’s chalk quarries and from no other source whatever. As long as that is done, how can it matter who is carrying on the works? There is nothing in the contract to restrict the development of the works on the land which formerly belonged to the Imperial company or to check the expansion and improvement in the ordinary course of things of the process of manufacture there. If the view I have expressed be correct, all difficulty vanishes. It is well settled that as a general rule the benefit of a contract is assignable in equity, and may be enforced by the assignee. The assignor ought in ordinary circumstances to be made a party. But I cannot think that this is necessary when the assignor is a mere name, as the Imperial company is in the present case, without any means and without any executive or board of directors, if indeed it has now any corporate existence. I am not aware of any authority for this proposition, but it seems to me to be in accordance with the practice in equity, and it is supported by what was said by JAMES, V.-C., in *Castellan v. Hobson* (1).

The result is that Tolhurst’s action fails, because, as regards the chalk which has been supplied to the Associated company, the company is entitled to have it at a stipulated price of 1s. 3d. per ton. The second action succeeds, but I think the Imperial company was not a necessary or proper party. If the requirements of ss. 142 and 143 of the Companies Act, 1862, have been complied with the company is “deemed to be dissolved,” and, therefore, I should suggest that in lieu of the declaration in the order pronounced by the Court of Appeal there should be inserted a declaration to the effect that the Associated company is entitled to the benefit of the contract of Jan. 5, 1898, they paying, as provided by the contract, for all chalk supplied to them in accordance with the contract. With this variation, I think that the orders under appeal should be affirmed, and the appeal dismissed with costs. My noble and learned friend, LORD SHAND, who is unable to be present today, has asked me to express his concurrence in this opinion.

I LORD ROBERTSON.—I can explain in a few sentences what I find an insuperable objection to the judgment appealed against. It seems to me that the demand of the respondents is that the appellant should supply them with something different from that which he bound himself to give. The subject-matter of the contract is expressed to be the supply of 750 tons, and so much more chalk, if any, as should be required for the business of a particular company, while the demand of the respondents is that the appellant shall supply 750 tons and so much more chalk as is required for the business of another and a different company.

The appellant's point is, therefore, not the true one that the contract is not A
 assignable, but it is that the thing for which the assign is asking is something
 which the appellant never bound himself to give. First of all, about the facts.
 It is true, or at least I assume it to be true, that the original company still exists
 in such sense that it can sue. But it is still more certain that it has finally
 ceased business; and it exists and comes into court solely in order to enforce
 this contract (if it can) in favour of the new company. And the crucial fact B
 (in my view) is that the original company is, as a manufacturer, dead and done
 with, and has no requirements large or small. The requirements which the
 appellant is now called on to meet are not the requirements of the old company,
 but the requirements of the new. It seems to me to be no answer to this to
 say that the old company might have increased its capital and its operations
 so that its requirements would have been as onerous as those of the new company. C
 This is merely the old and often rejected argument that a man can be forced to do
 something which he never agreed to, merely because it is very like and no more
 onerous than something which he did agree to. I have only to add that I should
 find it impossible to split up the subject of the contract, and to hold that, even
 if the appellant is not bound to meet the requirements of the new company, he
 is bound to give them the 750 tons. In a commercial contract like this the D
 benefit of the more elastic provisions belongs to both parties, and neither the
 person who supplies nor the person who takes can be held to the one part of the
 contract when the opposite party has by his own act rendered the other part of
 the contract impossible of fulfilment.

LORD LINDLEY. The nature of the agreement of Jan. 5, 1898, and the E
 time it was to last negative the idea that it was confined to the parties to it.
 The word "assigns" does not occur in the agreement. But this does not show
 that the benefit of the contract is not assignable. An agreement for a lease,
 and even an option to require a lease or a renewal of a lease is assignable in
 equity, even although there is no mention of executors, administrators, or assigns;
 see *Buckland v. Papillon* (2). If the above agreement had been with an ordinary F
 individual his interest would, on his death, have passed to his executors or
 administrators, or, if he had become bankrupt, his trustees could have claimed
 it and have sold it for the benefit of his creditors. It follows that on the same
 supposition he could have assigned such interest in his lifetime. The Imperial
 company could, in my opinion, have done the same thing. They could have G
 assigned their interest themselves before winding-up proceedings commenced,
 and their liquidators could have assigned it as part of their assets afterwards.

But it is necessary to look a little further and see what limit is set to the right
 conferred by the agreement. The Imperial company were not entitled to an
 unlimited supply of chalk, but only to so much as they might want for making
 cement on their own piece of land. I do not think that their right to have chalk
 from Tollhurst's quarries could be assigned apart from their own land and cement H
 works. The Imperial company could not by alienation or otherwise increase the
 burdens which Mr. Tollhurst undertook to bear. But this is the only limit which
 I can find in the present case. **MATHEW, J.**, thought that the mere fact that
 the Imperial company was a comparatively small company and that the Associated
 company was much larger, and would, or might want more chalk than the other, I
 involved a material increase in the burden thrown on Mr. Tollhurst. But the
 learned judge apparently overlooked the fact that the Imperial company could
 have increased its capital to any extent; and could have increased its cement
 works to any extent which the land they had bought from Mr. Tollhurst could
 carry. The limit of the burden thrown on Mr. Tollhurst is in any case measured
 by this consideration, and this limit can no more be passed by the Associated
 company than by the Imperial company. Counsel for the appellant relied on the
 words "as the company shall require for the whole of their manufacture of

A Portland cement upon their said land." By throwing a strong emphasis on the words "the company" and "their," the impression may be produced that these words, which plainly refer to the Imperial company, were purposely used to exclude all other persons. But I cannot think that these expressions indicate any such intention. There is no question here of any personal confidence or personal skill. There is no reason whatever for supposing that any personal element entered into the minds of either of the parties to the agreement, and I cannot find anything in it to prevent the Imperial company from assigning the benefit of it to any other company or to any individual. By so assigning it, the Imperial company would not get rid of their obligations to Mr. Tolhurst; but the contract is one the benefit of which is assignable in equity quite independently of the Judicature Acts. The Supreme Court of Judicature Act, 1873, s. 25 (6), has not made contracts assignable which were not assignable in equity before, but it has enabled assigns of assignable contracts to sue upon them in their own name without joining the assignor. I cannot agree with the Court of Appeal in thinking that the Associated company could not sue Mr. Tolhurst on this contract without joining the Imperial company as co-plaintiffs. The supposed necessity of making them parties or of postponing their dissolution to enable the Associated company to sue as their assignees has, I think, obscured the true position of the parties. I see no such necessity. But the joinder of the Imperial company, although unnecessary, has not increased the costs and need not be further noticed. If Mr. Tolhurst has any provable claim against the Imperial company, and if he is not too late, he can prove against it, and the liquidators can, if necessary, obtain the means of paying him from the Associated company under their indemnity. In conclusion, I will only add that *British Waggon Co. v. Lea* (3) was, in my opinion rightly decided, and is an authority very much in point for the Associated company. The contract there was held assignable, although the word assigns did not occur. The appeal fails, and the order of the Court of Appeal should be affirmed with costs, but the formal order of the Court of Appeal will, I think, be improved if amended as suggested by LORD MACNAGHTEN.

F Appeals dismissed.

Solicitors: *Sismey & Cook*, for Tolhurst, *Lovell & Clinch*, Gravesend; *Ashurst, Morris, Crisp & Co.*

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

HORNSEY URBAN DISTRICT COUNCIL v. HENNELL

KING'S BENCH DIVISION (Lord Alverstone, C.J., Darling and Channell, JJ.), March 25, April 15, 1902]

[Reported [1902] 2 K.B. 73; 71 L.J.K.B. 479; 86 L.T. 423; 66 J.P. 613; 50 W.R. 521; 18 T.L.R. 512; 46 Sol. Jo. 452]

Street—Repair—Public Health Acts—Expenses—Recovery—Land owned and occupied for the purposes of the Crown—Exemption—Public Health Act, 1875 (38 & 39 Vict., c. 55), s. 150.

The commanding officer of a volunteer battalion acquired land for the purpose of its being transferred to and used by the battalion. The urban authority paved a street adjoining this land under the Public Health Act, 1875, s. 150, and claimed from the commanding officer the expense apportioned to that land.

Held: the land was owned and occupied for the purposes of the Crown; s. 150 was not binding on the Crown; and, therefore, the amount of the apportionment could not be recovered.

Notes. The Public Health Act, 1875, s. 150, has been replaced by s. 189 (1), (3), (4), s. 190 (1), (2) and s. 213 (1), (2), of the Highways Act, 1959. For the other sections of the Public Health Act, 1875, mentioned in this case see the Table of Repeals and Replacements to the Highways Act, 1959, set out in 39 HALSBURY'S STATUTES (2nd Edn.) 783.

Referred to: *Cooper v. Hawkins*, [1904] 2 K.B. 164; *Lewis v. Durham Union* (1904), 2 L.G.R. 533; *Chare v. Hart* (1918), 120 L.T. 443.

As to the recovery of expenses under the Public Health Acts, see 31 HALSBURY'S LAWS (3rd Edn.) 48-52, and for cases see 26 DIGEST (Repl.) 590. For the Public Health Act, 1875, s. 150, see 19 HALSBURY'S STATUTES (2nd Edn.) 70, and for the Highways Act, 1959, see 39 HALSBURY'S STATUTES (2nd Edn.) 402.

Cases referred to:

- (1) *Westminster Vestry v. Hoskins*, [1899] 2 Q.B. 474; sub nom. *St. Margaret's and St. John's Vestry v. Hoskins*, 68 L.J.Q.B. 840; 81 L.T. 390; 63 J.P. 725; 47 W.R. 649; 15 T.L.R. 414; 43 Sol. Jo. 571, D.C.; 41 Digest 38, 280.
- (2) *Pearson v. Holborn Union Assessment Committee*, [1893] 1 Q.B. 389; 62 L.J.M.C. 77; 68 L.T. 351; 57 J.P. 169; 9 T.L.R. 275; 5 R. 290; Ryde, R. App. (1891-93) 303, D.C.; 38 Digest (Repl.) 569, 557.
- (3) *Smithett v. Blythe* (1830), 1 B. & Ad. 509; 9 L.J.O.S.K.B. 39; 109 E.R. 876; 41 Digest 956, 8508.
- (4) *Weymouth Corp'n. v. Nugent* (1865), 6 B. & S. 22; 5 New Rep. 302; 34 L.J.M.C. 81; 11 L.T. 672; 29 J.P. 451; 11 Jur.S.S. 465; 13 W.R. 338; 2 Mar.L.C. 163; 122 E.R. 1106; 41 Digest 964, 8569.
- (5) *Coomber v. Berks Justices* (1883), 9 App. Cas. 61; 53 L.J.Q.B. 239; 50 L.T. 405; 48 J.P. 421; 32 W.R. 525; 2 Tax Cas. 1, H.L.; 28 Digest (Repl.) 18, 67.
- (6) *Lord Advocate and Barbour v. Lang* (1866), 5 Macph. (Ct. of Sess.) 84; 39 Sc. Jur. 49; 38 Digest (Repl.) 547, *426.
- (7) *Rayner v. Drevith* (1900), 82 L.T. 718; 64 J.P. 567, D.C.; 38 Digest (Repl.) 569, 558.

Also referred to in argument:

- Perry v. Eames*, *Salaman v. Eames*, *Mercers' Co. v. Eames*, 1891 1 Ch. 658; 60 L.J.Ch. 345; 64 L.T. 438; 39 W.R. 602; 7 T.L.R. 297; 34 Digest 593, 129.
R. v. Cook (1790), 3 Term. Rep. 519; 100 E.R. 710; 12 Digest 690, 1043.
Felkin v. Herbert (1864), 11 L.T. 173; 19 Digest (Repl.) 200, 1407.

Lord Colchester v. Keeney (1866), L.R. 1 Exch. 368; 35 L.J.Ex. 204; 14 L.T. 888; 30 J.P. 567; 14 W.R. 994; affirmed (1867), L.R. 2 Exch. 253; 36 L.J.Ex. 172; 16 L.T. 463; 31 J.P. 468; 15 W.R. 930, Ex.Ch.; 30 Digest (Repl.) 842, 38.

Case Stated upon the hearing of a complaint made by the appellants on Oct. 16, 1901, for the recovery from the respondent of a sum of £409 10s. 9d., being the apportioned amount of expenses incurred by the appellants in sewerage, levelling, paving, metalling, flagging, channelling, and making good a certain street, called Nightingale Lane (being a street not repairable by the inhabitants at large), in the urban district of Hornsey, alleged to be payable in respect of the Elms, Priory Road, and land on the east side of Nightingale Lane, which premises abut on the street, together with interest on that sum at the rate of 5 per cent. per annum from Feb. 20, 1901.

The appellants were the urban district council of Hornsey, in the county of Middlesex. The respondent was a colonel in His Majesty's Army, and was at all material times until March, 1901, the commanding officer of the 1st Volunteer Battalion (Duke of Cambridge's Own) Middlesex Regiment, formerly called the 3rd Middlesex Rifle Volunteers.

By an indenture made June 15, 1896, between the Suburban Buildings Land Co., Ltd., and the respondent, certain premises, therein called the Elms, and hereinafter called "the premises," were granted and conveyed unto and to the use of the respondent, his heirs and assigns, for the sum of £1,910. It was not disputed that the premises were acquired by the respondent for the purpose of transferring them to and in the meantime allowing them to be used by the volunteer battalion. In or about the month of December, 1896, certain portions of the premises comprising an armoury and magazine were duly appointed by the respondent as such commanding officer, and approved by the Secretary of State for War as a store-house for arms, ammunition, and stores, in pursuance of s. 26 of the Volunteer Act, 1863, s. 6 of the Regulation of the Forces Act, 1871, and an Order in Council made under the last-mentioned section. The armoury consists of one room in the basement of the portion of the premises described as the main building. Since that time these portions of the premises have been used solely as such store-house. In or about February, 1897, the Secretary of State for War, on the application of the respondent, as such commanding officer, in pursuance of s. 5 (1) of the Military Lands Act, 1892, duly approved of the sum of £2,200, repayable in thirty-five years, being borrowed by the volunteer battalion for the purposes of acquiring the freehold of the premises.

By an indenture of mortgage made April 1, 1897, between the respondent and Robert Philpot, the Secretary of the Public Works Loan Commissioners, the respondent granted the premises and the grants made and to be made to the volunteer battalion out of moneys provided by Parliament unto Robert Philpot, as such secretary, and his successor secretaries, and his and their assigns, by way of mortgage for securing the sum of £2,200 and interest, and agreed that the premises should, subject to such mortgages, be held by him as such commanding officer and his successors under and by virtue of the terms of the Volunteer Act, 1863. The sum of £2,200 was advanced in pursuance of the mortgage by the Public Works Loan Commissioners, through the Commissioners for the Reduction of the National Debt, and was together with the sum of about £500 which had been raised by voluntary subscriptions, applied by the respondent in repaying himself the purchase price of £1,910 for the premises, and in altering and fitting up the same for the use of the volunteer battalion. The respondent thereupon ceased to have any interest in the premises otherwise than as such commanding officer. The premises had since their acquisition by the respondent, been used as the headquarters of and for the purposes of the volunteer battalion, and for no other purposes. No rent and no money had ever been charged or received by the volunteer battalion or its commanding officer

for the use of the premises or any part thereof. The funds of the volunteer A battalion consisted of the grants made to them out of moneys provided by Parliament, subscriptions from officers, and some voluntary subscriptions collected by other persons for specific purposes. The upkeep of the premises was paid for entirely out of the Parliamentary grants. The premises abutted on the east side of a street known as Nightingale Lane in the district. Nightingale Lane (hereinafter called the street) was at the date of the notice hereinafter mentioned B a street (not being a highway repairable by the inhabitants at large) within the meaning of s. 150 of the Public Health Act, 1875.

In December, 1899, the appellants resolved that notice should be served on the respective owners and occupiers of the premises fronting, adjoining or abutting on the street under the last-mentioned section, requiring them to sewer, level, pave, C metal, flag, channel, and make good the street, and on or about Jan. 21, 1900, notice under the section was duly served on (among others) the respondent. The notices were not complied with and the appellants executed the works therein mentioned themselves, and completed the same on or before Oct. 15, 1900. The expenses incurred by the appellants in executing the works were thereupon apportioned by their surveyor, and the sum of £409 10s. 9d. was so apportioned on the respondent D in respect of the premises, and notice of such apportionment was duly served upon him, and he did not within the space of three months dispute the same. On Feb. 20, 1901, notice demanding payment of the said sum of £409 10s. 9d. by the respondent was duly served upon him but he refused to pay the same and the appellants commenced summary proceedings for the recovery of the sum with interest thereon at the rate of 5 per cent. per annum from Feb. 20, 1901, which came on for hearing E on Oct. 16, 1901.

The justices were of opinion that the respondent was not liable to pay the expenses so apportioned, and dismissed the summons. The question for the opinion of the court was whether the respondent was liable to pay the share of the expenses apportioned upon him as aforesaid in respect of the frontage to Nightingale Lane of the premises.

Bray, K.C. (A. Glen with him) for the appellants. F

The Attorney-General (Sir R. Finlay, K.C.) (H. Sutton and G. S. Robertson with him) for the respondent.

Cur. adv. vult.

April 15, 1902. **LORD ALYERSTONE, C.J.**, read the following judgment of G the court.—This was an appeal by the Hornsey Urban District Council against a decision of the justices of Middlesex, sitting at the Highgate petty sessions, dismissing a complaint against the respondent to recover the sum of £409 10s. 9d., being the apportioned amount of expenses incurred by the appellants in sewerage, levelling, and paving a certain street called Nightingale Lane, under the provisions of s. 150 of the Public Health Act, 1875. The ground of the decision was that under H the circumstances of the case the respondent, who had acquired the premises in question as colonel of a volunteer corps was not liable to pay the amount of the apportionment.

In order to appreciate the point which arises upon this appeal, it is in our opinion necessary to state accurately the facts upon which the question arises. The respondent, Colonel Hannell, in His Majesty's Army, was, up to the month of March, I 1901, the commanding officer of the 1st Battalion Middlesex Rifle Volunteers. In 1896 the respondent purchased the fee simple of certain land at Hornsey for the sum of £1,910. The land was purchased by him for the purpose of its being transferred to and used by the volunteer battalion. In 1897 the premises acquired were, pursuant to the provisions of the Military Lands Act, 1892, mortgaged to the Public Works Loans Commissioners for the sum of £2,200. The money so received was applied to repaying the amount paid by the respondent in purchasing the premises and fitting them up for the use of the volunteer battalion. The premises abut upon

A Nightingale Lane. In December, 1899, the appellants duly served notices for the sewerage, paving, etc., of Nightingale Lane under the provisions of s. 150 of the Public Health Act, 1875. The work was subsequently executed by them. The amount apportioned was agreed to be the amount from the respondent as the legal owner of the premises if he is not exempt from payment. The lands in question were acquired under and by virtue of ss. 24, 25, and 26 of the Volunteer Act, 1863, and the mortgage, as already stated, was made under the provisions of the Military Lands Act, 1892.

C It was contended on behalf of the appellants that, inasmuch as by virtue of s. 3 of the Military Lands Act, 1892, the land could be let in any manner consistent with the use thereof for military purposes, and that it would not vest in the Secretary of State until after the disbandment of the corps, the respondent, as legal owner, was liable to pay to apportionment, and that *Westminster Vestry v. Hoskins* (1) was an authority in the appellants' favour binding upon us. It was contended on behalf of counsel for the respondent, that the land being in fact purchased, owned, and occupied solely for the purpose of the volunteer corps, it must be taken to be owned and occupied for Crown purposes, and that, therefore, the amount of the apportionment could not be recovered, as s. 150 was not binding upon the Crown. D We are of opinion that the contention of the Crown is right, and that the appeal should be dismissed.

E The liability to pay the apportionment depends upon the provisions of the Public Health Act, 1875. Section 150, as has frequently been pointed out, contemplates a notice being given to the owner or occupier to carry out the work specified themselves, and, upon their failure to carry it out, empowers the authority to execute the works and recover the expense from the various owners. Section 213 provides that the expense may be treated as private improvement expenses, and recovered by means of private improvement rates spread over a series of years. Section 257 provides for the recovery of the apportioned amount either at once or by instalments. Section 327, which was relied upon by counsel for the appellants, contains certain protective clauses with reference to lands vested in the Admiralty or War Office. F In our opinion, for the reasons given by LAWRENCE, J., and HENN COLLINS, J., in *Pearson v. Holborn Union Assessment Committee* (2), these lands were held for military purposes, and the respondent had no use or occupation of the premises other than as colonel commanding the corps, and in discharge of his duties of such, and so in fact a mere trustee for the corps having no personal beneficial interest.

G This is, in our opinion, an ownership and occupation for and on behalf of the Crown, and the appellants must show some words which impose upon the Crown an obligation to do the work or pay the expense of it. The principle that Acts of Parliament do not impose pecuniary burdens upon Crown property unless the Crown is expressly named, or unless by necessary implication the Crown has agreed to be bound, is in our opinion still applicable to such a case. No doubt the insertion in many Acts of Parliament of clauses to protect the Crown or save Crown rights has given rise to the impression that this rule has to some extent been trenched upon, and we are far from saying that there may not be provisions in public Acts of Parliament so framed as to bind the Crown, even though the Crown may not be specially named. But in our opinion the intention that the Crown shall be bound or has agreed to be bound, must clearly appear either from the language used or from the nature of the enactments, and there is in our opinion nothing of the kind in the provisions of the Public Health Act applicable to this case, which gives rise to any such presumption.

I Nothing would be gained by considering in detail the various authorities which were cited in support of this view, but we would call attention to the judgment of Lord TENTERDEN in *Smithell v. Blythe* (3), in 1830, in which, where there was an express exemption of King's ships of war from light dues, other vessels of the Crown were held not to be liable, although they were not mentioned in the express exemption. In other words, it was held that the general doctrine of the immunity

of the Crown applied, notwithstanding the insertion of an express exempting clause as to certain matters. Similarly, in *Weymouth Carpen. v. Sagert* (4), issue brought for the use of His Majesty's navy was held exempt from wharfage duties created by statute upon the same principle, notwithstanding the exemption in favour of certain Crown property, and it was pointed out by Cockburn, C.J., that these exemptions were merely inserted *ex majore cautela* and *Coomber v. Better Jackson* (6), which was a case of income tax, is strongly illustrative of the principle. It is, moreover, right to observe that in *Lord Advocate and Barbour v. Long* (6), Crown property was held exempt from any exactly similar burden.

Having regard to the above authorities we cannot accept the argument that the limited exemption of certain government lands in s. 327 of the Public Health Act is sufficient to show that all other interests of the Crown were intended to be affected by the provisions of the Act. The limited language of the exceptions in s. 327 appears to us to support the view that they were inserted *ex abundanti cautela* and we believe that if careful search is made there are many similar Acts in which no clauses protecting Crown rights have been inserted. There is no such general practice as to lead us to the view that the original doctrine of Crown exemption has ceased to exist, or has been infringed upon or that the insertion of a particular clause is intended to show that only that class of Crown property was intended to be exempt.

With reference to *Westminster Vestry v. Hoskins* (1), relied upon by counsel for the appellants, it certainly is not an authority upon the point now raised before us, but after the argument which was addressed to us in this case, we are not prepared to say that we should have come to the same conclusion. *Ryder v. Drewitt* (7) does not apply, as in that case the premises were not solely used for Crown purposes. For the above reasons we are of opinion that the appeal should be dismissed.

Appeal dismissed.

Solicitors : *Leonard J. Tatham ; Solicitor to the Treasury.*

[*Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.*] F

A MOREL BROS. & CO., LTD. v. EARL OF WESTMORLAND

HOUSE OF LORDS (The Earl of Halsbury, L.C., Lord Shand, Lord Davey and Lord Robertson), November 10, 12, 1903]

[Reported [1904] A.C. 11; 73 L.J.K.B. 93; 89 L.T. 702;
52 W.R. 353; 20 T.L.R. 38]

Husband and Wife—"Necessaries"—Claim for goods supplied to wife—Judgment obtained against wife—Competency of action against husband.
Practice—Summary judgment—Defendants liable in the alternative—Judgment against one defendant—Competency of action against other defendant—R.S.C., Ord. 14, r. 5.

A wife, living with her husband, ordered from the appellants certain necessities for their common household. The goods were delivered on credit between 1897 and 1901, the cost being charged to an account in the wife's name. On and after July, 1899, the husband provided the wife with a fixed and sufficient allowance for household expenses, and prohibited her from exceeding it. In 1901 the appellants brought this action against both the husband and the wife for the cost of the goods. They obtained summary judgment against the wife, but the husband was given leave to defend.

Held: (i) in respect of the period before July, 1899, there was a presumption that the wife was acting as agent for the husband, but on the above facts there was no evidence of joint liability; (ii) principal and agent are only liable in the alternative, and having obtained judgment against the agent, the appellants could not obtain judgment against the principal; (iii) the appellants could not rely on Ord. 14, r. 5 (which allowed a plaintiff who had obtained summary judgment against one defendant to proceed against another) because that rule only applied where the defendants were jointly liable; and (iv) in respect of the period after July, 1899, the husband had deprived his wife of authority to pledge his credit.

Notes. Applied: *Cross v. Matthews and Wallace* (1904), 91 L.T. 500. Distinguished: *Walton v. Topakyan Kervorkian and Marler* (1905), 49 Sol. Jo. 650. Applied: *French v. Howie*, [1906] 2 K.B. 674. Considered: *Slater v. Parker* (1908), 24 T.L.R. 621. Applied: *Moore v. Flanagan*, [1920] All E.R. Rep. 254; *London General Omnibus Co. v. Pope* (1922), 38 T.L.R. 270. Referred to: *M. Isaacs & Sons, Ltd. v. Salbstein*, [1916] 2 K.B. 139; *Miss Gray, Ltd. v. Cathcart* (1922), 38 T.L.R. 562; *Duffner v. Bouyer* (1924), 40 T.L.R. 700; *Debenham's, Ltd. v. Perkins*, [1925] All E.R. Rep. 234; *Bennett v. Whitehead*, [1926] 2 K.B. 380; *Firm of R.M.K.R.M. v. M.R.M.F.L. Supramanian Chetty* (1926), 95 L.J.P.C. 197; *Christopher (Hove), Ltd. v. Williams*, [1936] 3 All E.R. 68; *Kaprow & Co. v. Maclelland & Co.*, [1948] 1 All E.R. 264; *Rosenfeld v. Newman*, [1953] 2 All E.R. 885.

As to contracts by a wife as agent for her husband, see 19 HALSBURY'S LAWS (3rd Edn.) 856 et seq., and for cases see 27 DIGEST (Repl.) 177.

Cases referred to:

- (1) *Searf v. Jardine* (1882), 7 App. Cas. 345; 51 L.J.Q.B. 612; 47 L.T. 258; 30 W.R. 893, H.L.; 21 Digest (Repl.) 299, 633.
- (2) *Debenham v. Mellon* (1880), 6 App. Cas. 24; 50 L.J.Q.B. 155; 43 L.T. 673; 45 J.P. 252; 29 W.R. 141, H.L.; 27 Digest (Repl.) 182, 1363.

Also referred to in argument:

Weall v. James (1893), 68 L.T. 515; 4 R. 356, C.A.; 21 Digest (Repl.) 506, 45.

Appeal from a decision of the Court of Appeal (SIR RICHARD HENN COLLINS, M.R., ROMER and MATHEW, L.J.J.), reported [1903] 1 K.B. 64, reversing a decision of PHILLIMORE, J., upon further consideration.

The appellants, the plaintiffs in the action which was brought against both Lord and Lady Westmorland, sued for about £401—the price of provisions and other supplies between May, 1897, and September, 1901. Of these goods, £196 worth were supplied before the end of July, 1899, and the remaining £205 after that date.

The first order was given by the countess personally on May 27, 1897, and thereupon her name was entered in the books of the plaintiffs, and the prices of goods at that time, or subsequently, ordered by the countess, or by her directions, were debited in the books of the plaintiffs to the account opened in her name. The name of the earl was never entered in the plaintiffs' books. The greater part of the goods were supplied by the plaintiffs to Apethorpe Hall, Northamptonshire, where the defendants resided, but a portion of such goods were delivered elsewhere to addresses given by the countess. The whole of the goods were ordered by the countess, either personally or by letter, with few exceptions. Accounts were sent in periodically by the plaintiffs to the countess in which the goods were uniformly debited to her. No evidence was given on behalf of the plaintiffs to show that Lord Westmorland had, in fact, given the countess authority to pledge his credit. On Nov. 22, 1901, the plaintiffs issued a summons under Ord. 14, r. 1, asking leave to sign final judgment for the amount claimed on the writ against both defendants. On Nov. 27, 1901, the earl filed an affidavit denying his liability. On Nov. 28, 1901, the master made an order giving him unconditional leave to defend the action, and giving leave to the plaintiffs to sign final judgment against the countess, and the plaintiffs accordingly signed judgment against the countess.

On Dec. 27, 1901, Lord Westmorland delivered his defence, wherein he alleged that he never authorised any person to order, purchase, or take delivery of any of the goods in question, or to pledge his credit in respect thereof. On Jan. 18, 1902, he delivered his amended defence, wherein he alleged that if any order was given on his behalf, such order was given by the countess, and that, by suing and recovering judgment against her, the plaintiffs had elected to look to her alone as the contracting party, and were not entitled to recover against him. The case was tried before PHILLIMORE, J., with a jury.

On behalf of Lord Westmorland, Mr. Edmund Roys, his solicitor, gave evidence to the effect that in June, 1899, he had an interview with the earl and countess on the subject of the debts incurred by the latter. At that time, the net annual income of Lord Westmorland was £2,500 or thereabouts, and the countess had an annual income of £400 in her own right. It was at this interview agreed that out of his net income the earl should pay into a separate account a sum of £2,000 annually, upon which either the earl or countess might draw for payment of household expenses only, and the countess was at the same time told that this was the utmost sum which could be allowed for this purpose and that she must not exceed it, to which she agreed. The £2,000 was paid annually to this account as agreed.

PHILLIMORE, J., left certain questions to the jury, and, upon receiving their answers thereto, reserved the matter for further consideration. The following were the questions and the answers thereto:

- (1) Is defendant liable for goods supplied before July, 1899?—Answer: Yes.
- (2) As to goods supplied to Apethorpe since July, 1899: (a) Were they necessities suitable for the station of the defendant?—Answer: Yes. (b) Did the defendant give his wife a sufficient allowance for household expenses?—Answer: On income named; Yes. (c) Did he prohibit his wife from incurring any household expenditure except out of his allowance?—Answer: Yes. (d) Did the wife, when ordering goods from the plaintiffs, act as agent for the defendant and herself, or for the defendant only, or for herself only?—Answer: For defendant and herself jointly. (e) To whom did the plaintiffs give credit?—Answer: To the earl in the name of the countess. (f) Is defendant liable for goods sent after July, 1899, to other places than Apethorpe?—Answer: No.

A Upon May 9, 1902, PHILLIMORE, J., directed judgment to be entered for the plaintiffs against the defendant, the Earl of Westmorland, for £411 and costs. This decision was reversed by the Court of Appeal. The plaintiffs appealed.

Shearman, K.C., and *Hills* for the appellants.

Gore-Browne, K.C., and *Bonner* for the respondent.

B THE EARL OF HALSBURY, L.C.—The plaintiffs might have sued either the agent or the principal. I prefer keeping to those terms, because it gets rid of the confusion which arises from the peculiar relation of these parties to each other. The result was that the plaintiff obtained judgment against the agent. They cannot get judgment against the principal also. It is an alternative remedy; it cannot be made available against the two. I think the authorities upon which the judgment of SIR RICHARD HENY COLLINS, M.R., is founded, one of the principal authorities being a decision of this House, render it absolutely impossible to go back upon the course of decision upon this subject. I am myself satisfied that the question was rightly decided both in this House and in the Court of Appeal.

C With reference to the rule upon which reliance has been placed (Ord. 14, r. 5), I think it is accurately stated in the YEARLY PRACTICE of the Supreme Court, edited by D MR. MUIR MACKENZIE, MR. CHITTY, and others. The writers say :

“But for this rule, judgment against one of two defendants jointly liable [observe ‘jointly liable’] would have the effect of preventing the plaintiff from recovering against the other. The rule does not apply to the case of alternative liability. Therefore, if the claim is against two defendants as alternatively liable, and judgment is signed against one, this rule does not enable the plaintiff to proceed against the other; and the doctrine of election established by *Scarf v. Jardine* (1) applies.”

E I concur with that, and move your Lordships that this appeal be dismissed with costs.

LORD SHAND concurred.

F LORD DAVEY.—With regard to the part of the claim which is subsequent to July, 1899, it appears from the evidence of the solicitor that an arrangement was made by which a sum was placed at the disposal of the countess by the earl out of his own money for the purpose of her continuing to manage the household and defray the household expenses. The learned Master of the Rolls in the court below has discussed the effect of that arrangement, which I agree with him meant that G the countess was not to pledge the credit of the earl, but to pay the expenses of the household out of the annual sum which was placed at her disposal in a separate banking account for that purpose. The Master of the Rolls has illustrated the conclusions to which he came by the authorities bearing upon the subject. I do not desire to add anything to what he has said; I simply express my concurrence with H his view as to the effect of that arrangement with regard to that part of the claim of the appellants.

I With regard to the earlier claim, for the period prior to July, 1899, I agree with what has been said by the Lord Chancellor. I am disposed to think that, if the proof had established a joint liability, the plaintiff would not have been prejudiced by signing judgment under Ord. 14 against one of the joint debtors. I think he might then go on and show that the other debtor was also a joint debtor. But if the proof which he tendered at the trial shows not a joint debt by the two, but an alternative claim against one or the other, then I think that by signing judgment against one he has, on the principle of *Scarf v. Jardine* (1), elected to take his remedy against that one, and cannot afterwards sue the other, who is not jointly but alternatively liable. And I agree that the concluding words of Ord. 14, r. 5, do not enable the plaintiff to pursue his remedy against the other defendant who has got leave to defend, if the proof should show that the claim against the two was not joint but alternative. I think, therefore, that the appeal must be dismissed.

LORD ROBERTSON.—It is enough to support this judgment that there was no evidence at all of joint liability. The period before July, 1899, is bare of any evidence which would yield the legal inference of joint liability. The true history of the case—namely, that the earl was principal during the earlier period—is not available to the appellants now that they have taken judgment in this suit against the lady who ex hypothesi was agent. The period after July, 1899, is made much clearer, in a positive sense, for I hold the arrangement made to have deprived the lady of all power to pledge her husband's credit. The earl substituted this fund, which he placed at the lady's disposal, for any authority, express or implied, to pledge his credit at all, joint or several. This being the fact, the well-established law of *Debenham v. Mellon* (2) protects the respondent.

Appeal dismissed.

Solicitors: *A. L. Rayner; Royds & Rawstorne.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

FISHER v. BLACK AND WHITE PUBLISHING CO.

[COURT OF APPEAL (Rigby, Vaughan Williams and Romer, L.J.J.), December 12, 1900]

[Reported [1901] 1 Ch. 174; 71 L.J.Ch. 175; 84 L.T. 305; 49 W.R. 310; 17 T.L.R. 146; 45 Sol. Jo. 138; 18 Mans. 184]

Company—Dividend—Profits “available for dividend” *Prior appropriation of sum for reserve fund out of profit balance shown in profit and loss account—Companies Act, 1862 (25 & 26 Vict., c. 89), Sched. 1, Table A, reg. 74.*

The memorandum of association of a company provided, by cl. 5, that between the holders of the ordinary shares and the holders of the founders' shares the profits from time to time available for dividend shall be applicable as follows: (1) To the payment of a non-cumulative preferential dividend of 15 per cent. per annum on the capital paid up on the shares other than the founders' shares; (2) of the surplus, two-thirds shall be applicable to the payment of a further dividend on the capital paid up on the shares other than the founders' shares, and the remaining one-third shall be applicable to the payment of dividend on the founders' shares rateably. The articles of association provided that the regulations contained in Table A in Sched. 1 to the Companies Act, 1862, except so far as thereby excluded or modified, should be deemed to be the regulations of the company, reg. 74, which provided that the directors might, before recommending any dividend, set aside out of the profits of the company a sum as a reserve fund, not being excluded; that the holders of the ordinary shares should be entitled to be paid out of the profits in each year as a first charge a non-cumulative preferential dividend at the rate of 15 per cent. per annum on the amount for the time being paid up on the ordinary shares held by them respectively; and that the surplus profits in each year should be dealt with in manner following—that is to say, two-thirds should belong to and be divided between or among the holders of the ordinary shares rateably in proportion to the amount for the time being paid up on the

A ordinary shares held by them respectively, and the remaining one-third should belong to and be divided between the holders of the founders' shares in proportion to the number of shares held by them respectively.

B **Held:** "profits from time to time available for dividend" in cl. 5 of the memorandum meant profits after deducting all sums properly appropriated by the directors out of the profit balance shown in the profit and loss account; an appropriation of part of that balance to the formation of a reserve fund was a proper appropriation; and, therefore, the directors had power to carry a sum to a reserve fund although the effect of doing so was to deprive the founders' shares of any dividend.

C **Notes.** Followed: *Long Acre Press, Ltd. v. Odhams Press, Ltd.*, [1930] All E.R. Rep. 237. Applied: *Re Buenos Aires Great Southern Rail. Co., The Company v. Preston*, [1947] 1 All E.R. 729. Referred to: *Evling v. Israel and Oppenheimer*, [1918] 1 Ch. 101; *Stewart v. Sashalite, Ltd.*, [1936] 2 All E.R. 1481. As to dividends, see 6 HALSBURY'S LAWS (3rd Edn.) 396-411, and for cases see 9 DIGEST (Repl.) 627.

D **Appeal** against a decision of KEKEWICH, J., granting an interlocutory injunction restraining the defendant company and their directors from dealing with the profits of the company in the manner proposed by a report of the directors.

E The capital of the company was £100,000, divided into 9,500 ordinary shares of £10 each and 500 founders' shares of £10 each. The action was brought by William Fisher, on behalf of himself and all the other holders of founders' shares, claiming a declaration that one-third of the whole profits made by the company in each year, remaining after a non-cumulative preferential dividend at the rate of 15 per cent. on the amount for the time being paid up on the ordinary shares issued had been provided for, belonged to and ought to be divided between the plaintiff and the other holders of founders' shares in proportion to the number of shares held by them respectively, and should an injunction restraining the company, its directors, and agents from carrying to a reserve fund a one-third share (or any part thereof) of the whole profits made by the company during the year ended July 31, 1900, and remaining after a dividend of 15 per cent. on the ordinary shares issued by the company had been provided for, or dealing with the one-third share so as to prejudice or affect the right of the plaintiff and the other holders of founders' shares to have the same divided between them in proportion to the number of such shares held by them respectively. Clause 5 of the company's memorandum of association provided that

H "As between the holders of the ordinary shares and the holders of the founders' shares the profits from time to time available for dividend shall be applicable as follows: (1) To the payment of a non-cumulative preferential dividend of 15 per cent. per annum on the capital paid up on the shares other than the founders' shares; (2) of the surplus, two-thirds shall be applicable to the payment of a further dividend on the capital paid up on the shares other than the founders' shares, and the remaining one-third shall be applicable to the payment of dividend on the founders' shares rateably."

I It was provided by the articles of association (cl. 1) that the regulations contained in Table A in Sched. 1 to the Companies Act, 1862 [now Sched. 1 to Companies Act, 1948: 3 HALSBURY'S STATUTES (2nd Edn.) 452], except so far as thereby excluded or modified, should, so far as applicable, be deemed to be the regulations of the company. Clause 11 provided:

"The holders of the ordinary shares shall be entitled to be paid out of the profits in each year as a first charge a non-cumulative preferential dividend at the rate of 15 per cent. per annum on the amount for the time being paid up on the ordinary shares held by them respectively."

Clause 12 provided :

The surplus profits in each year shall be dealt with in manner following— that is to say, two-thirds shall belong to and be divided between or among the holders of the ordinary shares rateably in proportion to the amount for the time being paid up on the ordinary shares held by them respectively, and the remaining one-third shall belong to and be divided between the holders of the founders' shares in proportion to the number of shares held by them respectively."

Some of the clauses of Table A were expressly excluded by the articles, but all 72, 73, and 74 were not so excluded.

These three clauses [see now Companies Act, 1948, Sched. 1, Table A, regs. 114, 115, 116, 117] were as follows :

"(72.) The directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to their shares. (73.) No dividend shall be payable except out of the profits arising from the business of the company. (74.) The directors may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserved fund to meet contingencies, or for equalising dividends, or for repairing or maintaining the works connected with the business of the company, or any part thereof; and the directors may invest the sum so set apart as a reserved fund upon such securities as they may select."

The accounts for the year ending July 31, 1900, showed that the profits for that year, after allowing for an interim dividend of 2½ per cent. already paid to the ordinary shareholders, amounted to £13,225 11s. 4d., and the directors proposed by their report, in the first place, to pay a dividend of 12½ per cent. for the whole year to the holders of the ordinary shares, and then (a) to apply £2,179 7s., part thereof, in writing off a suspense account, and (b) to carry over £7,000 to a reserve fund. This proposal left the holders of the founders' shares without any dividend. A motion in the action was heard on Dec. 12, 1900, by Kekewich, J., who decided in favour of the plaintiff and granted an interlocutory injunction in the terms asked for. From this decision the company appealed, and at the hearing of the appeal it was agreed that it should be treated as an appeal from a judgment at the trial of the action.

Renshaw, Q.C., and Stewart Smith for the company.

E. A. Nepean (Warrington, Q.C., with him) for the plaintiff.

RIGBY, L.J.—In this case the question arises upon the construction of a memorandum and articles of association, and in particular of the 5th clause of the memorandum; the 11th and 12th articles of the company and the 74th article of Table A which, except so far as it is excluded, forms part of the articles.

First of all, let us consider what is meant by "the profits from time to time available for dividend" in cl. 5 of the memorandum. It seems to me that if that meant exactly the same thing as "the profits," it would be useless to introduce the qualifying words which, I think, are of considerable importance in this matter. It was argued that all profits are included, that you must consider reg. 73 of Table A (which forms part of this company's articles of association), and that there you find a limitation—namely, that dividends are to be paid out of profits. I do not think that we can be properly called upon to separate one part of profits from another. The profits mentioned in reg. 73 are profits "arising from the business of the company," and that article gives no assistance in trying to learn what are "profits from time to time available for dividend." Clauses 11 and 12 of the articles of association have been referred to, and they no doubt require consideration. Those articles clearly deal with the same subject-matter as is dealt with in cl. 5 of the

A memorandum. It would be idle, I think, to suppose that there was a deliberate intention to make a rule for the division of profits different from that in cl. 5 of the memorandum. I should rather assume—and I do so without much difficulty—that they meant to lay down the ordinary rule, and that when it was provided that a dividend of a fixed amount shall be paid “out of profits,” that did not mean that it should be paid out of any profits whatsoever, but only out of those profits that were available for dividend. As was pointed out by ROMER, L.J., the language of cl. 11 particularly, and of cl. 12, though not quite so pointedly, points, not to an aliquot share of gross profits, but to a dividend which is to be a first charge, and a non-cumulative one, to be paid out of the profits, and in so far as that first charge cannot be paid out of the profits it must fail. If the profits were only 5 per cent., for instance, the first dividend of 15 per cent. could not be paid, but I think generally that cll. 11 and 12 must be construed as meaning paid after the fashion and in the manner in which a dividend may be paid.

So far we have not arrived at any conclusion as to the precise meaning of the words “profits available for dividend,” but there is no difficulty in surmising what they must mean. They must mean profits which are properly applicable to the payment of dividends, and when we turn to reg. 74 of Table A we find a provision which, so far as I know, is the only provision which provides for a limitation of the profits which are applicable and can properly be applied to the payment of dividends, for it provides :

“The directors may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserved fund to meet contingencies, or for equalising dividends, or for repairing or maintaining the works connected with the business of the company. . . .”

It seems to me that one of the duties, perhaps the very first duty, the directors have to undertake when they formulate a statement of accounts of the profits for the period they are dealing with, is to determine what they shall set apart for a reserve fund, and when they have set it apart they must invest it, and from the moment when they have set apart the reserve fund it is no longer “profit available for dividend.” Clause 5 does not in any way deal with what they set apart as a reserve fund. They have power to set that fund apart, and as prudent men they ought to do so to meet any contingencies. They ought to determine whether a reserve fund shall or shall not be created, and, from the moment they decide to create one, cl. 5 of the memorandum and cll. 11 and 12 of the articles of the company have nothing whatever to do with the matter. The directors must divide the sum which remains after deducting the amount placed to the reserve fund. There may be some other funds which ought to be set apart also, and it is only when that amount has been set apart also that the profits which are available for a dividend can be estimated.

H **VAUGHAN WILLIAMS, L.J.**—I agree. I do not think this is an easy case. I think, moreover, that it is extremely probable that the question which has been raised upon this particular memorandum of association and these particular articles is one which may affect a great many companies, as one knows that similar forms to those used here are in common use.

I The question which we have to decide is a question of the construction of cl. 5 in the memorandum of association, and is: What is the meaning of the words “the profits from time to time available for dividend”? In considering that question counsel on both sides have invited us to treat cl. 5 of the memorandum as an ambiguous clause, and to construe it in the light of the articles, and I propose, therefore, to do so. I think that the words “profits from time to time available for dividend” in cl. 5 mean the net profits after deducting all proper appropriations by the directors. I do not think they can mean the net profit balance as shown by the profit and loss account, and no one contended that it did. If it does not mean

that, it seems to me that there is no resting place between that and saying that it is the net profit after deducting all sums properly appropriated by the directors before they arrive at the sum out of which the dividends are to be paid. If they had the power to appropriate, and they chose to appropriate, a portion of the profit balance shown by the profit and loss account to the replacement of capital which had been expended for revenue purposes nobody denies that they could do that, and, on the other hand, nobody can say that there is any obligation on them to do it. It is a matter within their discretion so to appropriate the profit balance. They might, if they chose, appropriate the whole profit balance as dividends without making any such appropriation for the purpose of replacement of capital. That being so, the question arises whether the appropriation of part of the profit balance to the formation of a reserve fund to meet contingencies is a proper appropriation by the directors, and I think it is. Everyone agrees, I think, that it is a proper appropriation by the directors if reg. 74 of Table A is in force.

Article 1 of the company says :

"In so far as these articles do not exclude or modify the regulations contained in the Table marked A in Sched. 1 to the Companies Act, 1862, the last-mentioned regulations shall, so far as the same are applicable, be deemed to be the regulations of the company."

Regulation 34 provides that regs. 52, 53, and 54 of Table A shall not apply. Regulation 74, therefore, is not expressly excluded, and it can be excluded only if it is inconsistent with something expressly provided in the memorandum of association or the articles. I see nothing in the memorandum or the articles to exclude reg. 74. On the contrary, if I had to construe cl. 5 of the memorandum without the assistance of the contemporaneous articles, I could not say that there was anything in cl. 5 inconsistent with the power of the directors to set aside, out of the profits of the company, such sum as they thought proper as a reserve fund. But if I must turn to the articles to construe the memorandum (a thing which I always do with very great hesitation), I think that reg. 74 of Table A is not excluded, and if it is not excluded, and is to be treated as written into the special articles, and one turns to those articles to construe the clause, I think the case is a fortiori. I think that there is nothing in cl. 5 to prevent the directors setting aside out of the profits of the company such a sum as they think proper as a reserve fund, because I think that the word "profits" in cl. 5 means profits after deducting all sums properly appropriated by the directors out of the profit balance shown in the profit and loss account. I wish to say that I am always sorry to come to a conclusion which may possibly be a conclusion at which business people would not arrive, and I confess that I had some doubt whether business people might not read "profits" in cl. 5 of the memorandum of association in a different way from that in which I am reading it. When I look at the report of the directors, the wording of the report looks as though they do not use that word "profits" in the way I am reading it. It rather looks as though the directors, who were creating this reserve fund, thought that the profits available for dividends were the whole sum of £13,225 11s. 4d. But, whatever they may have thought, it is the province of the court to determine what that expression means, and, according to my view, it does not mean the whole of that sum, but that sum less so much of it as the directors have within their powers properly to set aside as a reserve fund to meet future contingencies.

ROMER, L.J.—The point involved is, I think, somewhat a difficult one, but it has been very well argued on both sides, and I cannot say that I have had much difficulty in coming to a conclusion upon it, but, as we are differing from my brother KERWICH, I think it right to state my reasons in my own language.

I think that the words "available for dividend" in the memorandum of association following the words "profits" are intended in some degree at least to modify the

A word "profits." I think the phrase "profits from time to time available for dividend" means profits which, after making all proper deductions, remain for the purpose of paying dividends. One may arrive at the point of view I am taking by the consideration of another point. What is the period of time you must consider when you have to ascertain within cl. 5 of the memorandum of association what are the "profits available for dividend"? I think it is the time after you have already properly ascertained the profits applicable for the payment of dividend, and not any prior time.

Then is there any difficulty in the way of that construction by reason of the wording of cl. 11 and 12? I cannot see that there is. In my view, the word "profits" in cl. 11 and 12 must be taken to mean the same profits as are referred to in the memorandum of association—that is, "profits available for dividend"—just as if those words had been repeated in those articles. This is borne out by the fact that the payments mentioned in cl. 11 and 12 are described as payments of dividends. With regard to Table A, undoubtedly this is clear, that regs. 72, 73, and 74 are not expressly excluded, and it is to be borne in mind that when any articles of Table A are to be expressly excluded, those articles are specified in these articles of association. I think it is a fair deduction that those who prepared the memorandum and articles of association must have had regs. 72, 73, and 74 in their minds, and did not think it necessary expressly to exclude them. In my opinion, those articles ought certainly to be considered to be included unless there is some grave reason why they should be excluded. I see no such reason, and, on the other hand, I do see great difficulty in the way of holding that they should be excluded, and especially reg. 74. In my opinion, reg. 74 of Table A is included in these articles of association. I think it right to say, however, that as at present advised I do think that reg. 74 is modified to a certain extent, for I do not think that reg. 74 could be used for the purpose of creating a reserve fund to be applied in equalising dividends. That is my present view. I need not express any concluded opinion upon it, because that question is not at once before me, but I point that out as otherwise it might be thought that reg. 74 could be used so as to create an injustice as between the owners of the founders' shares and the owners of the ordinary shares. For these reasons I agree that the appeal ought to succeed.

Solicitors : *Dubois & Williams; W. Fisher.*

[*Reported by W. C. BISS, Esq., Barrister-at-Law.*]

Re BISS. BISS v. BISS

COURT OF APPEAL (Sir Richard Henn Collins, M.R., Bowen and Cresswell JJ.,
L.JJ.), February 18, 19, March 19, 1903]

[Reported [1903] 2 Ch. 40; 72 L.J.Ch. 473; 88 L.T. 403;
51 W.R. 504; 47 Sol. Jo. 383]

*In Land and Tenants: Lease: Renewal: Renewal to person in fiduciary position—
Son of deceased lessee—Constructive trust—Presumption in cases of joint
tenants, tenants in common, mortgagees, and partners.*

A person who obtains the renewal of a lease, and does not clearly occupy a fiduciary position, such as an executor, trustee, or agent, only becomes a constructive trustee of the renewed lease if in respect of the old lease he occupied some special position, and owed by virtue of that position a duty towards the other persons interested. The mere fact that he was partly interested in the old lease does not make him a constructive trustee of the new lease, whatever may be the nature of his interest or the circumstances under which he obtained the new lease.

In the cases of joint tenants, tenants in common, mortgagees, and partners, there is no presumption of law that a renewed lease obtained by one of them is held in trust for the others. There is only a rebuttable presumption of fact.

Palmer v. Young (1) (1684), 1 Vern. 276, and *Rawe v. Chichester* (2) (1773), Amb. 715, considered.

Ex parte Grace (3) (1799), 1 Bos. & P. 376, distinguished.

Shortly after the death of A. intestate, his lease of a house, which was of some value, came to an end. His widow, who was his administratrix, applied for a renewal of the lease, but the lessor refused to grant a renewal either to her personally or to anyone representing the estate, and said that, if he let the premises again, it would be to J., one of A.'s sons. Shortly afterwards, he let the premises to J. on an agreement for three years. A. left other children, one of whom was an infant. On the question whether J. was entitled to hold the tenancy for his own benefit or whether he must hold it for the benefit of the estate,

Held: J. was not a trustee of the tenancy for all the persons interested in the estate of A., as he was not in a fiduciary position to, and owed no duty towards, the other persons interested in the estate, and had not been guilty of any conduct which was unfair, or which disentitled him to retain the benefit of the agreement.

Notes. Applied: *Re Knowles' Will Trusts*, *Nelson v. Knowles*, [1948] 1 All E.R. 866. Considered: *Chelsea Investment Co. v. Marche*, [1955] 1 All E.R. 195. Referred to: *Griffith v. Owen*, [1904-7] All E.R. Rep. 718; *Nelson v. Hannam and Smith*, [1942] 2 All E.R. 680; *Re Pelly, Ransome v. Pelly*, [1956] 2 All E.R. 326.

As to constructive trusts, see 38 HALSBURY'S LAWS (3rd Edn.) 855 et seq., and for cases see 43 DIGEST 631 et seq.

Cases referred to:

- (1) *Palmer v. Young* (1684), 1 Vern. 276; 1 Eq. Cas. Abr. 380; 23 E.R. 168; 43 Digest 632, 709.
- (2) *Rawe v. Chichester* (1773), Amb. 715; 27 E.R. 463; sub nom. *Bromfield v. Chichester*, *Kear v. Duthelby*, 2 Dick. 480, L.C.; 43 Digest 633, 722.
- (3) *Ex parte Grace* (1799), 1 Bos. & P. 376; 126 E.R. 962; 43 Digest 632, 710.
- (4) *Keech v. Sandford* (1726), Sel. Cas. Ch. 61; 2 Eq. Cas. Abr. 741; Cas. temp. King, 61; 25 E.R. 223, L.C.; 43 Digest 633, 720.
- (5) *Trotter v. Marriott* (1768), Am. 668; 27 E.R. 433; 43 Digest 632, 717.

- (6) *James v. Dean* (1805), 11 Ves. 383; 32 E.R. 1135, L.C.; 31 Digest (Repl.) 38, 1940.
- (7) *Rushworth's Case* (1676), Freeman. Ch. 13; 22 E.R. 1026; 35 Digest 310, 571.
- (8) *Featherstonhaugh v. Fenwick* (1810), 17 Ves. 298; 34 E.R. 115; 30 Digest (Repl.) 436, 791.
- (9) *Nesbitt v. Tredennick* (1808), 1 Ball. & B. 29; 43 Digest 635, 731.
- (10) *Kennedy v. De Trafford*, [1897] A.C. 180; 66 L.J.Ch. 413; 76 L.T. 427; 45 W.R. 671, H.L.; 43 Digest 666, 977.
- (11) *Griffin v. Griffin* (1804), 1 Sch. & Lef. 352; 43 Digest 633, 727.
- (12) *Blewett v. Millett* (1774), 7 Bro. Parl. Cas. 367; 3 E.R. 238, H.L.; 43 Digest 633, 721.
- (13) *Pickering v. Towles* (1783), 1 Bro. C.C. 197; 28 E.R. 1089, L.C.; 43 Digest (Repl.) 632, 713.
- (14) *Thomas v. Thomas* (1855), 2 K. & J. 79; 25 L.J.Ch. 159; 1 Jur.N.S. 1160; 4 W.R. 135; 69 E.R. 701; 28 Digest (Repl.) 538, 519.
- (15) *Quinton v. Frith* (1868), 2 I.R.Eq. 396; 44 Digest 399, t.
- (16) *Cassels v. Stewart* (1881), 6 App. Cas. 61; 29 W.R. 636, H.L.; 36 Digest (Repl.) 547, 1084.
- (17) *Clegg v. Edmondson* (1857), 8 De G.M. & G. 787; 26 L.J.Ch. 673; 29 L.T.O.S. 131; 3 Jur.N.S. 299; 44 E.R. 593, L.J.J.; 20 Digest (Repl.) 553, 2597.
- (18) *Rakestraw v. Brewer* (1729), 2 P. Wms. 511; Cas. temp. King, 55; Mos. 189; 2 Eq. Cas. Abr. 162, 601; 24 E.R. 839, L.C.; 35 Digest 311, 572.
- (19) *Palmer v. Young* (1684), 1 Vern. 276; 1 Eq. Cas. Abr. 380; 23 E.R. 468; [1903] 2 Ch. 65, n.; 43 Digest 632, 709.

Also referred to in argument :

- Longton v. Wilsby* (1897), 76 L.T. 770; 43 Digest 635, 738.
- Fitzgibbon v. Scanlan* (1813), 1 Dow. 261; 43 Digest 633, 722ii.
- Hamilton v. Denny* (1809), 1 Ball & B. 199; 35 Digest 636, 3679i.
- Jackson v. Welch* (1836), L. & G. temp. Plunk. 346; 43 Digest 633, f.
- Clegg v. Fishwick* (1849), 1 Mac. & G. 294; 1 H. & Tw. 390; 19 L.J.Ch. 49; 13 Jur. 993; 41 E.R. 1278; sub nom. *Glegg v. Fishwick*, 15 L.T.O.S. 472, L.C.; 36 Digest (Repl.) 591, 1490.
- Dicconson v. Talbot* (1870), 6 Ch. App. 32; 24 L.T. 49; 19 W.R. 138, L.J.J.; 43 Digest 908, 3499.
- Warner v. Jacob* (1882), 20 Ch.D. 220; 51 L.J.Ch. 612; 46 L.T. 656; 46 J.P. 436; 30 W.R. 731; 7 Digest (Repl.) 506, 174.
- Holmes v. Williams*, [1895] W.N. 116; 43 Digest 642, 783.
- Re Lord Ranelagh's Will* (1884), 26 Ch.D. 590; 53 L.J.Ch. 689; sub nom. *Re Viscount Ranelagh's Will*, *Berton v. London School Board*, 51 L.T. 87; 32 W.R. 714; 43 Digest 635, 737.
- Holt v. Holt* (1670), 1 Cas. in Ch. 190; 22 E.R. 756; 43 Digest 634, 726.
- Witter v. Witter* (1730), 3 P. Wms. 99; 24 E.R. 985, L.C.; 43 Digest 871, 3160.

Appeal from a decision of BUCKLEY, J.

The defendant was the widow and administratrix of John Biss, deceased. At the time of his death the deceased was tenant from year to year of a house let to him by one Stone at £84 a year. He had formerly held it for a term of seven years from Lady Day, 1887, at a rent of £80. Stone had refused to renew the lease, but allowed him to remain on as tenant from year to year at a rent of £84 a year. John Biss died on Sept. 23, 1900, and the defendant was appointed his administratrix, and a receiver of the estate had been appointed by the court in May, 1901. As Stone's own term was about to expire on Mar. 25, 1902, he, on Sept. 23, 1901, gave notice to quit the premises on Mar. 25, following. John Biss left three children, J. E. Biss and a daughter, by a former marriage, both of full age, and an infant daughter by the defendant. This action was commenced for the administration of his estate. On the death of John Biss negotiations had been opened by

the widow for a new lease. Stone contended that the negotiations were on her own behalf, but she said that they were on behalf of the estate. Stone had refused in the most absolute terms to entertain any proposition for a renewal either to her or to anyone representing the estate, and he had caused to be sent to her solicitor a letter of Mar. 17, 1902, as follows:

"With regard to your inquiry as to renewal of the above premises, I beg to inform you that I positively decline any negotiations for renewal either to Mrs. Biss [that is, the widow] or to anyone representing the estate of the late Mr. John Biss. I have already rejected Mrs. Biss's application in this connection, and if I let the premises again it will be for the express purpose of offering it to Mr. J. E. Biss, jun. [that is, the son] as a matter of request for him and his late father; but this, of course, is entirely a matter between Mr. John E. Biss, jun., and myself."

J. E. Biss had himself called on Stone in the previous February with a view to a renewal for the benefit of the estate, which the latter had declined to make. Carrying out the intention expressed in his letter, Stone obtained a renewal himself and offered the premises to J. E. Biss on a three years' agreement at a rent of £95 a year, which the plaintiff accepted. A question then arose whether J. E. Biss was entitled to hold the agreement for his own benefit, or whether he must hold it for the benefit of the intestate's estate. It was proved that the deceased had used the premises as a lodging-house, and that the business had yielded a profit. BUCKLEY, J., found as a fact on the evidence that Stone intended to give the lease to the son adversely to the administratrix, and he meant to give the lease to J. E. Biss for his own benefit; but that the case was within *Ex parte Grace* (3), and, according to that case, the son stood in such a position as between himself and the other persons partly interested, one of them being an infant, that he must be treated as if he were a trustee for the estate. The plaintiff appealed.

Astbury, K.C., and *J. G. Wood* for the plaintiff.

Carson, K.C., and *Ashton Cross* for the defendant.

Cur. adv. vult.

Mar. 19, 1903. **SIR RICHARD HENN COLLINS, M.R.**, read a judgment in which he stated the facts and continued: BUCKLEY, J., considered himself bound by *Ex parte Grace* (3), and but for that case his view, as I understand his judgment, was in favour of the plaintiff. He considered that that case compelled him to hold that the plaintiff stood in such a position as to be under a personal incapacity to accept the renewal otherwise than as trustee for all persons interested in the estate. If, on the other hand, he was at liberty to consider the special circumstances under which the renewal was accepted, his view was, and I think it is entirely borne out by the affidavits, that there was nothing in the plaintiff's conduct which was unfair or such as to disentitle him to retain the benefit of the renewal.

There are, no doubt, many cases in which the presumption of personal incapacity to retain the benefit is one of law and cannot be rebutted. The simplest instance is that of a trustee, as in *Keech v. Sandford* (4). But the principle has been extended to cover other persons who are not primarily trustees at all towards those in remainder, as, for instance, tenants for life. The foundation of the presumption in their case is that they can take only what the will or settlement under which they make a title gives them, and that a renewal must be looked on as an accretion to or graft upon the original term, arising out of the goodwill or quasi tenant right annexed thereto, and that their rights to such accretion are those which they have in the term, and no greater, and terminate with their own life; *Taster v. Marriott* (5); *Rawe v. Chichester* (2); *James v. Dean* (6); and other cases cited in LEWIN ON TRUSTS (10th Edn.), p. 193.

There is another class of cases in which, as it seems to me, there is no presumption of law, but at most a rebuttable presumption of fact. In this class apparently

are mortgagees (*Rushworth's Case* (7)), joint tenants (*Palmer v. Young* (1)), and partners (*Featherstonhaugh v. Fenwick* (8)). *Prima facie* a mortgagee cannot renew for himself; he cannot hold the accretion any more than he can hold the term itself free from the right to redeem. The reason here is analogous to that which governs the rights of tenants for life. But in this case the presumption is apparently rebuttable, and in *Nesbitt v. Tredennick* (9) LORD MANNERS held it was rebutted. He said (1 Ball & B. at p. 47):

"Here no part of Nesbitt's conduct shows a contrivance, nor was he in possession; all that Nesbitt or Tredennick treated for was a new lease, giving, however, full opportunity to the plaintiffs to dispose of their interest or to renew if they were enabled to do so."

As to partners, in *Featherstonhaugh v. Fenwick* (8), SIR W. GRANT said (17 Ves. at p. 311):

"It is clear that one partner cannot treat privately and behind the backs of his co-partners for a lease of the premises where the joint trade is carried on for his own individual benefit; if he does so treat and obtains a lease in his own name, it is a trust for the partnership."

He then proceeds to examine the facts on that basis, and finds unfair dealing in fact. A joint tenant who is not a partner can be under no higher obligation. Tenants in common do not stand in a fiduciary relation to each other (*Kennedy v. De Trafford* (10)), and one of two mortgagors, tenants in common, is not debarred from buying for himself the undivided equity of redemption in the whole. The reason of the rule in the case of trustees and others whose liability is absolute and irrebuttable is said to be public policy (*Griffin v. Griffin* (11), per LORD REDESDALE (1 Sch. & Lef. at p. 354); *Blowell v. Millett* (12)), and is based, it would seem, largely on the fact that possession gives to such person an opportunity of renewal (*Pickering v. Fowles* (13), per LORD THURLOW (1 Bro. C.C. at p. 198)), acting on the goodwill that accompanies it; (*James v. Dean* (6), per LORD ELDON (11 Ves. at p. 395)). It may well be, therefore, that different considerations apply in the case of persons not in possession.

In the present case the plaintiff is simply one of the next of kin of the former tenant, and had as such a possible interest in the term. He was not as such a trustee for the others interested, nor was he in possession. The administratrix represented the estate and alone had the right to renew incident thereto, and she unquestionably could renew only for the benefit of the estate. But is the plaintiff in the same category? Or is he entitled to go into the facts to show that he has not in point of fact abused his position or in any sense intercepted an advantage coming by way of accretion to the estate? He did not take under a will or a settlement with interests coming after his own, but simply got a possible share upon an intestacy in case there was a surplus of assets over debts. It seems to me that his obligation cannot be put higher than that of any other tenant in common against whom it would have to be established, not as a presumption of law, but as an inference of fact, that he had abused his position. If he is not under a personal incapacity to take a benefit he is entitled to show that the renewal was not in fact an accretion to the original term, and that it was not until there had been an absolute refusal on the part of the lessor, and after full opportunity to the administratrix to procure it for the estate if she could, that he accepted a proposal of renewal made to him by the lessor.

These questions cannot be considered or discussed where the party is by his position debarred from keeping a personal advantage derived directly or indirectly out of his fiduciary or quasi fiduciary position; but where he is not so debarred I think it becomes a question of fact whether that which he has received was in his hands an accretion to the interest of the deceased or whether the connection between the estate and the renewal had not been wholly severed by the action of the lessor

below, the plaintiff accepted a new lease. This re-consecration seems to get rid of any difficulty that one of the great of law was so intent. The right or hope of renewal incident to the estate was determined before the plaintiff intervened. *Ex parte Grace* (8), by which BUCKLEY, J., expressed himself bound, that not to my opinion, cover the present case. There *Grace* had married the administratrix of the deceased owner of the term and held the term in her right, and subject to the trusts on which she held it. He was, therefore, in no better position than she would have been had she, being unmarried, obtained the renewal. *Keech v. Sandford* (4) was directly in point, and the renewed term could not be held otherwise than as part of the estate.

I may also point out that in *Ex parte Grace* (3), even if the beneficial interests only of those entitled to the old lease which was renewed are looked at, there were ample grounds for supporting the decision, for the old lease belonged partly to an infant, and when possession of the demised premises was taken by the stepfather, the latter (who renewed the lease) became, in contemplation of law, a bailiff or agent for the infant in respect of the infant's share or interest, and was, therefore, in that capacity also in a strictly fiduciary position when he applied for a renewal: see COKE LITT. 90a; *Thomas v. Thomas* (14); *Quinton v. Faith* (15), where the cases are collected. *Ex parte Grace* (3), as BUCKLEY, J., said, seems to be somewhat loosely reported, but the dicta must be read in reference to the true facts. Some reliance was placed by the defendant on the dictum of LORD BATHURST in *Rau v. Chichester* (2) (Amb. at p. 719) that

"If trustees, mortgagees, and persons interested obtain renewal, the new lease is always subject to the trusts and limitations of the old lease";

but the cases cited by him show that he had not in his mind such an interest as that of the plaintiff in this case. No decision has in fact gone as far as we are asked to go here, and in my opinion the principle to be extracted from the authorities does not cover this case. Public policy, which is said to be the basis of the principle, does not seem to me to require that every person who takes an interest, however slight, in the estate of an intestate of which a lease formed a part should be under a personal incapacity to hold a renewal of such lease in his own right. While, therefore, I am bound to differ from the actual decision of the learned judge I feel that I am giving effect to his own view. The appeal must be allowed.

ROMER, L.J.—I agree with the judgment of the Master of the Rolls, and need not add anything to what he has said about *Ex parte Grace* (3), on the authority of which BUCKLEY, J., decided this case. But since the arguments on this appeal I have had an opportunity of looking at most of the authorities bearing on the subject, and I think it may be useful if I add some observations upon them. I am induced to do this because there are some dicta of judges (notably of BARNES, L.C., in *Rau v. Chichester* (2)), and some statements in text-books, which might lead to the supposition that if any person only partly interested in an old lease obtains from the lessor a renewal, he must be held a constructive trustee of the new lease whatever may be the nature of his interest, or the circumstances under which he obtained the new lease.

In my opinion, the authorities when examined carefully do not support any such general proposition. I will endeavour to state, as shortly as I can, to what extent they have gone. In the first place, so far as regards the circumstances under which the new lease is obtained, the equitable doctrine I am considering is not limited in its application to cases where the old lease was renewable by agreement or custom, or where the new lease was obtained by surrender or before the expiration of the old lease. There may well be, and often is, an advantage for the purpose of obtaining a new lease in being in the position of an old lessee, and that advantage may be of appreciable value in the view of a court administering equity, even

through the landlord is under no obligation to grant a new lease to the old tenant. And, further, I may note here that the cases show that, with regard to a person obtaining a renewal who occupies a fiduciary position, it is contrary to public policy to allow him to rebut the presumption that in obtaining a renewal he acted in the interests of all persons interested in the old lease. I may also add that some of the decided cases where persons not in a fiduciary position obtaining renewals have been held to be constructive trustees depend upon the fact that those persons acted fraudulently in the matter, as, for instance, by representing to the lessors, or by inducing or allowing the lessors, to believe that they were acting in the interest of those entitled to the old lease. And, of course, if a person has obtained a new lease by reason and in consideration of a surrender or attempted surrender of an old lease, or rights belonging to third parties, he could not as against those third parties pretend to hold the new lease as his own absolute property. But cases falling within the two last-mentioned classes stand apart, and need no further examination by me.

I now proceed to consider the cases with reference to the position of the person obtaining the renewal. The cases where the person has clearly occupied a fiduciary position in the matter, including an executor, administrator, trustee, or agent, need not be dwelt upon, as they present no difficulty. I need only remark in passing that it must not be forgotten that if a stranger enters into possession of an infant's property he is to be regarded as acting as a bailiff or agent for the infant in respect of that property. The cases which really demand full consideration are those where the person renewing the lease does not clearly occupy a fiduciary position. On inquiry into these cases it appears to me as a result that a person renewing is only held to be a constructive trustee of the renewed lease if in respect of the old lease he occupied some special position, and owed by virtue of that position a duty towards the other persons interested.

Take, for example, the case of a tenant for life under a settlement of leaseholds. Although not a trustee for the remaindermen, yet his position is not that of a stranger as regards them. He owes by virtue of his position certain duties towards them in respect of the settled property; and if by virtue of his position he is enabled to obtain a renewal of the lease, equity clearly demands that the new right obtained in virtue of the old should be regarded as a graft on the old, and be treated accordingly as settled property.

Take next the case of a partner obtaining a renewal of a partnership lease. Here, apart from the fact that in ordinary cases concerning the carrying on of the partnership business he is an agent for the partners, he clearly owes a duty to his co-partners not to acquire any special advantage over them by reason of his position. And therefore as a rule, even if a partnership lease has come to an end, yet if he by virtue of his position obtains a renewed lease, he will be held to have acquired it on behalf of all the partners. As LORD SELBORNE, L.C., said in *Cassels v. Stewart* (16) (6 App. Cas. at p. 73):

"A man obtaining his locus standi, and his opportunity for making such arrangements, by the position he occupies as a partner, is bound by his obligation to his co-partners in such dealings not to separate his interest from theirs, but, if he acquires any benefit, to communicate it to them."

Yet even with regard to partners, between whom the utmost good faith is required by a court of equity, there are the following observations made by TURNER, L.J., in *Clegg v. Edmondson* (17). He said (8 De G.M. & G. at p. 807):

"I am not prepared to say that in no case can a partner during the continuance of the partnership contract for a new lease, to be granted to himself, of property which is on lease to the partnership without the new lease being held to be subject to trusts for the benefit of the partnership. The authorities, I

think, do not warrant that position; but this, I think, is plain upon all the authorities, that it is very difficult for any partner to secure to himself, to the exclusion of his co-partners, the benefit of a lease so contracted for, and the difficulty is certainly greater where the contracting partners are, as in this instance they were, the managing partners."

I will next deal with the cases decided as between mortgagor and mortgagee. Each of these owes a duty to the other in respect of the mortgaged property, and if in case of one being able by virtue of his position to obtain a renewal of a mortgaged lease, there are obvious grounds why it should be held against him, at any rate as a rule, that the renewed lease should be treated as encumbered on the old, and as forming part of the mortgage security. In the case of a mortgaged renewing, it was put as follows by the court in *Rakentam v. Brewer* (18) (2 P. Wms. at p. 513):

"This additional term comes from the old root, and is of the same nature, subject to the same equity of redemption, else hardships might be brought upon mortgagors by the mortgagees getting such additional terms more easily, as being possessed of one not expired, and by that means worming out and oppressing a poor mortgagor."

The only case that seems to call for special comment, beyond what I have already said, is that of *Palmer v. Young* (19), which is represented by some text-books as laying down a general proposition about one of several joint tenants renewing for his own benefit. That case is so shortly reported that I found it impossible to properly ascertain what the facts were, and I accordingly had the records and the registrar's note-book searched. The transcription of the records was somewhat difficult, but in the result I have ascertained that the following are the facts of the case and the grounds of the decision of the court, omitting unnecessary details. A lessee for lives from the Bishop of Rochester assigned part of the demised premises for the lives, at a proportioned part of the rent, to the plaintiff's predecessor in title. The lease was left in the hands of the principal defendant in order to enable him to renew. He obtained a renewal by availing himself of the possession of the lease, and by concealing the fact of the previous assignment, and by surrendering the old lease which still had two lives in existence. The renewed lease was for an additional life. The plaintiff brought his suit in Chancery, seeking to have it declared that under the circumstances the defendant was a trustee of the renewed lease so far as concerns the assigned premises, and that the plaintiff was entitled to the benefit of the extra life on his paying a proportioned part of the rent and of the expenses of renewal.

The defendant admitted the facts, and offered to place the plaintiff in his old position so far as concerns the two lives by granting him a lease, but otherwise claimed for himself the benefit of the renewal. The court found as a fact that the defendant had gone with the "parchment" (i.e., the old lease itself), and "pretended an interest in the whole," and had so obtained a renewal for an extra life to the exclusion of the plaintiff, and under these circumstances, of course, the court held the plaintiff entitled to relief. And as there was some doubt as to the validity of the new lease (presumably because the plaintiff as assignee of part of the demised premises had not joined in the surrender) it was ordered that the plaintiff and defendant should join in surrendering the premises and obtaining a new lease. These facts show that the case was one of clear breach of faith, and was decided on its special circumstances, and is no authority whatever to support the more general proposition for which it is often cited. To conclude, the result of my investigation of the case is that neither on authority or principle can the plaintiff in the present case be held a trustee of the new lease he has obtained. He was in no wise in any fiduciary position in respect of the matter; he owed no duty to anyone in respect

of it; he has been guilty of no fraud or concealment; and he has not used any right that a court of equity can recognise as belonging to other persons to enable him to obtain the lease. I, therefore, agree in thinking that the appeal must succeed.

COZENS-HARDY, L.J.—I have had an opportunity of reading the judgments of SIR RICHARD HENN COLLINS, M.R., and ROMER, L.J., and only desire to say that I agree with what they have said.

Solicitors: *T. H. Meynell; Arthur Price.*

[*Reported by W. C. Biss, Esq., Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS v. MULLER & CO.'S MARGARINE, LTD.

[HOUSE OF LORDS (The Earl of Halsbury, L.C., Lord Macnaghten, Lord Davey, Lord James of Hereford, Lord Brampton, Lord Robertson and Lord Lindley),
March 15, 19, 21, May 20, 1901]

[Reported [1901] A.C. 217; 70 L.J.K.B. 677; 84 L.T. 729; 49 W.R. 603;
17 T.L.R. 530]

Stamp Duty—Conveyance on sale—Goodwill—"Property"—"Property locally situated out of United Kingdom"—Goodwill of business wholly conducted abroad—Stamp Act, 1891 (54 & 55 Vict., c. 39), s. 59 (1).

Contract—Conclusion of contract—Contract "made" in England—Contract of sale—Execution by vendor abroad—Execution by purchaser in England.

A manufacturer, who carried on business solely in Germany, sold his business, manufactory, and goodwill to an English company. The agreement for sale was drawn up in England, and was executed by the vendor in Holland and by the company in England.

Held: (i) (per LORD DAVEY, LORD BRAMPTON, and LORD LINDLEY) the contract only became a perfect contract when it was executed by the purchaser, and, therefore, it was made in England; (ii) (The EARL OF HALSBURY, L.C., dissenting) goodwill was capable of having a local situation and where the business with reference to which it existed began and ended in a certain locality the goodwill was situated in that place; (iii) goodwill was "property" within s. 59 (1) of the Stamp Act, 1891; and, therefore, the goodwill sold in the present case was "locally situate out of the United Kingdom" within s. 59 (1), and the contract, so far as it related to goodwill, was not chargeable with the duty prescribed by the sub-section.

Per LORD MACNAGHTEN: Goodwill is the benefit and advantage of the good name, reputation, and connexion of a business, the attractive force which brings in custom.

Per LORD DAVEY and LORD LINDLEY: "Property" in s. 59 (1) of the Stamp Act, 1891, is not confined to real property, but includes personal property.

Notes. Distinguished: *Danubian Sugar Factories v. I.R. Comrs.*, [1901] 1 K.B. 245. Considered: *Urban v. I.R. Comrs.* (1913), 29 T.L.R. 476. Explained: *Velazquez, Ltd. v. I.R. Comrs.*, [1914] 3 K.B. 458; *English, Scottish and Australian*

Bank, Ltd. v. I.R. Comrs., [1931] All E.R. Rep. 212. Referred to: *Key v. Lecou-surier* (1907), 98 L.T. 497; *Re John Sinclair Ltd. v. Trade Mark* 537, 570 (1932), 148 L.T. 417; *Simpson v. Charrington & Co.*, [1903] 1 K.B. 64; *I.R. Comrs. v. Labour Exchanges* (1945), 173 L.T. 342; *Adriana Werke Maschinen G.m.b.H. v. Custodian of Enemy Property and the Administrator of German Enemy Property.* [1957] R.P.C. 49.

As to stamp duty on contracts for sale, see 33 HALSBURY'S LAWS (3rd Edn.) 338, 340, and for cases see 39 DIGEST 278 et seq. For Stamp Act, 1891, see 21 HALSBURY'S STATUTES (2nd Edn.) 610.

Cases referred to :

- (1) *Potter v. I.R. Comrs.* (1854), 10 Exch. 147; 23 L.J.Ex. 345; 18 Jur. 778; 2 W.R. 561; 156 E.R. 392; sub nom. *Re Stamp Duty on Potter's Deed*, 2 C.L.R. 1131; sub nom. *A.-G. v. Potter*, 23 L.T.O.S. 269; 39 Digest 279, 632.
- (2) *Ricket v. Metropolitan Rail. Co. (Directors, etc.)* (1867), L.R. 2 H.L. 175; 36 L.J.Q.B. 205; 16 L.T. 542; 31 J.P. 484; 15 W.R. 937, H.L.; 11 Digest (Repl.) 150, 281.
- (3) *I.R. Comrs. v. Angus, Same v. Lewis* (1889), 23 Q.B.D. 579; 61 L.T. 832; 38 W.R. 3; 5 T.L.R. 697, C.A.; 39 Digest 254, 378.
- (4) *Smelling Co. of Australia v. I.R. Comrs.*, [1897] 1 Q.B. 175; 66 L.J.Q.B. 137; 75 L.T. 534; 61 J.P. 116; 45 W.R. 203; 13 T.L.R. 84, C.A.; 36 Digest (Repl.) 824, 1804.
- (5) *Stamps Comr. v. Hope*, [1891] A.C. 476; 60 L.J.P.C. 44; 65 L.T. 268; sub nom. *New South Wales Stamps Comr. v. Hope*, 7 T.L.R. 710, P.C.; 8 Digest (Repl.) 546, 26.
- (6) *A.-G. v. Dimond* (1831), 1 Cr. & J. 356; 1 Tyr. 243; 9 L.J.O.S.Ex. 90; 145 E.R. 1458; 21 Digest (Repl.) 181, 1070.

Also referred to in argument :

- Re Wright* (1855), 11 Exch. 458; 156 E.R. 911; sub nom. *Wright v. I.R. Comrs.*, 25 L.J.Ex. 49; 39 Digest 255, 389.
- Cooper v. Metropolitan Board of Works* (1883), 25 Ch.D. 472; 53 L.J.Ch. 109; 50 L.T. 602; 32 W.R. 709, C.A.; 43 Digest 79, 833.
- Churton v. Douglas* (1859), John. 174; 28 L.J.Ch. 841; 33 L.T.O.S. 57; 5 Jur.N.S. 887; 7 W.R. 365; 70 E.R. 385; 43 Digest 78, 823.
- Re Kilchin, Ex parte Pannett* (1880), 16 Ch.D. 226; 50 L.J.Ch. 212; 44 L.T. 226; 29 W.R. 129, C.A.; 43 Digest 79, 827.
- Trego v. Hunt*, [1896] A.C. 7; 65 L.J.Ch.1; 73 L.T. 514; 44 W.R. 225; 12 T.L.R. 80, H.L.; 43 Digest 9, 44.
- West London Syndicate v. I.R. Comrs.*, [1898] 2 Q.B. 507; 67 L.J.Q.B. 956; 79 L.T. 289; 47 W.R. 125; 14 T.L.R. 569; 42 Sol. Jo. 714, C.A.; 39 Digest 278, 626.
- I.R. Comrs. v. Glasgow and South Western Rail. Co.* (1887), 12 App. Cas. 315; 56 L.J.P.C. 82; 57 L.T. 570, P.C.; 11 Digest (Repl.) 249, *785.
- Pile v. Pile, Ex parte Lambton* (1876), 3 Ch.D. 36; 45 L.J.Ch. 841; 35 L.T. 18; 24 W.R. 1003, C.A.; 11 Digest (Repl.) 288, 1936.
- Crutwell v. Lye* (1810), 1 Rose, 123; 17 Ves. 335; 34 E.R. 129; 43 Digest 84, 880.
- Chissum v. Deves* (1828), 5 Russ. 29; 38 E.R. 938; 43 Digest 77, 818.
- Robertson v. Quidjington* (1860), 28 Beav. 529; 54 E.R. 469; 43 Digest 87, 920.
- Austen v. Boys* (1858), 2 De G. & J. 626; 27 L.J.Ch. 714; 31 L.T.O.S. 276; 4 Jur.N.S. 719; 6 W.R. 729; 44 E.R. 1133, L.C.; 43 Digest 78, 822.
- Kennedy v. Lee* (1817), 3 Mer. 441; 36 E.R. 170, L.C.; 43 Digest 81, 862.
- A.-G. v. Bouwens* (1838), 4 M. & W. 171; 1 Horn. & H. 319; 7 L.J.Ex. 297; 150 E.R. 1390; 21 Digest (Repl.) 181, 1072.
- Walker v. Mottram* (1881), 19 Ch.D. 355; 51 L.J.Ch. 108; 45 L.T. 659; 30 W.R. 165, C.A.; 43 Digest 83, 872.

Hegarty v. Milne (1854), 14 C.B. 627; 2 C.L.R. 779; 23 L.J.C.P. 151; 18 Jur. 496; 139 E.R. 258; sub nom. *Petergate v. Milne*, 23 L.T.O.S. 78; 2 W.R. 373; 39 Digest 266, 498.

K. Iner v. Kalkh (1863), 15 C.B.N.S. 35; 143 E.R. 695; 17 Digest (Repl. 217, 164.

Appeal by the Commissioners of Inland Revenue from a decision of the Court of Appeal (A. L. SMITH, HENN COLLINS, and VAUGHAN WILLIAMS, L.JJ.), reported 1900, 1 Q.B. 310, reversing an order of the Queen's Bench Division (DAY and LAWRENCE, JJ.).

One Muller, who carried on the business of a manufacturer of margarine at Gildershaus, in Germany, under the style or firm of Muller & Co., wished to sell his business there with all that appertained to it. He gave to one Newman an option of purchase which Newman transferred to a syndicate in this country. The syndicate formed a company under the Companies Acts, called Muller & Co.'s Margarine, Ltd., to take the purchase off their hands. On Oct. 4, 1897, an agreement was made between Muller and the company for the sale and purchase of the business, the agreement being executed by Muller abroad and by the company in England. In it, though the price was a lump sum of £122,500, in addition to the ascertained value of the stock-in-trade, the subject of the sale was described under different headings, one of which was in the following terms :

"The goodwill of the said business, with the exclusive right to use the name of Muller & Co. as part of the name of the company, and to represent the company as carrying on the said business in continuation of the vendors and in succession to them."

The Crown claimed stamp duty on the value of the goodwill and on the value of the pending contracts of Muller & Co., and the appellants found that the proportion of the total purchase money applicable to those subjects of sale was £77,418 and assessed the duty at the rate of 10s. per cent.—viz., £387 5s. in addition to a fixed duty of 10s. in respect of other matters not chargeable with ad valorem duty. The claim was allowed by the Divisional Court and disallowed by the Court of Appeal, and the Commissioners appealed.

By s. 59 (1) of the Stamp Act, 1891 :

"Any contract or agreement *made in England* . . . for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property except lands, tenements, hereditaments, or heritages, or property locally situate out of the United Kingdom . . . shall be charged with the same ad valorem duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the . . . property contracted or agreed to be sold."

The words in italics were repealed by the Revenue Act, 1909.

The Attorney-General (Sir Robert Finlay, K.C.) and Rowlatt (Danckwerts, K.C., with them) for the appellants.

A. T. Lawrence, K.C., and W. C. Compton Smith for the respondents.

Their Lordships took time for consideration.

May 20, 1901. The following opinions were read.

LORD MACNAGHTEN.—In this case your Lordships have listened to an interesting disquisition on the subject of that which is commonly called goodwill. Most, if not all, of the many cases touching upon that subject have been cited at the Bar with the view of satisfying your Lordships that the goodwill of a foreign business, which was confined within certain known and narrow limits on the Continent and apparently never had a single customer in this country, cannot be described as "property locally situate out of the United Kingdom." One Muller, who

carried on the business of a manufacturer of margarine at Gilderhaus, in Germany. A under the style or firm name of Muller & Co. was intended to sell his business there with all that appertained to it. He gave an option of purchase to one Newman. Newman, or the person for whom Newman was acting, transferred that option to a syndicate. The syndicate founded or formed a company called Muller & Co.'s Margarine, Ltd., to take the purchase off their hands. On Oct. 4, 1887, an agreement in which the intermediaries were joined, was made between Muller and the company for the sale and purchase of the business. The agreement was executed by Muller abroad and by the company in England. In it, though the price was a lump sum, in addition to the ascertained value of the stock in trade, the subject of the sale is split up and described under different headings, one of which is in the following terms:

"The goodwill of the said business, with the exclusive right to use the name of Muller & Co., as part of the name of the company, and to represent the company as carrying on the said business in continuation of the vendors and in succession to them."

There are two questions in the case:—(i) Was this agreement made in England? and (ii) Was the goodwill of this business property "locally situate out of the United Kingdom?" As to the first question I do not think that there can be any difficulty. It seems to me that according to the true construction of the Stamp Act, 1891, an agreement is made in England if it is executed in England by a party to the agreement, whose execution is required to make the instrument on the face of it complete and perfect. The argument that because s. 59 of the Act speaks of an agreement for sale and not of an agreement for sale and purchase, regard is only to be had to the execution by the vendor, is, in my opinion, too refined to be substantial. I think that the agreement was made in England and not the less so because it may also be described with equal propriety as made abroad.

I now come to the second point. It was argued that if goodwill be property, it is property having no local situation. It is very difficult, as it seems to me, to say that goodwill is not property. Goodwill is bought and sold every day. It may be acquired, I think, in any of the different ways in which property is usually acquired. When a man has got it he may keep it as his own. He may vindicate his exclusive right to it if necessary by process of law. He may dispose of it if he will, of course, under the conditions attaching to property of that nature. Then comes the question: Can it be said that goodwill has a local situation within the meaning of the Act? I am disposed to agree with an observation thrown out in the course of the argument that it is not easy to form a conception of property having no local situation. What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates. Goodwill is composed of a variety of elements. It differs in its composition in different trades and in different businesses in the same trade. One element may preponderate here and another element there. To analyse goodwill and split it up into its component parts, to pare it down as the commissioners desire to do until nothing is left but a dry residuum ingrained in the actual place where the business is carried on while everything else is in the air, seems to me to be as useful for practical purposes as it would be to resolve the human body into the various substances of which it is said to be composed. The goodwill of a business is one whole, and in a case like this it must be dealt with as such.

For my part I think that if there is one attribute common to all cases of goodwill, it is the attribute of locality. For goodwill has no independent existence. It

cannot subsist by itself. It must be attached to a business. Destroy the business, and the goodwill perishes with it, though elements remain which may perhaps be gathered up and be revived again. No doubt, where the reputation of a business is very widely spread, or where it is the article produced rather than the producer of the article that has won popular favour, it may be difficult to localise goodwill. But here, I think, there is no difficulty. We have it in evidence that the firm of Muller & Co. had no customers out of Germany, and it is a significant fact that the protected area—the limit within which the vendor is prohibited from setting up in business—is the limit of fifty miles from Gilderhaus. Moreover, under the Stamp Act, 1891, we are not required to define the local situation of the goodwill. We have only to determine whether it is or is not situate out of the United Kingdom. Surely if there was an agreement made in England for the sale of a local German newspaper the circulation of which did not extend beyond a limited district in Germany, no one would doubt that the goodwill of that business was locally situate out of the United Kingdom, and so it must be, I think, in the present case. I am, therefore, of opinion that the decision of the Court of Appeal is right and ought to be affirmed, and I move your Lordships accordingly.

LORD DAVEY.—The questions on this appeal arise on the construction of a few words in s. 59 (1) of the Stamp Act, 1891. By an agreement of Oct. 4, 1897, the goodwill of a business carried on in Germany, together with the factory and buildings in which the business was carried on, and all the plant, machinery, apparatus, rolling stock, and chattels employed in the business except stock-in-trade, and all pending contracts and orders in connection with the business, books of account, documents, and papers, were sold for a lump sum to the respondents—who are an English company. The principal question is whether the goodwill so sold was either wholly or partially “property situate out of the United Kingdom” within the meaning of the exception in the section referred to.

But other subsidiary points have been argued to which I will first address a few remarks. First it was said that the agreement was not made in England because the vendors executed it in Amsterdam. It was not, however, a completed agreement for purchase and sale till it was executed by the purchasers, and that was done in England. It was argued that the acceptance by the purchasers might have been proved by oral evidence, which is true. But what we have to deal with is the document in which the acceptance by the purchasers was expressed by the execution of it in this country.

Another point made was on the construction of the section. It was suggested that the word “property” ought to be read as *ejusdem generis* with the words which immediately precede it—viz., “lands, tenements, hereditaments, or heritages”—and to be confined to real property. The first observation which occurs to one is that if such had been the intention it would have been very easy to have expressed it, to have said “real property.” But the word “property” occurs in two places in the earlier part of the section. It is there used in its widest sense as meaning property of every description, and I can find no sufficient reason in the context for thinking that it is used in a more restricted sense in the passage in question. The clause is drawn in rather a confused manner. The material words are “any contract or agreement . . . for the sale of any estate or interest in any property except lands, etc.” or “property locally situate out of the United Kingdom or goods, etc.” Whatever the word “property” means in the words imposing the duty, I think it must mean in the words of exception. It is not disputed that property in its wider sense may include whatever rights or benefits pass under the term “goodwill.”

I pass now to the principal question which has been argued—viz., whether goodwill can be said to be situated outside the United Kingdom or to have any local situation. A more accurate way of stating the question would, in my opinion, be whether the goodwill which is comprised in this contract has a locality for the

purpose of the Stamp Act. The subject of the contract is the sale of a going concern of a German manufacturing and commercial business carried on by a German in Germany, with the buildings in which the business is carried on, and all the plant, etc., necessary for carrying it on. It does not appear to me that the mention of goodwill adds anything to that which would be included in a sale of the business. What rights pass to the purchaser of the goodwill, in my opinion, depend *primæ facie* on the German law, but the parties have to a certain extent defined them for themselves as

"the exclusive right to use the name of Müller & Co. as part of the name of the company and to represent the company as carrying on the real business in continuation of the vendors and in succession to them."

And they have protected the purchaser by the vendor's covenant not to carry on the business of manufacturer of margarine at any time thereafter within fifty miles of the business premises. It is said that the purchaser might remove the business, *viz.*, to England. Whether he could do so and still retain the right conferred by the contract is, in my opinion, a question of German law. It seems to me, however, immaterial whether he can do so or not, because, I repeat, this business was at the date of the contract in Germany. What we have to look at is the state of things at the date of the contract, and the possibility of its removal no more affects the question than if it were a valuable chattel such as a picture or a statue. The position taken up by the Attorney-General was a singular one, and somewhat embarrassing to persons who have to stamp their contracts. He admitted that, so far as the goodwill was attached to the business premises and thereby enhanced their value, he did not assert that an *ad valorem* stamp should be affixed in respect of that value. But I am not aware that you can split up goodwill into its elements in that way, and I see great difficulty in doing so. The term "goodwill" is nothing more than a summary of the rights accruing to the respondents from their purchase of the business and property employed in it. As that business and property undoubtedly had their local habitation in Germany at the date of the contract, I have no difficulty in the conclusion that the Court of Appeal were right, and this appeal ought to be dismissed. I do not find it necessary to say anything about the numerous cases which were referred to in the course of the argument, because, in my opinion, they have no direct bearing on the case. Nor do I express any opinion on the abstract question whether an incorporeal right can have a local situation beyond saying that I am not impressed with the difficulty of holding that it may have one for revenue purposes in analogy to the decisions in the probate cases.

LORD JAMES OF HEREFORD.—I share the view that the decision of the Court of Appeal is correct, and that this appeal should be dismissed. For the reasons already given, I think the contention of the Crown, that this contract was made in England, correct. The principal question for decision by your Lordships no doubt afforded great opportunity for ingenious argument, but that question can, I think, easily enough be solved by the application of mere common sense.

The question whether the agreement for the sale of the goodwill of a manufacturing business should be charged with an *ad valorem* stamp under the Stamp Act, 1891, depends upon the application of the words of that Act to certain facts existing in this case. The business sold was a wholesale manufacturing business carried on in buildings situated at Gilderhaus, in Germany. All the stock and plant of the company were on these premises. All the customers of the company were resident in Germany. As the Stamp Act imposes no duty on agreements referring to property locally situated out of the United Kingdom, the question arises: Where is the goodwill of this business to be found? I would premise that, in my view, no substantial difference can be established between the words "locally situated" and the word "situated." It is admitted that goodwill is property within the Act, and the Act assumes that the property, *primæ facie* all the property mentioned in the Act, may

A is situated out of the United Kingdom. In this case we have a business in respect of which a goodwill exists. This business, without doubt, lies abroad. It cannot be otherwise, for buildings, plant, manufacture, trade, residence of customers, are all in Germany. And this business, locally situated out of the United Kingdom, has a goodwill attached to it. It is difficult to separate them—certainly out of the business the goodwill springs, and its value depends entirely upon the local existence of the premises and the manufactory—and the existence and action of more or less local customers. The parties to the agreement certainly attached value to the continuance of the business in the locality, for the vendor contracted not to carry his business on within fifty miles of the existing buildings.

I entirely dissent from the view that the goodwill of a business, either wholesale or retail, cannot be locally situated. On the contrary, I should say that the goodwill of most businesses is locally situated. There may be exceptions, but this case is not one of them, and I, therefore, think that no stamp duty is chargeable upon that part of the agreement which refers to the goodwill of the business sold, and that the decision of the Court of Appeal should be affirmed.

D **LORD BRAMPTON.**—By the Stamp Act, 1891, s. 59 (1), it is enacted that

E “Any contract or agreement made in England . . . for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property, except lands, tenements, hereditaments, or heritages, or property locally situate out of the United Kingdom . . . shall be charged with the same ad valorem duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold.”

Before dealing with the contents of the instrument sought to be charged with the stamp duty in this case, I think it desirable to describe, in a few words, the relative positions of the parties to it. Wolf Muller (the vendor) carried on, under the style of Muller & Co., at Gilderhaus, in Germany, the business of a manufacturer of margarine. One Newman, as a trustee for Wigley, acquired from Muller the right to purchase the said business and the assets thereof for a sum of £80,000, exclusive of the stock-in-trade and book debts, which were to be taken on a valuation. Subsequently Newman, with the sanction of Wigley, agreed to make over his rights to a syndicate, and the syndicate afterwards arranged to sell its rights of purchase to the respondent company, which, before the contract in question was made, had been incorporated under the Companies Acts, 1862 to 1893. To put this arrangement in the form of a written agreement, the instrument in question, which bears date Oct. 4, 1897, was prepared, the above-named persons and company being all parties to it, Wolf Muller being described as “the vendor,” and the respondent company (called the company) being treated as the purchaser, the others, Newman, Wigley, and the syndicate being joined for the mere purpose of testifying their concurrence.

I By the first article of the instrument it was agreed that the vendor by the direction of the three intermediate parties should sell, and the company should purchase, as from June 1 then last: First, the goodwill of the said business, with the exclusive right to use the name of “Muller & Co.” as part of the name of the company, and to represent the company as carrying on the said business in continuation of the vendor, and in succession to him. Secondly, all the freehold hereditaments specified in the first schedule thereto, and therein described as

“all those four acres of land with the factory and buildings erected thereon, situate in the parish of Waldseil, in the community of Gilderhaus, Hanover, Germany; also all those two houses situate in the Bahnhof Strasse, at Gilderhaus aforesaid.”

A description of the remainder of the property made the subject of the agreement is not material to this case. The price to be paid by the vendor was £122,500, which included the profit made by the intermediate parties. That sum was not divided and appropriated part to the goodwill, and part to the buildings, &c., but they were treated as one subject of sale. The purchase was to be completed on or before Nov. 22, 1897, and possession to be then given, and in the meantime it was to be retained by the vendor, who during that time was to carry on the same business as a going concern; and he declined to have been so carrying it on as from June 1 on behalf of the company. By cl. 11 the vendor bound himself not to carry on the business of a margarine manufacturer within fifty miles of the said freehold premises, with one exception, immaterial to be stated. The agreement was executed under seal by the vendor, and by Newman and Wigley at Amsterdam, and afterwards by the syndicate and by the purchasing company under their respective common seals in England.

Upon this state of things the first question raised is whether this instrument of agreement was made in England, for upon it and it alone, if at all, can the stamp duty now sought to be imposed, be charged. If the question were in which country was the instrument executed, the only possible truthful answer would be partly in Holland and partly in England. But when the question is: Where was the contract made? one is driven to say it was not in Holland, for while in that country, though it was then signed and sealed by the vendor and two of the intermediates, it lacked the execution of the syndicate and of the purchaser, which was essential to its validity as a contract. It only became a perfect contract when the purchasing company and the syndicate affixed their respective common seals to it. It was suggested, however, that there must have been an oral contract made in Germany before the written instrument was prepared, but that would not assist the respondent company, for it is only the written instrument which requires to be, or is capable of being stamped. I may add that by the Stamp Act the duty is to be paid by the purchaser, and the written instrument could not bind the purchasing company until it was executed by that company's common seal. So far as the contract by the purchasers was concerned it was entirely made in England. For these reasons I have no hesitation in answering the first question in the affirmative, in favour of the Crown.

As to the second question, I think it very clear that no equitable estate or interest in the property was ever vested in either Newman, Wigley, or the syndicate. The whole interest, both legal and equitable, remained in the vendor until the rights of option to purchase were exercised by the intermediate parties in the manner hereinbefore described and carried out by the written contract. This question, therefore, must be answered in the negative against the Crown.

The remaining question is whether the goodwill of the business, sold as it undoubtedly was in one contract, and as part of one subject-matter of sale, with the buildings, houses, and land in and upon which the business was carried on by the vendor, was property locally situate out of the United Kingdom. I think it was. Whether the goodwill and the land and the factory are rightly to be treated as combined and inseparable, or as separated from each other, each is undoubtedly property within the meaning of the Stamp Act, and has been decided so to be by a long string of cases, of which I will only mention that of *Potter v. I.R. Comrs.* (1). Granting that a goodwill is property, the question still remains: Was the goodwill in this case, when it was purchased by the company, "property locally situate out of the United Kingdom"? The answer to this depends, in my judgment, upon whether at the time of the making of the written contract the goodwill was attached to and incorporated with the business premises, and formed in the hands of the then vendor an inseparable property, very valuable in its combination as giving to the premises a character and an increase of value which, stripped of the goodwill, they would not have possessed, and which represents the value of the profit-earning quality of those premises, when and so long as they are used by the then

A occupier, for carrying on in them the business he had created within them by reason of the attraction of customers from any of those causes which tend to make a prosperous business, for that is what the vendor had to sell, and sold, and the question must be determined having regard to the time when the contract of sale was made, and not regarding anything the vendee might think fit to do with them in the future.

B This word "goodwill," when used in connection with the sale and purchase of a trade, must, I think, be interpreted according to its popular acceptance. Taken in its strictest sense "goodwill" would hardly be a saleable commodity at all. I do not say that there may not be such a thing as a goodwill of a business utterly unconnected with the buildings in which the business has been previously carried on, for it is quite possible that a man retiring from business might wish to retain the buildings for his own private use, and sell merely the goodwill, but, as was pointed out by POLLOCK, C.B., in *Potter's Case* (1), there is a wide difference between the sale of a goodwill together with the buildings in which the trade is then carried on, whereby the value of the buildings is enhanced, and the sale of a goodwill without any interest in land or buildings connected with it, which is merely the advantage of the recommendation of the vendor to his connections and customers, and his covenant to allow the vendee to use his trade name, and to abstain from competition with him. In the first of these cases the trade and the buildings are inseparable so long as the trade is therein carried on. The advantages and facilities constituting the goodwill are all more or less derived from them, or the profitable results of such goodwill are therein realised. The goodwill of a trade carried on in a shop is as essential to the tradesman as the shop itself, which is benefited by it. What is the trade of a shop but the business done in it, and how is that custom brought to the shop but by the goodwill attached to it? The combination of a suitable shop with the trade done in it, and the goodwill inducing that trade, seem to me to be inseverable.

F In my judgment, it matters not whether the business be a manufacturing one, or that of a shopkeeper, or a publican, or a brewer; in each case the seller of his business premises with his goodwill sells, and the purchaser buys, the outgoing man's premises, with, so far as in him lies, the whole business carried on therein as a going concern, with the same prospects the vendor himself would have had had he continued it; and I think it immaterial whether the business has been built up by reason of the personal good qualities of the outgoer, the goodness of his wares or merchandise, the good situation of the buildings, or the absence of competition. G In each case the business and custom, in fact, have been attracted to the house or buildings, and, when the incomer takes possession, he takes all the chances offered, and conveyed to him by his purchase, of standing, so far as the business is concerned, in the shoes of the outgoer, and he must rely upon his own good qualities and aptitude for his undertaking to continue the prosperity of the business and profit by his bargain. Dealing with an argument touching an injury to the custom of a public-house, LORD WESTBURY in *Ricket v. Metropolitan Rail. Co. (Directors, etc.)* (2), says (L.R. 2 H.L. at p. 204):

I "It is a fallacy, almost a mockery, to answer; 'the custom is one thing and the house another, and the injury is to the custom, not to the house.' You cannot sever the custom from the house itself or from the interest of the occupier, for the custom is the thing appertaining to the house, which gives it its special character, and constitutes its value to the occupier."

In short, as was observed by the Court of Exchequer in the same case, "the goodwill is part of the value of the property." The judgment of LORD ESHER in *I.R. Comrs. v. Angus* (3) is to the same effect.

It must not for a moment be imagined that these observations are intended to affect in the least degree the present mode of assessing for sale or compensation purposes, the value of buildings to which a goodwill is attached. In this case

the business sold was continued, and its reputation was made and established in these buildings and nowhere else. The margarine and butter substances have all been there manufactured at this factory; all the orders of customers, for the most part resident in Germany, have been received at it, and from it the manufactured commodities have been delivered. I care not to enquire into the reasons for its success, for there is the business, consisting of goodwill, and buildings combined, for which in their combination the vendors voluntarily consented to pay the large sum of money mentioned in the contract. The vendors may, of course, deal as they please with the future of that which they have bought. We have only to deal with it as it stood at the time of the sale. I cannot understand how that business goodwill so attached can be treated or spoken of as being otherwise than locally situate in Germany. I think that the judgment of the Divisional Court was rightly reversed by the Court of Appeal, and that this appeal should be dismissed with costs.

LORD ROBERTSON.—I am bound to say that on the main question argued, my judgment, which is against the appellants is dependent on a fact which does not appear in the Stated Case, but the learned Attorney-General argued upon the assumption that it is true, as stated by the respondents' solicitors in their letter of Dec. 14, 1897 (in answer to a categorical question of the Board of Inland Revenue), that "the whole of the regular customers" (of Muller) "are resident within the country in which Gilderhaus is situated—namely, Germany—and that there is no trade whatever transacted outside the latter country." When this is taken along with the fact that the manufactory and, so far as appears, the office were at Gilderhaus, the case is, so far as facts are concerned, as compact and free from complication as any case could be which gives rise to the present question. So far as the seat of trade, and so far as the trade itself are concerned, everything is out of the United Kingdom, and of nothing connected with the trade can it be predicated in any sense whatever that it was not out of the United Kingdom. This consideration seems to me to lift the case clean over such questions and phrases as whether the goodwill is attached or affixed to the manufactory. I do not accede to the view that the goodwill is affixed or attached to the manufactory. Supposing that the products of the manufactory were all exported to England and sold to English customers, I should find it difficult to hold that the goodwill was out of England merely because the manufactory was. The application of the words "locally situate" would then present a different question requiring, I should think, a different answer. Again, if the facts as to the distribution of the products were more complicated, as, for example, if the trade were diffused over England and other countries, then the location of the goodwill would be a more complex, although I do not by any means think an insoluble problem. I confess that I find no repugnancy in affirming of the goodwill of a business that it is locally situate somewhere. It is, I should say, locally situate within the geographical limits which comprehend the seat of the trade. That sounds like a very cautious statement, and fortunately it is enough for the present question. It seems to me that in the statute the distinction drawn is between what from a British point of view we should call British property and foreign property, and the goodwill of a business which begins and ends abroad is, I think, property locally situate outside the United Kingdom. On the point as to the place of the execution of the agreement, I have nothing to add.

LORD LINDLEY.—Before addressing myself to the main controversy in this case I will say a few words on one or two minor points arising on the construction of s. 59 of the Stamp Act, 1891. It was said that the agreement for sale in this case was not made in England, because the selling company signed it abroad and the purchasing company signed it in this country. Until the purchasing company signed it there was no written agreement, but only an offer to sell, the document

A was made complete as a contract for sale by what was done in this country, and I have no doubt, therefore, that s. 59 applied to it. Then comes the question whether the word "property" in the exception is confined to real property or extends also to personal property. In my opinion, it includes personal property. Property is used in the widest possible sense in the earlier part of the section, and it appears to me to be used in the same sense when repeated in the exception. The words "lands, tenements, and hereditaments" themselves exhaust real property, and the introduction after them of the word "property" shows that something more is to be excepted. Nothing more can be suggested which is ejusdem generis, and nothing but personal property remains. Upon this point my own opinion coincides with that of RIGBY, L.J., in *Smelting Co. of Australia v. I.R. Comrs.* (4).

But even if the word "property" in the exception extends to corporeal personal property which can have a local situation, it is contended that incorporeal property, such as goodwill, cannot be said to be locally situate anywhere, and cannot, therefore, fall within the exception. This is the main contention of the appellants. It is necessary to deal with it, as it has not been contended that goods, wares, and merchandise cover goodwill, and if goodwill is to be excepted it must be because it is property locally situate abroad. Goodwill regarded as property has no meaning except in connection with some trade, business, or calling. In that connection I understand the word to include whatever adds value to a business by reason of situation, name and reputation, connection, introduction to old customers, and agreed absence from competition, or any of these things, and there may be others which do not occur to me. In this wide sense goodwill is inseparable from the business to which it adds value, and, in my opinion, exists where the business is carried on. Such business may be carried on in one place or country or in several, and, if in several, there may be several businesses, each having a goodwill of its own. That in some cases and to some extent goodwill can and must be considered as having a distinct locality is obvious, and was not in fact disputed. The goodwill of a public-house or of a retail shop is an instance. The goodwill of a business usually adds value to the land or house in which it is carried on if sold with the business, and, so far as the goodwill adds value to land or buildings, the goodwill can only be regarded as situate where they are. In such a case the goodwill is said to be annexed to them.

This consideration alone would, in my opinion, suffice for the determination of this case, for the factory, business, and goodwill were all sold together for a lump sum, and I do not myself see why the goodwill should be dealt with as having value apart from the factory. But even if the goodwill in the case before us can be properly regarded as to some extent separable from the factory, I still think that it must be treated as locally situate abroad. The goodwill sought to be taxed is that of a manufacturer of margarine. His business was to manufacture and sell; his factory was in Germany. The owner was a German living in Germany; he had no agency or place of business abroad; his customers were all in Germany, and his business, so far as selling was concerned, was a wholesale and not a retail business. He covenanted not to carry on business within fifty miles of the old place. If, therefore, the goodwill of a wholesale manufacturer can be regarded as situate anywhere, the goodwill in this case can only be regarded as situate in Germany. Not one of its elements is, or can possibly be regarded, as situate anywhere else. The contention for the Crown was that some part of the goodwill—viz., such part of it as did not simply enhance the value of the land and buildings of the factory—could not be regarded as situate anywhere, and was, therefore, liable to stamp duty. This view, if sound, would be very embarrassing to buyers and sellers, who have to see that they stamp their agreements properly.

But the view contended for is, in my opinion, quite untenable. Goodwill is only taxable as property; and the legal conception of property appears to me to involve the legal conception of existence somewhere. Incorporeal property has no existence in nature, and has, physically speaking, no locality at all. We, however,

are dealing not with anything which in fact fills a portion of space, but with a legal conception, or, in other words, with rights regarded as property. But in talk of property as existing nowhere it is too language which to me is unintelligible. The authorities which bear upon the locality of incorporeal personal property for purposes of probate appear to me to afford the best guide for the solution of the case before us. Those cases tend strongly to show that for purposes of probate, good-will, except so far as it merely enhances the value of lands and hereditaments, must be regarded as personal property situate somewhere, and if this were a probate case I do not suppose that anyone would say that the goodwill with which we have to deal would be regarded as in any sense situate in this country. *Stamps Comr. v. Hare* (5), in which the locality of debts for probate purposes is considered, contains some valuable general remarks on the subject, but there is nothing in that case which conflicts with the view I take of this goodwill. It may, perhaps, be true that property which has no physical existence may, if necessary, be treated for some purposes as in one locality, and for other purposes as in some other locality. But, until the necessity for so treating it is apparent, I see no justification for introducing confusion by judicially holding the same property to be legally situate in two different places at one and the same time. But this confusion would be introduced if your Lordships were to decide that the analogy of probate cases was to be no guide in dealing with liability to stamp duty.

I am not aware of any case in which goodwill, as property, has been treated as having no locality for legal purposes. *Smelting Co. of Australia v. L.R. Comrs.* (4), so much relied upon by counsel for the Crown, was not a case of goodwill at all. The property then in question was not the goodwill of a business, but a share in an Australian patent and a licence to use the same in Australia. This share and licence belonged to an English registered company, which agreed to sell it to another English company, and the question was whether the instrument of agreement required a stamp. The court decided that the share and licence were property, and came within the first part of s. 59 (1), of the Stamp Act, 1891. But they held that such property could not be regarded as locally situate abroad. LORD ESHER, M.R., and LOPES, L.J., considered that incorporeal personal property could not be said to be situate anywhere. This is, of course, true, physically speaking, but not, I think, in contemplation of law. RIGBY, L.J., did not adopt the reasoning of the other members of the court. He referred to the probate decisions, but he considered that, as the property was saleable and sold in this country, it could not be regarded as locally situate out of it. I am not myself able to adopt this conclusion arrived at by RIGBY, L.J. Any property situate anywhere can be agreed to be sold or purport to be sold in any other country, and the test of locality relied upon by the lord justice was not, I think, the true one. The patent was not assignable without registration in Australia, and the view of the lord justice is, I think, opposed to *A.G. v. Dimond* (6), the case of French Rentes. Be this as it may, in the Australian patent case the court was not dealing with the goodwill of a foreign manufacturing business, and it would be wrong, I think, to treat the decision as governing the case before us. In my opinion, the decision appealed from ought to be affirmed, and the appeal be dismissed with costs.

THE EARL OF HALSBURY, L.C.—I regret to say I am unable to concur in the view which has found favour with your Lordships in this case. The goodwill of a business is what the word itself expresses, although the concurrence of so many of your lordships leads me to doubt what I should otherwise have had no doubt upon. The advantages which may be conferred upon a business either by its local situation or by its attractive appearance have nothing to do with the goodwill although they may have originally contributed to procure it, and may, to some extent be connected with the nature of the business, which itself, however, is a different thing. "The goodwill thereof" is a thing which can be assumed to exist separately. Like every other thing which suggests one simple idea, it is difficult,

A if not impossible, to define it. The right to trade under the name of a firm which has acquired a reputation is not confined to a particular locality or to any particular buildings. The right would remain if the business were transferred to another site elsewhere, or if the buildings were entirely altered. In the case of a public-house, owing to the convenience of its situation and its being known as a favourite place of resort, the advantages of its situation are so mixed up with the goodwill of the business that, as a matter of fact, it may well be that it is very difficult to sever them, and to say how much is goodwill and how much is local situation. But these difficulties of fact will not necessarily make their separate existence impossible. In compensation cases, for instance, where a man is being turned out of his holding, and has to be put into the same position so far as compensation can do it, by money which is to be awarded to him, it is unnecessary to regard any such severance into the different elements which make up the advantages of his holding. He is to be compensated for the loss which he has sustained by the alteration of his premises or the removal of his trade from those premises, and for the extent to which his business may be injured under the circumstances, and it would be quite unnecessary to consider how much he is to be allowed for each element, because he is, so far as the tribunal can do it, to be placed in the same position as he was in before. The illustrations which are given of businesses, for instance the business of a local newspaper, seem to me not to touch the question. It may be very probable that in such a case there would be no goodwill of the business, or very little, but the mere fact that the business was practically, or altogether, local, would not make the goodwill of the business simply local, unless by the contract of sale it was confined to a particular spot. In the particular case now under review the vendors would not be entitled to come to this country and set up a business here under that name and claim the goodwill of customers who might have been brought together in Germany. The right to the goodwill was absolutely transferred to the vendees here. I think that, if, in order to ascertain what would be the rights of the parties, one looked at the contract apart from any question arising as to the limit of fifty miles, one would see that the thing transferred was the goodwill of that business, whatever it consists of—that would be in every part of the world. The question whether it would be worth the while of the parties to transfer it is a question quite beside that which in point of law constitutes goodwill. I am wholly unable to see that goodwill itself is susceptible of having any local situation. In my opinion, therefore, the decision of the Court of Appeal ought to be reversed; but, as the majority of your Lordships take a different view, the appeal will be dismissed and the judgment of the Court of Appeal affirmed.

Appeal dismissed.

Solicitors : *Solicitor of Inland Revenue ; H. A. Graham.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

JANSON *v.* DRIEFONTEIN CONSOLIDATED MINES LTD.

[House of Lords (The Earl of Halsbury, L.C., Lord Macnaghten, Lord Shand, Lord Davey, Lord Brampton, Lord Robertson and Lord Lindley, May 9, 13, 15, 16, August 5, 1902)]

[Reported [1902] A.C. 484; 71 L.J.K.B. 857; 87 L.T. 372; 51 W.R. 142; 18 T.L.R. 796; 7 Com. Cas. 268]

Contract—Illegality—Public policy—New heads of public policy not to be created by the court—Assistance to enemy—Contract entered into and performed while war imminent and in contemplation of war, but before outbreak.

Insurance—Policy—Illegality—Assistance to enemy—Policy entered into while war imminent and in contemplation of war, but before outbreak.

It is not left at large to the courts to find that a particular contract is against public policy. The court cannot invent a new head of public policy. Contracts of various kinds have been either enacted or assumed by the common law to be unlawful, and in cases where this question is raised the judge must decide whether the facts found do or do not come within a head of public policy recognised by the law. A contract which assists the King's enemies, as, e.g., a contract between a British subject and an alien enemy, the performance of which would benefit the enemy, is unlawful as being against public policy, but to render a contract illegal and void on this ground war must actually exist at the time of the creation of the contract or its fulfilment. It is not sufficient that the contract was entered into when there were strained relations between Great Britain and the foreign Power of which the alien enemy was a subject, in contemplation of the imminence of war and the assistance of the alien enemy when war came. The probability of war cannot have the same effect for this purpose as war itself.

A foreign government seized a quantity of gold, the property of one of its subjects, during the course of its transit from the foreign State to England. At the time of the seizure war was imminent between the foreign State and the United Kingdom, and the gold was seized with a view to its use for the purposes of the war, which was declared shortly afterwards. The gold was insured with underwriters in London under a policy which covered risk of seizure. In consequence of the seizure the gold was totally lost to the insured.

Held: as a state of war did not exist at the time of the seizure, it was not contrary to public policy that the contract of insurance should be enforced, and, therefore, the underwriters were liable.

Notes. Considered: *Amorduct Manufacturing Co. v. Dajries*, [1914], 84 L.J.K.B. 586; *Porter v. Freudenberg*, [1914-15] All E.R. Rep. 918; *Zinc Corpn., Ltd. v. Aron Hirsch und Sohn*, [1914-15] All E.R. Rep. 487. Applied: *Horwood v. Miller's Timber and Trading Co.*, [1916] 2 K.B. 44. Considered: *Dunlop Co. v. Continental Tyre and Rubber Co. (Great Britain)*, [1916-17] All E.R. Rep. 191; *Rodriguez v. Speyer Bros.*, [1918-19] All E.R. Rep. 884; *Fender v. Midland*, [1937] 3 All E.R. 402; *Apt (otherwise Magnani) v. Apt*, [1947] 1 All E.R. 620. Referred to: *Re Sutherland, Bechoff, David & Co. v. Balme* (1915), 31 T.L.R. 248; *Ingle v. Mannheim Insurance Co.*, [1915] 1 K.B. 227; *Robinson v. Continental Insurance Co. of Mannheim*, [1915] 1 K.B. 155; *Archbold Kuhn & Co. v. Blythe, Green, Jourdain & Co.*, *Schneider v. Burgett and Neusem*, [1916] 1 K.B. 435; *Stierman v. Akt. für Cartonnagen-Industrie*, [1917] 1 K.B. 842; *Fidel Biche & Co. v. Hin Tint Co., Ltd.*, [1918-19] All E.R. Rep. 127; *Monteure v. Medway Motor Carriage Co.*, [1918-19] All E.R. Rep. 1188; *Nagler, Benzon & Co. v. Kugelschke Industri*

- A *Gesellschaft*, [1918] 1 K.B. 331; *Oreanera Iron Ore Co. v. Fried Krupp Akt.* (1918), 87 L.J.Ch. 313; *Johnstone v. Pedlar*, [1921] All E.R. Rep. 176; *Soyfracht (F.O.) v. Van Udens Scheepvaart en Agentuur Maatschappij*, [1943] 1 All E.R. 76; *Re Cooper, Bendall v. Cooper* (1945), 62 T.L.R. 65; *Schering, Ltd., v. Stockholm Enskilda Bank*, [1946] 1 All E.R. 36; *Arab Bank, Ltd., v. Barclays Bank (D.C. & O.)*, [1953] 2 All E.R. 263; *Shaw v. Shaw*, [1954] 2 All E.R. 638;
- B *Kuenigl v. Demmersmarch*, [1955] 1 All E.R. 46; *Re Grottrian, Cor v. Grottrian*, [1955] 1 All E.R. 788.

As to agreements illegal because contrary to public policy and as to the application of the doctrine to insurance policies, see 8 HALSBURY'S LAWS (3rd Edn.) 130-136 and *ibid.*, vol. 22, pp. 32-35. For cases see 12 DIGEST (Repl.) 269 et seq. and 29 DIGEST 155 et seq.

Cases referred to :

- (1) *Muller v. Thompson* (1811), 2 Camp. 610, N.P.; 29 Digest 185, 1430.
- (2) *Egerton v. Earl Brownlow* (1853), 4 H.L.Cas. 1; 8 State Tr.N.S. 193; 23 L.J.Ch. 348; 21 L.T.O.S. 306; 18 Jur. 71; 10 E.R. 359, H.L.; 12 Digest (Repl.) 269, 2072.
- (3) *Aubert v. Gray* (1862), 3 B. & S. 169; 32 L.J.Q.B. 50; 7 L.T. 469; 9 Jur.N.S. 714; 11 W.R. 27; 1 Mar.L.C. 264; 122 E.R. 65, Ex. Ch.; sub nom. *Grey v. Auber*, 1 New Rep. 33; 29 Digest 218, 1745.
- (4) *Flindt v. Waters* (1812), 15 East, 260; 104 E.R. 842; 2 Digest (Repl.) 250, 509.
- (5) *Brandon v. Carling* (1803), 4 East, 410; 1 Smith, K.B. 85; 102 E.R. 888; 29 Digest 156, 1116.
- (6) *Esposito v. Bowden* (1857), 7 E. & B. 763; 8 State Tr.N.S. 807; 27 L.J.Q.B. 17; 29 L.T.O.S. 295; 3 Jur.N.S. 1209; 5 W.R. 732; 119 E.R. 1430, Ex. Ch.; 12 Digest (Repl.) 440, 3352.
- (7) *Society for the Propagation of the Gospel v. Wheeler* (1814), 2 Gallison 105.
- (8) *M'Connell v. Hector* (1802), 3 Bos. & P. 113; 127 E.R. 61; 2 Digest (Repl.) 217, 306.
- (9) *Wells v. Williams* (1697), 1 Lut. 34; 1 Salk. 46; 1 Ld. Raym. 282; 125 E.R. 18; 2 Digest (Repl.) 171, 12.
- (10) *The Jonge Klassina* (1804), 5 Ch. Rob. 297; 2 Digest 281, 683.
- (11) *The Portland* (1800), 3 Ch. Rob. 41; 2 Digest (Repl.) 216, 294.
- (12) *Furtado v. Rogers* (1802), 3 Bos. & P. 191; 127 E.R. 105; 2 Digest (Repl.) 254, 550.
- (13) *Kellner v. Le Mesurier* (1803), 4 East, 396; 102 E.R. 883; 2 Digest (Repl.) 255, 551.
- (14) *The Jan Frederick* (1804), 5 Ch. Rob. 128; 1 Eng. Pr. Cas. 434; 165 E.R. 721; 37 Digest 585, 202.
- (15) *The Boudes Lust* (1804), 5 Ch. Rob. 233; 165 E.R. 759; 37 Digest 591, 276.
- (16) *Conway v. Gray* (1809), 10 East, 536; 103 E.R. 879; 29 Digest 277, 2242.
- (17) *Le Bret v. Papillon* (1804), 4 East, 502; 102 E.R. 923; 2 Digest (Repl.) 250, 508.

Also referred to in argument :

- Gamba v. Le Mesurier* (1803), 4 East, 407; 1 Smith, K.B. 81; 102 E.R. 887; 29 Digest 155, 1114.
- Touteng v. Hubbard* (1802), 3 Bos. & P. 291; 127 E.R. 161; 29 Digest 219, 1752.
- The Herstdelder* (1799), 1 Ch. Rob. 114; 165 E.R. 116; 37 Digest 591, 275.
- Printing and Numerical Registering Co. v. Sampson* (1875), L.R. 19 Eq. 462; 44 L.J.Ch. 705; 32 L.T. 354; 23 W.R. 463; 12 Digest (Repl.) 272, 2093.
- The Hoop* (1799), 1 Ch. Rob. 196; 2 Digest (Repl.) 276, 639.
- Bristow v. Towers* (1794), 6 Term Rep. 35; 101 E.R. 422; 2 Digest (Repl.) 254, 549.
- Potts v. Bell* (1800), 8 Term Rep. 548; 101 E.R. 1540; 2 Digest (Repl.) 256, 562.

Appeal by the defendant in the action from a decision of the Court of Appeal (SIR ARCHIBALD LEVIN SMITH, M.R., and ROMER, L.J., VAGHAN WILLIAMS, L.J., dissenting), [1901] 2 K.B. 419, affirming a decision of MERREW, J., in favour of the respondents, the plaintiffs below, at the trial before him without a jury.

The action was brought by the respondents, a corporation constituted in accordance with the laws of the South African (Transvaal) Republic, against the appellant, an underwriter, to recover £133 19s. as for a total loss by seizure or theft, under a Lloyd's policy, dated Aug. 1, 1899, in respect of gold received by the policy and "commandeered" by the orders of the South African Republic at Vereeniging while in transit from Johannesburg to London on Oct. 2, 1899. War had not then broken out between the South African Republic and the United Kingdom, but it was imminent, and on that day gold bullion worth £13,305, together with other consignments amounting to about £300,000, was seized by the officials of the Transvaal government. War broke out on Oct. 11. The defence was that the contract was unlawful or against public policy as being made with alien enemies.

Lord Robert Cecil, K.C., and J. A. Hamilton, K.C., for the appellant.

Lauson Walton, K.C., T. G. Carrer, K.C., and Scrutton, K.C., for the respondents.

Their Lordships took time for consideration.

Aug. 5, 1902.—The following opinions were read.

THE EARL OF HALSBURY, L.C.—In this case the plaintiffs, who had effected a policy at Lloyd's on a large quantity of gold which was being consigned from South Africa to London, sue on this policy, dated Aug. 1, 1899, in respect of a seizure by the Transvaal government of the gold in question on Oct. 2 of the same year. There is no doubt that the loss of the gold is covered by the express words of the policy in question, and the defence to the action rests upon the proposition that the policy was an unlawful contract. It may be that for some purposes, or it might be the subject of debate whether I am correct in assuming what I do assume for the purposes of my judgment, but for the sake of clearness I do assume that the plaintiff company was an alien, a subject of the Transvaal government. I also assume, though this also might be the subject of debate, that both parties to the contract had in their mind on Aug. 1, 1899, the possibility of war, and even the probability of war. The making of the policy and the loss under it both accrued before the breaking out of war, which it is agreed between the parties occurred at five o'clock on Oct. 11.

All the judges, with the exception of VAGHAN WILLIAMS, L.J., have held that the plaintiffs are entitled to recover upon the policy, and if I rightly understand the reasoning of the learned lord justice, he thinks that the policy was in its inception illegal, and would have been equally illegal even if no war had intervened. He does indeed say that there could have been no claim if war had not occurred, but he is mistaken, since the assumed imminence of the war and the seizure by the Transvaal government might have occurred even if war had finally been averted. The difficulty which I have in dealing with the learned judge's judgment is that I do not trace any definite proposition as to what interest of the State, or what public injury, is supposed by him to be involved; but at all events, in whatever sense the learned judge uses this phrase, it is upon this general ground alone that he decides against the plaintiffs. As I have said, I understand the judgment of VAGHAN WILLIAMS, L.J., to be put upon the sole ground that this policy is against public policy. He puts it at various parts of his judgment in different ways. He calls it a contravention of public interest injurious to the country, inconsistent with public duty, repugnant to the interests of the State; and no doubt there are equivalent phrases to be found in many judgments where their application is expounded; but the learned judge, beyond using these phrases, does not go on to explain in what sense they are used, and how and on what principles of law the policy in question was unlawful.

A I do not think that the phrase "against public policy" is one which in a court of law explains itself. That would leave at large to each tribunal to find that a particular contract is against public policy. If such a principle were admitted, I should very much concur with what SERJEANT MARSHALL said in the first edition of his work on MARINE INSURANCES a century ago :

B "To avow or insinuate that it might, in any case, be proper for a judge to prevent a party from availing himself of an indisputable principle of law, in a court of justice, upon the ground of some notion of fancied policy or expedience, is a new doctrine in Westminster Hall, and has a direct tendency to render all law vague and uncertain. A rule of law, once established, ought to remain the same, until it be annulled by the legislature, which alone has the power to decide on the policy or expedience of repealing laws, or suffering them to remain in force. What politicians call expedience often depends on momentary conjectures, and is frequently nothing more than the fine-spun speculations of visionary theorists, or the suggestions of party and faction. If expedience, therefore, should ever be set up as a foundation for the judgments of Westminster Hall, the necessary consequence must be that a judge would be at full liberty to depart to-morrow from the precedent he has himself established to-day; or to apply the same decisions to different, or different decisions to the same, circumstances, as his notions of expedience might dictate."

E I do not think that the law of England does leave the matter so much at large as seems to be assumed. In treating of various branches of the law, learned persons have analysed the sources of the law and have sometimes expressed their opinion that such and such a provision is bad because it is contrary to public policy. But I deny that any court can invent a new head of public policy. A contract for marriage brokerage, the creation of a perpetuity, a contract in restraint of trade, a gaming or wagering contract, or, what is relevant here, the assisting of the King's enemies, are all undoubtedly unlawful things, and you may say that it is because they are contrary to public policy that they are unlawful, but it is because these things have been either enacted or assumed to be by the common law unlawful, and not because a judge or court have a right to declare that such and such things are in his or their view contrary to public policy. Of course, in the application of the principles here insisted on, it is inevitable that the particular case must be decided by a judge; he must find the facts, and he must decide whether the facts so found do or do not come within the principles which I have endeavoured to describe—that is, a principle of public policy, recognised by the law, which the suggested contract is infringing, or is supposed to infringe. If this is the true view, it is not difficult to solve the question whether the contract of insurance made before a war which it is sought to enforce in respect of a loss incurred before the war is illegal, either in its inception or at the date when the loss was incurred. However stated it amounts to this—that the thing done must be in its nature an assistance to the public enemy, and if there be no public enemy, there can be no aid given to him. Nor is this a mere question of words; the importance of the whole region of public policy involved makes the existence of war actually existing at the time of the creation of the contract or its fulfilment necessary.

I I will assume for my present purpose (though I think it might well be debated), that the Transvaal company did, to quote the language of VAUGHAN WILLIAMS, L.J., "enter into this contract with a view to the imminent war which might or might not break out with Great Britain." I note that the lord justice uses the phrase "imminent," and one is disposed to ask: Does that word represent a principle capable of logical application to the propositions ultimately arrived at? It is notorious that for many years the Transvaal government had been purchasing and storing up arms and ammunition to an enormous extent, which could have no other object than a war with this country. Were all the contracts made with British

suppose illegal, or with foreigners, breaches of neutrality on the part of countries of which the subjects were supplying arms and ammunition to the expected enemy of the British government? No such principle has ever been affirmed by any lawyer yet, and the principles upon which commercial intercourse must stand between nations at war with each other can only be where the heads of the state have created the state of war. BYRNE-SHOER propounds the principle in *QUER JURIS PUBLICI*, lib. 1, c. 21 :

"Præmissi, quemadmodum assicuratio sit definienda, ut vel ex definitione constaret, rationem belli omni modo exigere, ne naves, ut interea, ne ulla hostium bona liceat assecurare. Hostium periculum in se aucupare quid est aliud quam eorum commercia maritima promovere?"

And :

"Quod si sit, etiam vetatur quoquo modo hostium utilitati consulere. Id exigit jus belli generale, et exigebat quoque jus belli Hispanici ex Edicto Ordinum Generalium, April 1599. Sin alias, ex ejusmodi assicurationibus plus lucri quam damni ferre assecutores, adeoque nostris, quam hostibus plus prodesse, id ais[?], quod est incertissimum, et de quo vix ipse experientia judicare poterit, cum interim sit certissimum, sic hostibus eorum præbere commercia sua latius promovendi. Quod, quia hostibus est utile, et vere redundat in nostram necem, omni ratione prohibendum est."

Throughout this the actual existence of the public enemy is assumed, and it is, as I have said, no mere technical phrase. It must be the enemy made so by the public authority. In order to produce the effect, either nationally or municipally, it must be a war between the two nations. No contract or other transaction with a native of the country which afterwards goes to war is affected by the war. The remedy is indeed suspended; an alien cannot sue in the court of either country while the war lasts, but the rights on the contract are unaffected, and when the war is over the remedy in the courts of either is restored.

The earlier writers on international law used to contend that some public declaration of war was essential, and VALIN, writing in 1770, does not hesitate to describe Admiral Boscawen's operations in the Mediterranean in 1754 as acts of piracy, because no actual declaration of war had been made; but, though it cannot be said that that view is now the existing international understanding, it is essential that the hostility must be the act of the nation which makes the war, and no amount of "strained relations" can affect the subjects of either country in their commercial or other transactions. In VATTEL, liv. 3, c. 5, n. 70, it is stated :

"Quand le conducteur de l'état, le Souverain, déclare la guerre à une autre Souverain, on entend que la Nation entière déclare la guerre à une autre nation. Car le Souverain représente la Nation, et agit au nom de la Société entière, et les nations n'ont à faire, les unes aux autres, qu'un corps dans leur qualité de nations. Ces deux nations sont donc ennemis; et tous les sujets de l'une sont ennemis de tous les sujets de l'autre. L'usage est ici conforme aux principes."

In *Muller v. Thompson* (1) LORD ELLENBOROUGH held that the voyage to Königsberg in 1810, though the relations were much strained between this country and Prussia—British ships being actually excluded from Prussia, and it being objected that that was an enemy port—was lawful. Inasmuch as no war was declared and no act of hostility committed, we could not be said to be at war, which alone could render the voyage unlawful. Trading with the King's enemies is, of course, illegal. Undertaking by contract to indemnify the King's enemies against loss inflicted by the King's forces is also illegal. Such things are manifestly unlawful, but the words "King's enemies" are a necessary feature of the last proposition. To substitute

A the word "aliens," who may possibly or even probably become the King's enemies—and in this case the loss and the policy were both before there were any persons who could answer to that description—would be, to my mind, to introduce a new principle into our law, to hold that the probability of a war should have the same operation as war itself. It is war, and war alone, that makes trading illegal. I think that no more striking example of the mischief which might result from so B base a mode of applying the principle of public policy in courts of justice could be found than the example which elicited SERJEANT MARSHALL'S protest which I have C quoted above. LORD MANSFIELD had expressed the opinion that it was good policy to permit an insurance by British underwriters of enemies' goods, because we might obtain more in premiums than we should lose by capture, but this, in my view, was plainly wrong; and VALIN, followed by POTHIER and EMERIGON, denounced such insurance, and said that by the English practice one part of the nation was restoring to them by insurance what another part took from them by arms.

If it were competent to a court of law to consider the question which VAUGHAN WILLIAMS, L.J., propounds, whether upon principles of public policy, apart from the known and ascertained rule that intercourse between nations at war is forbidden D (which, for the reasons which I have given, I think it is not), I should answer the question in a different way from that at which he arrives. Instead of a known and ascertained rule which makes it clear whether a contract is unlawful or not, the intending parties to a contract must look all round the political horizon and form a judgment whether in some one or more contingencies the fulfilment of it may be injurious to their own country in the event of war; and I note here again that the E word "imminent" finds a place in the learned judge's question. It seems to me that the hindrance done to the free commercial intercourse between nations would be far more injurious to the interests of both than the injury the learned judge suggests. But further, as the learned judge himself points out, the question depends, not on what afterwards takes place, but whether the supposed contract is illegal in its inception. The learned judge says

F "the accident of no war occurring would merely prevent any claim arising, but would not affect the legality of the contract or its construction."

I think the learned judge mistaken here, because the Transvaal government might have seized the gold although no war had taken place; but the proposition is one which discloses the inpolitic nature of such a principle. The courts would have to consider whether war was so probable or "imminent," that the contract would have to be regarded as illegal, not because war occurred, but because war was likely to occur. I cannot imagine worse public policy than this.

H For these reasons I think this appeal should be dismissed, and I only desire to add that the authorities referred to in the argument do not justify the proposition that expected war renders a contract illegal between citizens of the two nations between whom war is anticipated, and to lay down such a rule would be to establish an entirely new code for which there is no authority in the law. I conclude by reading the words of PARKE, B., on this subject, when advising your Lordships' House in *Egerton v. Earl Brownlow* (2) (4 H.L.C. at p. 123):

I "To allow this to be a ground of judicial decision would lead to the greatest uncertainty and confusion. It is the province of the statesman, and not the lawyer, to discuss, and of the legislature to determine what is the best for the public good, and to provide for it by proper enactments. It is the province of the judge to expound the law only; the written from the statutes, the unwritten or common law from the decisions of our predecessors and of our existing courts, from text-writers of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference, not to

speculate upon what is the best, in his opinion, for the advantage of the community. Some of those decisions may have, no doubt, been founded upon the prevailing and just opinions of the public good: for instance, the illegality of covenants in restraint of marriage or trade. They have become a part of the recognised law, and we are therefore bound by them, but we are not thereby authorised to establish as law everything which we may think for the public good, and prohibit everything which we think otherwise."

It is not necessary to go through all the principles of law which may make a contract altogether illegal. As a wagering contract is illegal, so will creating a perpetuity have no operation in that respect, but it is enough for the purpose which I have in hand. There are defined legal principles, known to and abidingly fixed as part of our law, and a judge is called upon to bring the instrument which he has to construe to the test whether it is or is not within such principles, but I do not think that he has any jurisdiction to bring into the discussion his own views of what he may consider an inexpedient thing in his own peculiar view of public policy. To permit such a discussion to arise it must be a question of some public policy recognised by the law. To apply what I have said to this case, I do not deny that a judge has a right to consider whether the thing incriminated is an adherence to the King's enemies or something calculated to assist them, but I do not think that we are at liberty to consider whether the contract might be against public policy because one of the parties to it might become an alien enemy afterwards.

LORD MACNAGHTEN.—I assume that the corporation, which was plaintiff in the action and is now respondent here, was to all intents and purposes in the position of a natural-born subject of the South African Republic. I do not think that it can be entitled to any exceptional favour or to any peculiar indulgence by reason of the fact, if it be the fact, that the bulk of its shareholders were of European nationality. If all its members had been subjects of the British Crown the corporation itself would have been none the less a foreign corporation, and none the less, in regard to this country, an alien. I assume further that the seizure which has given rise to the claim on which the action is founded was made by the government of the South African Republic, in immediate contemplation of war with this country, which that government was then determined at all hazards to bring about unless this country would submit to conditions which no sovereign State with a particle of self-respect could entertain. Notwithstanding these assumptions, and notwithstanding the very able argument of the learned counsel for the appellant, it seems to me to be perfectly clear that there is no defence to the action. I think the learned counsel for the respondents right in saying that the law recognises a state of peace and a state of war, but that it knows nothing of an intermediate state which is neither the one thing nor the other—neither peace nor war. In every community it must be for the supreme power, whatever it is, to determine the policy of the community in regard to peace and war. It is not, I think, for private individuals to pronounce upon the foreign relations of their Sovereign or their country and to measure their own responsibilities arising out of civil contracts with foreigners by a standard of public policy which they set up for themselves, even though their views may be right in the abstract and might possibly find acceptance with a jury of their countrymen if such a question were within the competence of such a tribunal. Public policy, in my opinion, requires a good citizen in matters of this sort to conform to the rule and guidance of the State. However critical may be the condition of affairs, however imminent war may be, if and so long as the government of the State abstains from declaring or making war, or accepting a hostile challenge, there is peace—peace with all attendant consequences for all its subjects. The result, therefore, in the present case is that, however hostile the intentions of the South African Republic may have been at the moment when this gold was seized, the seizure must be treated as a seizure in time of peace between the Republic and this country. The event which happened was within the terms of the policy, and there is no ground

A in which the underwriters can dispute their liability. The appeal, I think, must be dismissed with costs. My noble and learned friend **LORD SHAND** concurs in this opinion.

LORD DAVEY.—I do not think it necessary to state the facts of this case, or to discuss in detail the numerous cases which were cited in the course of the argument. B I will content myself with stating concisely how the case presents itself to my mind, and the conclusion at which I have arrived. I think it must be taken that the respondent company was technically an alien, and became, on the breaking out of hostilities between this country and the South African Republic, an alien enemy. I also assume in accordance with the decision in *Aubert v. Gray* (3) that the loss occasioned by the embargo placed on the goods by the assured's own government C might, in ordinary circumstances, be recovered on the policy.

There are three rules which are established in our common law. The first is that the King's subjects cannot trade with an alien enemy—that is, a person owing allegiance to a government at war with the King—without the King's licence. Every contract made in violation of this principle is void, and goods which are the D subject of such a contract are liable to confiscation. The second principle is a corollary from the first, but is also rested on distinct grounds of public policy. It is that no action can be maintained against an insurer of an enemy's goods or ships against capture by the British government. One of the most effectual instruments of war is the crippling of the enemy's commerce, and to permit such an insurance E would be to relieve enemies from the loss which they incur by the action of British arms, and would, therefore, be detrimental to the interests of the insurer's own country. The principle equally applies where the insurance is made previous to the commencement of hostilities, and was, therefore, legal in its inception, and whether the person claiming on the policy be a neutral or even a British subject if the insurance be effected on behalf of an alien enemy. The third rule is that if a loss has taken place before the commencement of hostilities, the right of action F on a policy of insurance by which the goods lost were insured is suspended during the continuance of war and revives on the restoration of peace. In the present case the third rule would have constituted a defence to the present action, but the parties, being desirous of obtaining a decision on the merits of the case, waived the objection. I have some doubt whether it was competent for the parties to take this course, for it humbly appears to me that the objection being one based on considerations of public policy affecting the Sovereign, his courts should be held bound to take notice of the plaintiff's inability to sue, and I do not think that this observation is inconsistent with *Flindt v. Waters* (4). But the point is now happily academic, and I do not desire to make it a ground of judgment.

It will be observed that in each of the rules on this subject which I have endeavoured to formulate the actual commencement of hostilities is made the time H when and the occasion on which the rule comes into operation. Counsel for the appellant have endeavoured to persuade this House to extend their operation to a period when the relations between two governments are strained and war is imminent, though the peace has not been broken and negotiations are still continued on the ground that the same principles of public policy are as applicable to such a state of things as to a time of actual hostility. In the case before us he I says that the seizure of the gold by the government of the South African Republic was in contemplation of and with a view to the eventuality of war. The seizure of the gold, however, was not in itself an act of hostility against this country. I am not disposed to agree to such an extension of the law, which appears to me to be unsupported by any authority. Public policy appears to me to be always unsafe and treacherous ground for legal decision, and in the present case it would not be easy to say on which side the balance of convenience would incline. On the other hand, such an extension of the law as we are invited to lay down would certainly lead to interference with the lawful contracts and commercial pursuits of the King's

subject. It might conceivably precipitate a state of war which it was the object of settlement to avert, and I think that there is great force in the observation made by RUSSELL, L.J., as to the difficulty of determining the intention of a foreign government and the enforcement which might ensue from our courts being obliged to decide a question of that kind as one of fact. I quote the following passage from the judgment of the learned lord justice:

"I think that the intention of a foreign government at any given time ought, by these courts for such a purpose as that which I am now considering, to be treated as conclusively determined by the way in which our government chooses or has chosen to deal with that foreign government and its acts, and that where our government has not treated the foreign government as being hostile at a particular time, our courts ought not to try to ascertain what was then in the minds of the King, President, or responsible Ministers, or authorities of the foreign government."

Against these considerations is to be set only the possible, but somewhat remote, advantage to our government, which might accrue from the enforcement of the rule contended for by the appellant. I prefer to abide by the limits of the law as laid down in the decided cases, and by the text-writers, and I, therefore, think that the decision of MANNING, J., and the Court of Appeal should be affirmed.

LORD BRAMPTON. I am of opinion that the respondent company is entitled to your Lordships' judgment. At first sight the case may appear to be fraught with difficulties, but when the material facts, which are few and simple, are ascertained and understood, the difficulty will, as I think, be found to be more apparent than real.

The plaintiff is a company, incorporated under the laws of the South African Republic, for the purpose of working gold mines therein. The majority of its shareholders are subjects of the United Kingdom. The company has an office and a committee of management in England, and it was a custom of the company to transmit to this country gold bullion for sale and distribution of the profits among its shareholders. The company clearly must be treated as a subject of the Republic, notwithstanding the nationality of its shareholders. In the early autumn of 1899 the company was, in the ordinary course of business, about to send to the United Kingdom a large amount of such bullion, and on Aug. 1 it effected a policy of insurance, on its transit from the mines to England, with underwriters at Lloyd's, the defendant, a British subject, being one. On Oct. 2 the bullion was placed in the mail train at Johannesburg for conveyance to Capetown, en route for its destination. It reached Vereeniging, the frontier station of the Republic, in safety, but on its arrival there it was seized and appropriated by the government of the Republic and became totally lost to the plaintiff. When the bullion was so seized there can be no doubt that the friendly relations between this country and the South African Republic were much strained; but both countries were negotiating for a settlement of their differences, and it was not until the afternoon of Oct. 11 that war was declared between them, from which date they continued in open hostility until the end of May, 1902.

The action was commenced on Jan. 30, 1900, the crucial issue between the parties being whether war had been commenced, or a state of hostility equivalent to a state of war so far as the insurance was affected was in existence between the two countries when the seizure was made on Oct. 2, 1899. If the answer was in the affirmative, the plaintiff company, as a subject of the Republic, could not recover upon its policy against the defendant, an English subject and an alien enemy of the plaintiff's country, for, although covered by the words of the policy, it would have been a loss happening during the existence of hostilities and within the proviso which, according to the language of Lord FITZGERALD, C.J., in *Brandon v. Cuning* (5) (4 East, at p. 417) is in all cases considered as engrafted in every insurance, namely,

A "that this insurance shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured and assurer."

The reason he assigns for this is (*ibid.*),

B "Because during the existence of such hostilities, the subjects of the one country cannot allowably lend their assistance to protect by insurance the property and commerce of the subjects of the other."

The law is in other words also explained by WILLES, J., in delivering the judgment of the Exchequer Chamber in *Esposito v. Bowden* (6) (7 E. & B. at p. 779):

C "It is now fully established that, the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the licence of the Crown, is illegal."

D If, however, the answer to the issue between the parties ought to be—as I think it was rightly found by MATHEW, J.—in the negative, the plaintiff company was clearly entitled (subject to a point which was waived) to recover its loss from the defendant, for both the making of the contract of indemnity and insurance and the loss by seizure—which was simply an outrage by the Republic upon its own subject—occurred before the declaration of war.

E By way of defence it was urged that the seizure of the bullion by the government of the Republic was incidental to actual or expected hostilities against Her Majesty Queen Victoria, and for the purpose of supplying the Republic with funds to levy war upon Her Majesty, and that, coupled with the actual declaration of war which followed, created a state of hostility against Her Majesty, and rendered the plaintiff's claim for indemnity contrary to public policy and irrecoverable. This contention, though very ingenious and exceedingly well argued by counsel, affords, in my opinion, no bar to this action. It was an endeavour to extend the well-established principle described by LORD ELLENBOROUGH so as to meet the circumstances of this case, in which undoubtedly hostile intentions were made manifest by word and by action during the time negotiations for peace were being carried on, though no declaration or act of war was made or done until after the British government had signified by silence, on Oct. 11, the non-acceptance of the ultimatum of the Republic received on the previous day. No decided authority supporting this contention was cited to your Lordships, while, in my opinion, reason and good sense are against it. Every prudent government naturally endeavours and takes steps to place itself in a condition to uphold its own country in the possible event of a state of hostility arising with any other Power, and it would indeed be strange that a declaration of war should be held to have relation back to an indefinite period of time during which both the hostile countries believed themselves to be, and conducted themselves towards each other as if they were in a condition of amity, and were negotiating with a view to avoid any rupture of a then existing state of peace. I do not think it necessary to say more. In my opinion, the judgments of MATHEW, J., and of the majority of the Court of Appeal ought to be upheld, and this appeal dismissed with costs.

I LORD ROBERTSON.—I agree that the appeal ought to be dismissed, but I wish to rest my concurrence on one definite ground—namely, that at the date of the seizure the South African Republic was not at war with Queen Victoria. That this company was a Transvaal subject, that the nationality of its shareholders is immaterial, that the gold was seized as sinews of a war against Great Britain intended by the seizers, and morally inevitable—these propositions I accept as the conditions of the argument, and it is obvious that the circumstance that the gold

was insured, happened prior to the outbreak of the war when it broke out. But then the question is, does this state of facts bring the case within any prohibition of the common law? After very careful consideration of this question and with a high appreciation of the judgment of VAUGHAN WILLIAMS, L.J., I am satisfied that, near as in every sense the state of things at the time of the seizure was to war, it is yet separated from it by a line of the sharpest and most definite kind. It cannot be affirmed that at the moment in question there was a state of war between this country and the Transvaal. That the Transvaal was a future enemy, an intending enemy, that she was arming, and that this seizure was an act of arming—all this I assume and I believe; and if the principle of the case about actual war really involved cases of impending war I should not be deterred by the absence of any former decision from applying it. But for the purpose of the present question there are, as it seems to me, but two categories—war and not war; and the difference between the two things is essential. The present case is, perhaps, as strong a case as can occur, but in it war was still a contingency of futurity. To extend the law's prohibition of trading with the King's enemies to future or contingent enemies would be subversive of the broad and palpable distinction between peace and war, would be unworkable in practice and productive of endless uncertainty and loss. I mention these considerations, not as if we were here as legislators or had to decide upon a balance of general considerations, but the question whether it is workable or salutary is one of the tests of any legal doctrine, and I am satisfied that the law against trade with enemies is inapplicable to the events now in question.

LORD LINDLEY.—I will not detain the House by recapitulating the facts of this case. I will only ask the House to bear in mind that the policy was effected, and the loss of the goods insured took place before war was declared or broke out. These facts are of cardinal importance.

Before considering the legality or illegality of the policy, it is desirable to consider the legal position of the company assured by it. The company was incorporated and registered according to the laws of the Transvaal, and it carried on business there. It had gold mines there, and extracted gold from them and sent such gold to England or Europe for sale and division of profits among its shareholders there. It had also a London office and London committee of management. For all purposes material for the determination of the present appeal, the company must, in my opinion, be regarded as a company resident and carrying on business in the Transvaal, although not exclusively there. It was subject to the laws of that country. When war broke out the company became an alien enemy of this country: see the American case of *Society for the Propagation of the Gospel v. Wheeler* (7). If it becomes material to attribute nationality to the company, it would, in my opinion, be correct to say that the company was a Transvaal company and a subject of the Transvaal government, although almost all its shareholders were foreigners resident elsewhere and subjects of other countries. But when considering questions arising with alien enemies it is not the nationality of a person but his place of business during war that is important. An Englishman carrying on business in an enemy's country is treated as an alien enemy in considering the validity or invalidity of his commercial contracts: *McConnell v. Hector* (8). Again, the subject of a State at war with this country, who is carrying on business here or in a foreign neutral country, is not treated as an alien enemy; the validity of his contracts does not depend on his nationality nor even on what is his real domicile, but on the place or places in which he carries on his business or businesses: *Wells v. Williams* (9). As observed by SIR WILLIAM SCOTT in *The Lange Klössing* (10) (5 Ch. Rob. at p. 302):

“A man may have mercantile concerns in two countries, and if he acts as a merchant of both, he must be liable to be considered as a subject of both, with

A regard to the transactions originating, respectively, in those countries. That he has no fixed computing house in the enemy's country, will not be decisive"; see also *The Portland* (11).

B I pass on now to consider the seizure and its effect on the rights of the assured against the underwriters. The risk of loss by seizure by a foreign government was clearly insured against in the sense that the general words of the policy covered such a risk. But even if this particular risk is one which cannot be lawfully insured against, the fact that the general words cover it, does not render the policy illegal ab initio; the only consequence is that the general words must be read as subject to an implied proviso that they are not intended to cover and do not cover any risk against which it is unlawful to insure. Therefore, if the seizure in question could not be lawfully insured against, the general words ought not to be held to cover it. C This rule for dealing with general words in policies of insurance was formulated and acted upon in *Furtado v. Rogers* (12) and *Kellner v. Le Mesurier* (13) and has been recognised ever since. In those cases it was held that general words did not cover loss by capture by British forces of an enemy's goods insured before war broke out. The policy being effected before war broke out, it is not invalid upon the ground that it was, when made, a contract with a then alien enemy; nor can D it be treated as an invalid contract ab initio by reason of the generality of its terms. This was in fact conceded by the counsel for the appellant in his reply.

The question, then, is reduced to this: Is the seizure in question one which it is unlawful to insure against? One ground, and one only, is invoked to show that it is, and that ground is the ground of public policy. A contract or other trans- E action which is against public policy—that is, the general interest of this country—is illegal; but public policy is a very unstable and dangerous foundation on which to build until made safe by decision. On this point I venture to remind your Lordships of the weighty observations of ALDERSON and PARKE, BB., in *Egerton v. Earl Brownlow* (2). The seizure of the gold in the present case was a distinct gain to the captors. To indemnify the owner of the gold against the loss of such gold is F clearly a benefit to the owner, and such an indemnity is a benefit to a person who is regarded as an enemy as soon as war breaks out. But he was not an enemy when the policy was effected nor when the gold was seized; and how it can be against the policy of this country to keep faith with him when the war is over I fail to see. He cannot, of course, sue in this country during the war if the defendants raise that objection; but they do not. The contention is that if the war were over this action could not be maintained. Reference was made in the argument to such cases as *The Jan Frederic* (14) and *The Boedes Lust* (15) to show that contracts G made before war breaks out, but in contemplation of it, for the protection of enemy's property against British capture will not be recognised in this country. This is intelligible enough, for to recognise such contracts would be to defeat the object of this country in effecting the capture. It would be to undo by means of H British tribunals the work done for the British nation by its naval or military forces. Anything which would produce, or be calculated to produce, such an effect as that would be clearly against public policy, and be judicially dealt with accordingly. I am unable myself to bring the present case within this principle. The view that public policy requires an extension of rules already recognised so as to meet the present case has been very clearly presented by VAUGHAN WILLIAMS, L.J., I in his judgment. I am unable, however, to arrive at the same conclusion. His view appears to me to be based on the doctrine which identifies every subject of a state with its own government. This doctrine was no doubt laid down in *Conway v. Gray* (16); and so long as that case stood there was authority for the proposition that an ordinary policy of insurance does not cover a loss occasioned by the seizure of the assured property by the government of the country of the assured. But even before 1861 this doctrine can hardly be said to have been regarded as settled law; it has never been accepted in America. The subject was carefully examined in the second edition of ARNOULD ON INSURANCE (2nd Edn.), p. 803 et seq. and in

3 KENT'S COMMENTARIES, vol. 3, p. 292 et seq. In 1861 *Aubert v. Gray* (3) finally regulated any such general doctrine in this country. It was, however, immaterial in that case to decide whether such a seizure would be covered by a policy if the seizure occurred during or in contemplation of war with this country. The cases left this point open; but *Conway v. Gray* (16) does not cover it, for the embargo there in question was not an act of hostility. A seizure after war has broken out is very different from a seizure before war has been declared or has actually commenced. It appears to be settled that a British subject cannot even before war insure a person against any loss sustained by him after the war began, and while he is an enemy of this country: see *Fortale v. Rogers* (12), and *Brandon v. Curling* (5). Those were cases of capture after war, by the British forces in the first case, and by our allies in the second case; and these authorities go far to show that if the seizure here had been after the war had broken out the policy would not have covered such a loss. But apart from *Conway v. Gray* (16) and other cases based upon the doctrine there laid down and now exploded, there is no authority for saying that an insurance effected before war does not cover a seizure of the insured property by the government of the assured in time of peace, even if war with this country is imminent and shortly afterwards breaks out between that government and our own. In ARNOULD ON MARINE INSURANCE (7th Edn.), p. 112, s. 89, it is stated generally,

"where the party intended to be insured by the policy does not become an alien enemy, until after the loss and cause of action have arisen, his right to sue on the policy is only suspended during the continuance of hostilities, and revives on the restoration of peace."

For this is cited *Flindt v. Waters* (4) which warrants the author's statement. That case is also useful as showing that where the insurance is legal in its inception, and the loss occurs before war, an action on the policy may be successfully brought even during war if the underwriter does not put on the record a special dilatory plea. The case is an authority for the course taken in this case of obtaining a decision of the controversy between the parties on its merits without waiting for the termination of the war. The general rule laid down in ARNOULD is a sound intelligible working rule, and covers the present case. I agree with VAUGHAN WILLIAMS, L.J., in thinking that *Aubert v. Gray* (3) does not quite cover this case, but I cannot agree with him in thinking that public policy requires that this action should be decided in favour of the underwriters. War produces a state of things giving rise to well-known special rules. It prohibits all trading with the enemy except with the Royal licence, and dissolves all contracts which involve such trading: see *Esposito v. Bowden* (6). But threatened war or anticipated war or imminent war is peace which may not after all result in war, and to apply the rules of war to insurances against loss before war breaks out would paralyse commerce, and often without any real necessity. Is it for the interest of this country to dislocate trade because international relations are strained and war appears probable to the public, who do not know and cannot know the real views and resolutions of the governments concerned? It must be remembered that contracts of insurance are not by any means the only contracts which have to be considered in this connection; what affects them affects contracts of sale and contracts of carriage both by land and sea, and in fact affects the whole external commerce of the country. ROMER, L.J., saw this, as is apparent from his judgment. Where a policy of insurance is not void ab initio, and a loss from one of the perils insured against happens before war is declared or breaks out, what defence can be offered to an action upon it? I know of none except where the loss is occasioned by British capture followed by war. Of course, if war breaks out before the action is brought or before it is over, the war suspends its prosecution, for an alien enemy cannot sue in this country: *Le Brix v. Papillon* (17). Your Lordships are asked to invent a new defence unheard of before, and to say that every policy on a foreigner's property abroad is subject to the implied

A condition that it shall not be seized by his own government in order to be used against this country if war breaks out. Such a doctrine, I venture to think, would paralyse legitimate trade and be entirely against the interests of this country. In my opinion, the order and judgment appealed from should be affirmed, and the appeal be dismissed with costs.

Appeal dismissed.

B Solicitors: *Waltons, Johnson, Bubb & Whalton; W. A. Cramp & Sons.*

[*Reported by C. E. MALDEN, ESQ., Barrister-at-Law.*]

C

BIRD v. PHILPOTT AND OTHERS

D [CHANCERY DIVISION (Farwell, J.), February 1, 2, 1900]

[*Reported* [1900] 1 Ch. 822; 69 L.J.Ch. 487; 82 L.T. 110; 16 T.L.R. 173;
44 Sol. Jo. 246; 7 Mans. 251]

E

Bankruptcy—Trustee in bankruptcy—Duty in administering estate—Trustee for bankrupt of surplus—Disposal by bankrupt during pendency of bankruptcy—Right of bankrupt to intervene in administration.

F

A trustee in bankruptcy takes all the bankrupt's property for an absolute estate in law, but for the limited purpose of paying the creditors under that bankruptcy and the costs of the bankruptcy. He is a trustee for the bankrupt of the surplus. The bankrupt cannot intervene and interfere with the administration of the estate until the creditors and costs have been paid and the surplus ascertained, but he has a right to the surplus which he can dispose of by will, or deed, or otherwise, during the pendency of the bankruptcy even before the surplus is determined.

G

H

Bankruptcy—Property available for distribution—After-acquired property—Charge by bankrupt—Security for loan for purchase of property.

All the after-acquired property of a bankrupt vests in the trustee in the bankruptcy, and, therefore, a bankrupt cannot create any effectual charge on such property to the exclusion of the trustee. But where, while the bankrupt took the conveyance of property the plaintiff provided the money for the purchase and retained the conveyance pending the repayment of that money, and the bankrupt charged after-acquired property as security for that advance, held, that the plaintiff was entitled to the charge to the extent of the money which he advanced.

Meux v. Smith (1) (1843), 11 Sim. 410, applied.

I

Bankruptcy—Second bankruptcy—Rights of trustee—Claim to surplus of first bankruptcy.

A trustee in a second bankruptcy has no claim to any of the surplus of the first bankruptcy which the bankrupt has effectually dealt with so far as he has an equity. He can only take property of the bankrupt at the time of the second receiving order. What that property is depends on what the bankrupt has done with it, and for what consideration, between the date of the first order and that of the second order. If and so far as the bankrupt has effectually dealt with it, it is not property of the bankrupt which can pass to the trustee in the second bankruptcy.

Notes. Applied: *Re Cunnally*, *Wood v. Cunnally* (1912), 106 L.T. 708; *Reverend v. London and County Contractors v. Tallack* (1903), 51 W.R. 408; *Preston's Trustees v. Cooke* (1906), 75 L.J.Ch. 751; *Jarrell v. Barclays Bank, Ltd.*, *Nash v. Jarrell*, [1947] 1 All E.R. 72.

As to a second or subsequent bankruptcy and a bankrupt's right in the surplus, see 2 HALSBURY'S LAWS (3rd Edn.) 431, 432, 513, 514, and cases there cited. For Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Cases referred to:

- (1) *Meux v. Smith* (1841), 1 Mont. D. & De G. 306; subsequent proceedings (1843), 11 Sim. 410; 2 Mont. D. & De G. 789; 12 L.J.Ch. 209; 7 Jur. 821; 59 E.R. 931; 5 Digest (Repl.) 789, 6689.
- (2) *Re Austin, Ex parte Sheffield* (1879), 10 Ch.D. 434; 40 L.T. 15; 27 W.R. 622, C.A.; 4 Digest (Repl.) 541, 4723.
- (3) *Re Leadbitter* (1878), 10 Ch.D. 388; 48 L.J.Ch. 242; 39 L.T. 286; 27 W.R. 267, C.A.; 4 Digest (Repl.) 628, 5597.
- (4) *Troup v. Ricardo* (1864), 4 De G.J. & Sm. 489; 5 New Rep. 62; 34 L.J.Ch. 91; 11 L.T. 399; 10 Jur.N.S. 1161; 13 W.R. 147; 46 E.R. 1008, L.C.; 5 Digest (Repl.) 1069, 8613.
- (5) *Dyson v. Hornby* (1855), 7 De G.M. & G. 1; 25 L.T.O.S. 91; 3 W.R. 439; 44 E.R. 1, L.J.J.; subsequent proceedings, sub nom. *Cook v. Sturgis* (1859), 3 De G. & J. 506; 28 L.J.Ch. 345, L.J.J.; 5 Digest (Repl.) 1035, 8365.
- (6) *Wearing v. Ellis* (1856), 6 De G.M. & G. 596; 26 L.J.Ch. 15; 28 L.T.O.S. 113; 2 Jur.N.S. 1149; 5 W.R. 40; 43 E.R. 1365, L.C.; 5 Digest (Repl.) 1069, 8612.
- (7) *Cohen v. Mitchell* (1890), 25 Q.B.D. 262; 59 L.J.Q.B. 409; 63 L.T. 206; 38 W.R. 551; 6 T.L.R. 326; 7 Morr. 207, C.A.; 5 Digest (Repl.) 787, 6675.
- (8) *Re New Land Development Association and Gray*, [1892] 2 Ch. 138; sub nom. *Re New Land Development Association, Ltd., and Fagence's Contract*, 61 L.J.Ch. 495; 66 L.T. 694; 40 W.R. 551; 36 Sol. Jo. 416, C.A.; 5 Digest (Repl.) 788, 6678.

Also referred to in argument:

- Re Archer, Ex parte Archer* (1826), 2 Gl. & J. 110.
- Re Malachy, Ex parte Malachy* (1840), 1 Mont. D. & De G. 353; 10 L.J.Bey. 7; 4 Jur. 1092, Ct. of R.; 4 Digest (Repl.) 258, 2333.
- Re Webb, Ex parte Bell* (1822), 1 Gl. & J. 282; 5 Digest (Repl.) 909, 7528.
- Curtis v. Price* (1805), 12 Ves. 89; 33 E.R. 35; 40 Digest (Repl.) 63, 436.
- Re Sims, Ex parte Sheffield v. Prince* (1896), 45 W.R. 189; 41 Sol. Jo. 113; 3 Mans. 340; 5 Digest (Repl.) 910, 7541.
- Bromley v. Goodere* (1743), 1 Atk. 75; 26 E.R. 49, L.C.; 4 Digest (Repl.) 335, 3041.
- Charman v. Charman* (1808), 14 Ves. 580.
- Banks v. Scott* (1821), 5 Madd. 493; 56 E.R. 984; 4 Digest (Repl.) 541, 4727.
- Ex parte King* (1810), 17 Ves. 115; 1 Rose, 212; 34 E.R. 45, L.C.; 4 Digest (Repl.) 496, 4364.
- Re Evelyn, Ex parte General Public Works and Assets Co., Ltd.*, [1894] 2 Q.B. 302; 63 L.J.Q.B. 658; 70 L.T. 692; 42 W.R. 512; 10 T.L.R. 456; 38 Sol. Jo. 479; 1 Mans. 195; 10 R. 238, D.C.; 4 Digest (Repl.) 541, 4724.
- Mitford v. Mitford* (1803), 9 Ves. 87; 32 E.R. 534; 5 Digest (Repl.) 683, 6020.
- Re Clark, Ex parte Beardmore*, [1894] 2 Q.B. 393; 63 L.T.Q.B. 806; 70 L.T. 751; 10 T.L.R. 459; 38 Sol. Jo. 492; 1 Mans. 207; 9 R. 498, C.A.; 5 Digest (Repl.) 793, 6718.
- Re Clayton and Barclay's Contract*, [1895] 2 Ch. 212; 64 L.J.Ch. 615; 59 J.P. 489; 43 W.R. 549; 39 Sol. Jo. 503; 13 R. 556; sub nom. *Clayton v. Barclay*, 72 L.T. 764; 11 T.L.R. 415; sub nom. *Re Clayton and Beaumont's Contract*, 2 Mans. 345; 5 Digest (Repl.) 788, 6682.

Hunt v. Tapp. [1898] 1 Ch. 675; 67 L.J.Ch. 377; 77 L.T. 516; 46 W.R. 125; 42 Sol. Jo. 47; 5 Mans. 105; 5 Digest (Repl.) 788, 6683.

Re Culbert and Elvin's Contract. [1898] 2 Ch. 460; 67 L.J.Ch. 553; 78 L.T. 826; 46 W.R. 673; 42 Sol. Jo. 653; 5 Mans. 208, C.A.; 4 Digest (Repl.) 197, 1776.

Re Barnett, Ex parte Reynolds (1885), 15 Q.B.D. 169; 54 L.J.Q.B. 354; 53 L.T. 448; 33 W.R. 715; 1 T.L.R. 433; 2 Morr. 147, C.A.; 4 Digest (Repl.) 39, 339.

Re Pooley, Ex parte Rabbidge (1878), 8 Ch.D. 367; 48 L.J.Bey. 15; 38 L.T. 663; 26 W.R. 646, C.A.; 5 Digest (Repl.) 975, 7859.

Action for a declaration, injunction, account, and inquiries.

In 1885 the defendant Thomas Lovibond Templeman was carrying on business as a plumber at Taunton. On June 20, 1885, a receiving order was made against him, and on Aug. 4, 1885, he was adjudicated bankrupt in the county court. The defendant Philpott was the trustee under this bankruptcy. The defendant Templeman never obtained his discharge, a small dividend was paid to his creditors under that bankruptcy. In 1891 Templeman went to Slough, got into employment there, and obtained credit. The plaintiff was a solicitor at Uxbridge; he was introduced to Templeman and procured advances for him and did work for him as a solicitor. He also made advances to him in respect of which the questions in this action arose. These advances were made in respect of three different sets of property.

With respect to the first—Nos. 1 to 4, Chard Villas—Templeman contracted to buy this property. On May 20, 1897, he paid the deposit on it, and under a subsequent contract of June 24, 1897, the balance was made payable by instalments. On June 2, 1897, Templeman gave the plaintiff a charge on the property for his costs. On Sept. 14, 1897, the property was conveyed to Templeman, the balance of the purchase money, with the exception of one instalment, being paid by the plaintiff. On Sept. 24, 1897, Templeman mortgaged the property to a Mrs. Payne, and the plaintiff was paid either all or the greater part of the advances which he had made in accordance with what the learned judge found was the arrangement made between the parties.

The next property was Nos. 5 and 6, Chard Villas. The site of this property was bought by Templeman on Sept. 30, 1897, and was conveyed to him on Dec. 29, 1897. The plaintiff paid no part of the purchase money of these plots. Templeman deposited the deeds with his bankers, and applied to the plaintiff to obtain an advance for him on the property. On Feb. 7, 1898, he gave the plaintiff a memorandum in these terms:

"Messrs. Bird and Son,—If you will pay off my overdraft of £9 3s. 5d., or thereabouts, at Messrs. Woodbridge, Lacy & Co.'s, Slough Bank, to enable you to take up my conveyance of the plot adjoining Chard Villas, Montague Road, Stoke Road, Slough, and any other papers of mine in their hands, and make me an advance of £2 16s. 5d., the balance up to £12, I authorise you to deduct such payment with interest at 5 per cent. per annum out of the first instalment to become due out of an advance of £375 to £400, you are arranging for me on the two houses I am about to build on such plot.—(Signed) THOS. TEMPLEMAN. Received the cheque for £2 16s. 7d. this day.—(Signed) Thos. Templeman."

Templeman proceeded to build Nos. 5 and 6, Chard Villas, the plaintiff made advances to him for the purpose, and paid builders and others whose accounts he had guaranteed for the benefit of Templeman to enable him to build.

The third property consisted of three plots of land adjoining the last-mentioned property. These plots Templeman bought at a sale by auction on May 16, 1898. The plaintiff at his request paid the deposit, took up the contract, and retained it; and on June 17, 1898, Templeman mortgaged by way of second charge the property, Nos. 1 to 4, Chard Villas, by way of first charge, Nos. 5 and 6, Chard Villas, and by way of first charge the contract for the sale of the three plots to secure a certain

sums of money and further advances. On July 6, 1898, the mortgage was executed of those three plots to Templeman, the plaintiff paying the balance of the purchase money and conveying and retaining the conveyance, which was still to his hands. On Sept. 30, 1898, Templeman was adjudicated a bankrupt at Wooler, and the defendant Mercer was appointed the trustee in that bankruptcy, but, some time in the latter part of 1898, took possession of all the property. On Oct. 19, 1898, the plaintiff was informed by Mercer, in a letter dated Oct. 18, 1898, and became acquainted for the first time with the fact, that Templeman was an undischarged bankrupt. In the course of October, 1898, the defendant Philpott, as trustee in the first bankruptcy, intervened and claimed to be entitled to the property comprised in the mortgage of June 17, 1898, free from that mortgage.

The plaintiff claimed (i) a declaration that he was entitled to a first mortgage on Nos. 5 and 6, Chard Villas, and the three plots of building land adjoining, and to a second charge under the mortgage of June 17, 1898, to secure the several sums of £193 4s. 10d., £144 0s. 3d., £123 13s., £305 7s. 2d., and £26, and all other sums of money due to the plaintiff for money advanced or paid on account of Templeman or in respect of costs with interest as provided by the said indenture of mortgage; (ii) an injunction restraining the defendants and each of them, their servants and agents, from trespassing on or selling or otherwise dealing or interfering with the said property and collecting or otherwise dealing with the rents thereof; (iii) a receiver; (iv) all necessary accounts and inquiries; (v) alternatively a declaration that the plaintiff was entitled to a lien or charge on the said property and the title deeds thereof for the amount expended by the plaintiff on the purchase and development or improvement of and building upon the said property, and for the costs, charges, and expenses relating to such purchase; (vi) further, or in the alternative, a declaration that the plaintiff was entitled on payment of the balance of the debts, costs, charges, and expenses provable and incurred under the first bankruptcy to have conveyed to him or as he might direct, free from incumbrances, the property mentioned in the indenture of June 17, 1898, as security for the amount found due to him and purporting to be secured by the said indenture.

Herbert Reed, Q.C. (E. W. Hansell with him) for the plaintiff.

The Solicitor-General (Sir Robert Finlay, Q.C.) and Muir Mackenzie for the defendants.

FARWELL, J., stated the facts, held that the memorandum of Feb. 7, 1898, did not create any charge on the property, and continued: The first question I have to determine relates to the title of the trustee in the second bankruptcy, and I will deal with that first. Under the Bankruptcy Act, 1883, the trustee in the bankruptcy, whether it be the first, second, or any other, takes the benefit of the property and nothing more (see now Bankruptcy Act, 1914, s. 53). The bankrupt cannot give him anything that he has not got himself, subject, of course, to the various provisions which make that which is in ordinary cases not the bankrupt's property his, such as ordinary dispositions. To speak generally, the trustee claims through the bankrupt, and takes the bankrupt's property and not somebody else's property. That being so, it is suggested, inasmuch as there will be a surplus in respect of the first bankruptcy if I hold that all the after-acquired property, including the three properties in question in this action, belonged to the trustee in the first bankruptcy, that that surplus never belonged to the debtor in such a way that he could deal with it to the exclusion of the trustee in the second bankruptcy. I am not able to follow that argument. It appears to me that, in order to establish that, the learned Solicitor-General would have had to go a length which he very candidly declined to go, and say that the bankrupt could not deal with his property at all, but was in fact survivor mortuis. It was suggested by counsel for the plaintiff, and it has been said in some of the text-books that *Re Austin, Ex parte Sheffield* (2) and *Re Leadbitter* (3) decided that the bankrupt cannot deal with the possibility of surplus until all the debts in the first bankruptcy have been paid

and the surplus has been ascertained. I do not think that these decisions decide anything to that effect at all. If they do, they would have overruled prior decisions—of the Lord Chancellor among others—which were not referred to, and would be, in my opinion, contrary to the whole spirit and principles on which the Bankruptcy Act is now built.

As I read the Bankruptcy Act, the trustee takes all the bankrupt's property for an absolute estate in law, but for limited purposes only—namely, for the payment of creditors under that bankruptcy and that bankruptcy only—the principal and interest and all the costs of the bankruptcy. Subject to that he is a trustee for the bankrupt of the surplus. He as a trustee has got a better position than an ordinary trustee to the extent pointed out in *Re Austin, Ex parte Sheffield* (2) and *Re Lead-bitter* (3)—that is to say, the bankrupt has not got the ordinary right of a cestui que trust to intervene until the surplus has been ascertained to exist and all the creditors and interest and costs have been paid. He cannot interfere so as to trouble the trustee by taxing the bill of costs or interfere with the administration of the estate in any way, but subject to that, and subject to his non-interference with the administration and with the management of the trustee during the bankruptcy in due course of the execution of his duty, he can, in my opinion, demand the surplus, and he has a right to the surplus, a right which he can dispose of by will or deed or otherwise during the pendency of the first bankruptcy even before the surplus is determined, but all this will be ineffectual unless it appears that there is a surplus finally.

The cases in the LAW JOURNAL which were cited appear to me to establish what I have said is the general principle of the bankruptcy law. LORD WESTBURY in *Troup v. Ricardo* (4) says (34 L.J.Ch. at p. 94):

“The duty of the Insolvent Debtors’ Court is discharged when the debts and claimants are all satisfied. There will then follow upon universal principle the equity that the property remaining undistributed, being no longer required for any function of that court, falls under the general rule of law which raises on the part of the legal owner of property no longer required for the purposes of the conveyance to him, a trust and obligation to restore that which is not wanted to the original owner, from whom it was taken for a limited purpose. It is clear, therefore, that the surplus of an insolvent’s property is subject to that law of resulting trust.”

I need not refer in any more detail to *Cook v. Sturgis* (5), but the Solicitor-General makes a distinction of that case and says that the Act of Parliament was phrased in different words. To my mind it really makes no difference. It appears to me that the older Act made two steps instead of the one step taken by the present Act. The present Act vests the right to the surplus now direct in the bankrupt, subject to all the due distribution being made by the prior section to which junior counsel for the defendants referred, whereas the older Act required a further vesting order. The authority which counsel for the plaintiff cited in reply of *Wearing v. Ellis* (16) seems to me to dispose of the suggestion that that was anything more than mere machinery.

The Solicitor-General goes on to take a further point and to say: “Here the mortgage is a mortgage of a specific property. The bankrupt does not purport to deal with the surplus.” That appears to me to be looking only at the shell and not at the substance. The bankrupt could not be heard to say, if it turned out in fact that there was this property, “I did not convey it as surplus, and all I could do was to convey surplus,” and I do not see how anyone claiming through the bankrupt can be in any better position than the bankrupt himself. To some extent it is like the case of a cestui que trust who is entitled to a share of the proceeds of sale of real property sold under a trust for sale. If that cestui que trust contracts to sell his share of the real estate in specie, and it turns out that the real estate had never been sold, I do not see how he could be heard to say that that particular

property had not passed, because at the time he made it his only strict right was to share in a distribution of the proceeds of sale of a larger portion of the estate. Therefore, I see no distinction on that ground either. In my opinion, the trustee in the second bankruptcy has no claim to any of the surplus which the bankrupt has effectually dealt with so far as he has an equity, which I shall have to determine as against the trustee in the first bankruptcy. He can only take the property of the bankrupt at the time of the second receiving order. What that property is depends on what the bankrupt has done with it, and for what consideration, between the date of the first order and the date of the second order, and if and so far as the bankrupt has effectually dealt with it, then, in my judgment, it is not property of the bankrupt which can pass to the trustee in the second bankruptcy.

That brings me to the consideration of the first bankruptcy, and, as regards that, the properties that I have to consider fall under three different heads. First of all, as to the property, Nos. 1 to 4, Chard Villas, there is the charge of June 2, 1897, for costs. As regards that, it appears to me that it is invalid as against the trustee in the first bankruptcy. All the after-acquired property of the bankrupt vests in the trustee of the first bankruptcy, and the bankrupt cannot create any effectual charge to the exclusion of the trustee in the first bankruptcy. Therefore, that is simply an ineffectual attempt to charge property which was vested in the trustee of the first bankruptcy, and did not belong to the bankrupt so that he could charge it. The other point in respect of these properties rather depends on facts, and that is whether the plaintiff can have any claim for the balance of the purchase money, which he paid on Sept. 14, 1897. On the facts, in my opinion, he cannot. He made that payment on the footing that he was to be repaid, as he was repaid, to a great extent, if not entirely, out of the advance which Mrs. Payne, his client, was subsequently to make and which she did make on Sept. 24, 1897. It seems to me that the facts, therefore, exclude any possibility of my applying the rule in *Meux v. Smith* (1) in respect of these properties. That disposes of Nos. 1 to 4, and, in respect of those, as against the trustee in the first bankruptcy, in my opinion the plaintiff has no claim.

As regards Nos. 5 and 6, I also hold that the plaintiff has no claim. He made no payment there at all either of the deposit, or of the purchase money, and I have already said what in my view is the construction of the charge of Feb. 7, 1898. The other three properties raise a different question—a question of some little nicety.

As regards them, the property appears to me to have been acquired with the plaintiff's money entirely, both as regards the deposit and as regards the balance, under an agreement by which he took up the contract and obtained a memorandum of charge, which corroborates the view that he was making the advance with the intention of taking the benefit of the conveyance, when it was obtained, to the extent of his charge, and this is not displaced by the subsequent conveyance of July 6, 1898. To my mind, the facts of the case are brought substantially within the decision of *Meux v. Smith* (1). That case is somewhat curious, but I think the grounds on which it was decided are put very plainly by the Lord Chancellor. The Lord Chancellor suggests (11 Sim. at p. 427):

"But whether this sort of case may not be made out, namely, that previously to the contract being carried into effect between Gurney and the bankrupt there was a contemporaneous contract between the undersigned bankrupt and Meux & Co., by which it was agreed that, although the undersigned bankrupt was to take a lease in his own name, yet that the lease so taken in his name was to the extent of the money advanced to be for the benefit of Meux & Co. and Seagar, Evans & Co."

That was the ground which the Vice-Chancellor appears to have adopted (ibid. at p. 431). As I read the judgment, he seems to have found the fact rather from a consideration of the whole of the circumstances than from any pointed reference to

to the existence of such an agreement. In my opinion, the case here is stronger, because I think there was an actual agreement which was borne out by the charge taken in June before the conveyance was executed in July. I, therefore, rest my judgment on *Meur v. Smith* (1). I am unable to adopt the ingenious suggestion made by the plaintiff's counsel in reply that I could apply *Cohen v. Mitchell* (7) on the ground that the charge was a chose in action. It appears that in *Cohen v. Mitchell* (7) the only charge as a chose in action was in respect of the right to have property which was afterwards actually conveyed but I cannot regard as a chose in action that which has since become real estate. Further, I am unable to adopt counsel's suggestion—and this is a general observation referring to all the properties—that *Cohen v. Mitchell* (7) does apply, and that I can disregard the *New Land Development Association Case* (8), which appears to have been rightly decided, but which, whether it was or not, I should not venture to do otherwise than follow. I hold that the plaintiff is entitled to the extent of the money which he has paid to a charge on the last three properties.

Solicitors: *Church, Rendell, Todd & Co.*, for *Bird, Son & Lovibond*, Uxbridge;
Solicitor to the Board of Trade.

[*Reported by P. S. OSWALD, Esq., Barrister-at-Law.*]

FORMBY v. BARKER

[COURT OF APPEAL (Vaughan Williams, Romer and Stirling, L.JJ.), June 13, 15,
July 14, 1903]

[Reported [1903] 2 Ch. 539; 72 L.J.Ch. 716; 89 L.T. 249; 51 W.R. 646;
47 Sol. Jo. 690]

Sale of Land—Restrictive covenant—Personal covenant—Enforcement by personal representative—Enforcement against assignee of purchaser.

Where a vendor conveys his whole estate so that no contiguous estate would be benefited by a restrictive covenant in the conveyance and there is no re-entry clause under which the vendor could go in, as of any estate a restrictive covenant is a personal covenant, but a breach of it after the vendor's death would give a right of action to his personal representative against the purchaser as covenantor, but not against the assignee of the purchaser.

Tulk v. Moxhay (1) (1848), 2 Ph. 774, distinguished.

Notes. Considered: *Chelsham and Woldingham Association v. Haywood* (1911), 76 J.P. 52. Applied: *L.C.C. v. Allen and Another*, [1914-15] All E.R. Rep. 1008. Distinguished: *Ires v. Brown*, [1919] 2 Ch. 314; *Lord Northbourne v. Johnstone & Sons*, [1922] All E.R. Rep. 144. Applied: *Chambers v. Randall*, [1922] All E.R. Rep. 565. Considered: *Re Union of London and Smiths Bank, Ltd.'s Conveyance*, *Mills v. Easter*, [1933] All E.R. Rep. 355; *Marten v. Flight Refuelling, Ltd.*, [1961] 2 All E.R. 696. Referred to: *Brigg v. Thornton*, [1904] 1 Ch. 386; *Re Nibbel and Pott's Contract*, [1904-07] All E.R. Rep. 865; *Elliston v. Reacher*, [1908-10] All E.R. Rep. 612; *Lord Strathcona Steamship Co., Ltd. v. Dominion Coal Co., Ltd.*, [1925] All E.R. Rep. 87; *Price v. Corpn. D' Energie De Montmagny*, [1927] A.C. 363; *Clore v. Theatrical Properties, Ltd.*, and *Westby & Co., Ltd.*, [1936] 3 All E.R. 483; *Re Rutherford's Conveyance*, [1938] 1 All E.R. 495;

Smith v. River Douglas Catchment Board, [1949] 2 All E.R. 179; *Newton Abbot A. Co-operative Society, Ltd. v. Williamson and Treadgold*, 1952] 1 All E.R. 279.

As to restrictive covenants on a sale of land see 34 *HALSBURY'S LAWS* (5th Ed.) 367 et seq., and for cases see 40 *DIGEST* (Repl.) 328 et seq.

Cases referred to :

- (1) *Talk v. Meachay* (1848), 12 L.T.O.S. 469; 13 Jur. 26; affirmed 2 Ph. 774; 1 H. & Tw. 105; 18 L.J.Ch. 83; 13 L.T.O.S. 21; 13 Jur. 89; 41 E.R. 1142, L.C.; 40 Digest (Repl.) 342, 2774.
- (2) *Beckham v. Drake* (1819), 2 H.L.Cas. 579; 13 Jur. 921; 9 E.R. 1213, H.L.; 24 Digest (Repl.) 765, 7546.
- (3) *Rogers v. Hosegood*, post; [1900] 2 Ch. 388; 69 L.J.Ch. 652; 83 L.T. 186; 48 W.R. 659; 16 T.L.R. 489; 44 Sol. Jo. 607, C.A.; 40 Digest (Repl.) 340, 2769.
- (4) *London and South-Western Rail. Co. v. Gomm* (1882), 20 Ch.D. 562; 51 L.J.Ch. 530; 46 L.T. 449; 30 W.R. 620; 40 Digest (Repl.) 331, 2716.
- (5) *Spencer's Case* (1583), 5 Co. Rep. 16a; 77 E.R. 72; sub nom. *Anon.*, Moore K.B. 159; 21 Digest (Repl.) 666, 1563.
- (6) *De Mattos v. Gibson* (1859), 4 De G. & J. 276; 28 L.J.Ch. 498; 34 L.T.O.S. 36; 5 Jur.N.S. 555; 7 W.R. 514; 45 E.R. 108, L.C.; 28 Digest (Repl.) 832, 740.
- (7) *Doherty v. Allman* (1878), 3 App. Cas. 709; 39 L.T. 129; 26 W.R. 513, H.L.; 28 Digest (Repl.) 740, 14.
- (8) *Lumley v. Wagner* (1852), 1 De G.M. & G. 604; 21 L.J.Ch. 898; 19 L.T.O.S. 264; 16 Jur. 871; 42 E.R. 687, L.C.; 28 Digest (Repl.) 829, 726.

Also referred to in argument :

- Leech v. Schweder* (1874), 9 Ch. App. 463; 43 L.J.Ch. 487; 30 L.T. 586; 38 J.P. 612; 22 W.R. 633, L.J.J.; 28 Digest (Repl.) 817, 632.
- Austerberry v. Oldham Corp.* (1855), 29 Ch.D. 750; 53 L.J.Ch. 633; 53 L.T. 543; 49 J.P. 532; 33 W.R. 807; 1 T.L.R. 473, C.A.; 40 Digest (Repl.) 331, 2717.
- Western v. MacDermott* (1866), 2 Ch. App. 72; 36 L.J.Ch. 76; 15 L.T. 641; 31 J.P. 73; 15 W.R. 265, L.C.; 28 Digest (Repl.) 807, 558.
- Stokes v. Russell* (1790), 3 Term Rep. 678; affirmed sub nom. *Russell v. Stokes* (1791), 1 Hy. Bl. 562; 126 E.R. 823, Ex. Ch.; 31 Digest (Repl.) 477, 6027.
- Renals v. Coulshaw* (1879), 11 Ch.D. 866; 48 L.J.Ch. 830; 41 L.T. 116; 28 W.R. 9, C.A.; 40 Digest (Repl.) 346, 2796.
- Duke of Bedford v. British Museum Trustees* (1822), 2 My. & K. 552; 1 Coop. temp. Cott. 90, n.; 2 L.J.Ch. 129; 39 E.R. 1055, L.C.; 40 Digest (Repl.) 360, 2887.
- Lloyd v. London, Chatham and Dover Rail. Co.* (1865), 2 De G.J. & Sm. 568; 6 New Rep. 51; 34 L.J.Ch. 401; 12 L.T. 363; 29 J.P. 743; 11 Jur.N.S. 380; 13 W.R. 698; 46 E.R. 496, L.J.J.; 40 Digest (Repl.) 347, 2602.
- Raymond v. Fitch* (1835), 2 Cr. M. & R. 588; 1 Gale, 337; 5 Tyr. 985; 5 L.J.Ex. 45; 150 E.R. 251; 24 Digest (Repl.) 776, 7646.
- Osborne v. Bradley*, post p. 541; [1903] 2 Ch. 446; 73 L.J.Ch. 19; 89 L.T. 11; 40 Digest (Repl.) 362, 2897.
- Leader v. Duffey* (1888), 13 App. Cas. 294; 58 L.J.P.C. 13; 59 L.T. 9, H.L.; 40 Digest (Repl.) 502, 145.
- Haywood v. Barrack Building Society* (1881), 8 Q.B.D. 403; 51 L.J.Q.B. 76; 45 L.T. 699; 46 J.P. 356; 30 W.R. 299, C.A.; 40 Digest (Repl.) 331, 2714.
- Chamberlain v. Williamson* (1814), 2 M. & S. 408; 105 E.R. 433; 24 Digest (Repl.) 767, 7562.
- Ricketts v. Weaver* (1844), 12 M. & W. 718; 13 L.J.Ex. 195; 3 L.T.O.S. 78; 152 E.R. 1289; 24 Digest (Repl.) 776, 7648.
- Wood v. Loadbitter* (1845), 13 M. & W. 838; 14 L.J.Ex. 161; 4 L.T.O.S. 433; 9 L.P. 312; 9 To. 187; 153 E.R. 361; 19 Digest (Repl.) 26, 112.

Nottingham Patent Brick and Tile Co. v. Butler (1886), 16 Q.B.D. 778; 55 L.J.Q.B. 280; 54 L.T. 444; 34 W.R. 405; 2 T.L.R. 391, C.A.; 40 Digest (Repl.) 343, 2781.

Spicer v. Martin (1888), 14 App. Cas. 12; 58 L.J.Ch. 309; 60 L.T. 546; 53 J.P. 516; 37 W.R. 689, H.L.; 40 Digest (Repl.) 336, 2744.

Appeal by the plaintiff from a decision of HALL, V.-C., in the Palatine Court of Lancaster.

The plaintiff, Mrs. Caroline Formby, suing in her individual capacity and also as administratrix with the will annexed of Roger Hesketh Formby, deceased, claimed against the defendant, Samuel Barker, an injunction restraining him from building any shop upon certain land at the corner of Andrew's Lane and Elson Road, at Formby, in the county of Lancaster, and for damages and costs. By a deed of 1868 Roger Hesketh Formby, the owner of certain land, and his mortgagees, conveyed that land to the Mutual Land Co. in fee simple. The deed contained a covenant intended to be executed by the company, but the deed was not in fact executed by the company. The company, however, took possession of the land by virtue of the deed, and the statement of claim was based upon the statement that the company had entered into the covenant. The covenant in question was as follows:

"And the said company do hereby for themselves, their successors and assigns, covenant with the said Roger Hesketh Formby, his heirs, executors, and administrators, that they shall not nor will exercise or permit or suffer to be exercised or carried on upon the said lands and hereditaments hereby assured or intended so to be, or any part thereof, or in or upon any building now or hereafter to be erected thereon, any manufactory of vitriol, glass, copper, brass, iron, or any other mineral, or any alkali or other chemical operation which shall produce any smoke or disagreeable smell, or the trade or business of a melter of fat, fustian dresser, pipe maker, manufacturer of caudles, soap boiler, or any other trade, manufactory, business, or employment whatsoever which shall or may be deemed a public or private nuisance, or any annoyance or inconvenience to the neighbourhood, and shall not nor will erect, build, or make, or permit or suffer to be erected, built, or made, upon the said land any iron or brass forge or foundry, or any furnace or steam engine, or any warehouse or other building for the deposit of goods, and shall not nor will erect, build, or make on the land coloured pink and fronting Raven-road any beer-house or shop or any hotel of less annual value than £50."

The defendant, who claimed the pink land through the Mutual Land Co. by virtue of divers mesne assignments, threatened to build a shop on that land. The shop was not to be a beerhouse or beershop, but some shop wholly unconnected with beer. The questions to be decided were whether the building of such a shop would be a breach of the covenant, and, if it was, whether the plaintiff could maintain the action. The action was heard in the Palatine Court of Lancaster, and on Jan. 27, 1903, HALL, V.-C., gave judgment dismissing it with costs. The plaintiff appealed.

Neville, K.C., and *F. M. Preston* for the plaintiff.

Astbury, K.C., and *Dixon McConkey* for the defendant.

Cur. adv. vult.

July 14, 1903. The following judgments were read.

VAUGHAN WILLIAMS, L.J., stated the facts and said that as the Mutual Land Co. took possession of the land by virtue of the deed of 1868, and the defendant claimed under them, the non-execution of the deed by the company only resulted in the rights thereunder being merely equitable, because there was no legal covenant, held that, on the construction of the covenant, "shop" therein meant

"learned," and continued: "This view really puts an end to the plaintiff's case, A but as another defence was raised and is discussed by the learned Vice-Chancellor, I think it right to deal with that point also. The learned Vice-Chancellor expressed his opinion that, even if the plaintiff's construction of the covenant was right, and there had been a breach of the covenant, nevertheless the plaintiff was not entitled to sue—that is to say, was not entitled to sue either as personal representative of Roger Formby, or as residuary devisee under the will of Roger B Formby. I agree with the conclusions of the Vice-Chancellor as to there being nothing in the point made by the defendant on the non-execution of the conveyance by the company, other than this, that there is no legal covenant. I have no doubt but that the Mutual Land Co. took the estate conveyed subject to the condition contained in the covenant, and I have no doubt but that Formby during his life could have entered that condition, and I am inclined to think even by an action C for damages. I wish before dealing with the question of the plaintiff's right to sue, to point out that that which Roger Formby conveyed was his whole estate, and that he had no contiguous estate which would be benefited by the covenant in question. I wish, further, to point out that there is in the deed no re-entry clause under which the vendor could go in as of his old estate or, indeed, as of any D estate."

In my judgment, this covenant is a personal covenant, but I do not think that, having regard to the opinions of the judges delivered in the House of Lords in *Beckham v. Drake* (2), the right of action which, in my judgment, would have vested in Roger Formby on a breach in his lifetime is of such a character that a breach after his death would not give a right of action to his personal representative against the covenantors, the Mutual Land Co. The maxim *actio personalis moritur E cum persona* has no application to any breaches of contract except those which constitute a mere personal wrong, and with the exception of actions for breaches which constitute a mere personal wrong all rights of action for breaches of contract pass to the executors. In an action for breach of covenant or condition, proof of damage is not essential, and, in my judgment there has been, if the plaintiff's construction of the covenant is right, a plain breach in this case of a covenant, F which breach is not a mere personal wrong.

I make these observations to dispose of the argument addressed on the maxim *actio personalis moritur cum persona*, but this still leaves the difficulty that the defendant is not a party to the deed, and that there is plainly no covenant running with land on which the defendant could be sued at law. It becomes necessary, G therefore, to see if an action for an injunction can be brought upon the principle established by the judgment of LORD COTTENHAM, L.C., in *Tulk v. Meechay* (1). In the marginal note in that case it is said (2 Ph. at p. 774):

"A covenant between vendor and purchaser, on the sale of land, that the purchaser and his assigns shall use or abstain from using the land in a particular way, will be enforced in equity against all subsequent purchasers with H notice, independently of the question whether it be one which runs with the land so as to be binding upon subsequent purchasers at law."

But when the Lord Chancellor begins his judgment he says (2 Ph. at p. 777):

"That this court has jurisdiction to enforce a contract between the owner of land and his neighbour purchasing a part of it, that the latter shall either use I or abstain from using the land purchased in a particular way, is what I never knew disputed."

These words do not cover the present case, because the land company did not purchase a part of the vendor's land, but the whole of it.

It becomes necessary, therefore, to ascertain whether the principle of *Tulk v. Meechay* (1) applies to a case where the vendor sells his whole estate. I have not been able to find any case in which after the sale of the whole of an estate in land,

A the benefit of a restrictive covenant has been enforced by injunction against an assignee of the purchaser at the instance of a plaintiff having no land retained by the vendor, although there are cases in which restrictive covenants seem to have been enforced at the instance of plaintiffs other than the vendor for the benefit of whose land it appears from the terms of the covenant, or can be inferred from surrounding circumstances, the covenant was intended to operate. In all other cases the restrictive covenant would seem to be a mere personal covenant collateral to the conveyance. It is a covenant which cannot run with the land either at law or in equity, and, therefore, the burden of the covenant cannot be enforced against an assignee of the purchaser. But it is said that the doctrine of *Tulk v. Moryay* (1) is independent of the question whether there is in law or in equity a covenant running with the land, and that the doctrine is based upon an obligation on the conscience of persons taking an estate with notice of a restrictive covenant binding it. The answer, I think, is to be found in a passage in the judgment of HENX COLLINS, L.J., in *Rogers v. Hosegood* (3). He says ([1900] 2 Ch. at p. 407):

"These authorities establish the proposition that, when the benefit has been once clearly annexed to one piece of land, it passes by assignment of that land, and may be said to run with it in contemplation as well of equity as of law without proof of special bargain or representation on the assignment."

In such a case it runs, not because the conscience of either party is affected, but because the purchaser has bought something which inhered in or was annexed to the land bought. This is the reason why in dealing with the burden the purchaser's conscience is not affected by notice of covenants which were part of the original bargain on the first sale, but were merely personal and collateral, while it is affected by notice of those which touch and concern the land. The covenant must be one that is capable of running with the land before the question of the purchaser's conscience and the equity affecting it can come into discussion.

It seems to me that in the passage I have just cited HENX COLLINS, L.J., assumes that the doctrine of *Tulk v. Moryay* (1) will not apply to a contract which is merely personal and collateral. In my judgment, the covenant in the present case is merely personal and collateral; it has not been entered into for the benefit of any land of the vendor or of any land designated in the conveyance; it is a covenant which, in my judgment, would not pass to the heirs of the vendor, notwithstanding the words of the covenant are "covenant with the said Roger Hesketh Formby, his heirs, executors, and administrators." There is no land designated to which the word "heirs" can be applied. Roger Formby could have sued the purchasers for breaches in his lifetime, and I think that his administratrix could have sued the purchasers for breaches after the death of Roger Formby, but I do not think that the administratrix can sue the assignee of the purchasers. There is no contractual privity and no relation of dominancy and servieny of lands which will enable an action to be brought against a person not a party to the original contract, nor do I think that the benefit of the covenant could be dealt with by a devise. In his judgment in *London and South-Western Rail. Co. v. Gomm* (4) SIR GEORGE JESSEL says (20 Ch. D. at p. 583):

"The doctrine of that case, [*Tulk v. Moryay* (1)] rightly considered, appears to me to be either an extension in equity of the doctrine of *Spencer's Case* (5) to another line of cases, or else an extension in equity of the doctrine of negative easements, such, for instance, as a right to the access of light which prevents the owner of the servient tenement from building so as to obstruct the light. . . . This is an equitable doctrine establishing an exception to the rules of common law which did not treat such a covenant as running with the land, and it does not matter whether it proceeds on analogy to a covenant running with the land or on analogy to an easement."

I think that in both these paragraphs SIR GEORGE JESSEL, whether describing the doctrine of *Tulk v. Moxhay* (1) as an extension of *Spencer's Case* (5) or of the equitable doctrine of negative covenants, regards it as something arising from the relation of two estates one to the other.

I have only to add that I do not think that either the passage in the judgment of KNIGHT BRUCE, L.J., in *De Mattos v. Gibson* (6), nor the statement of the law by LORD CAIRNS in *Doherty v. Allman* (7) in any way militate against the conclusion at which I have arrived, that where a negative or restrictive covenant is imposed upon user of land it will not be enforced against an owner not a party to the deed containing the covenant, if such covenant is merely personal and collateral to a conveyance of land. If it is said that the statement of KNIGHT BRUCE, L.J., in *De Mattos v. Gibson* (6) which runs thus (4 De G. & J. at p. 282):

"Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not to the material damage of the third person in opposition to the contract, and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller. This rule, applicable alike in general, as I conceive, to movable and immovable property, and recognised and adopted, as I apprehend, by the English law, may, like other general rules, be liable to exceptions arising from special circumstances; but I see at present no room for any exception in the instance before us"

negatives the above conclusion, because it shows that the doctrine of *Tulk v. Moxhay* (1) applies to personal as well as real property. I answer, first, that the basis of the statement by KNIGHT BRUCE, L.J., is rather the principle of *Lumley v. Wagner* (8) than that of *Tulk v. Moxhay* (1); and, secondly, that it is plain that the lord justice would not have thought that an injunction ought to have been granted if the plaintiff had assigned the charterparty, nor unless the plaintiff has sustained material damage. And as to what LORD CAIRNS says in *Doherty v. Allman* (7), it only shows that proof of damage is not necessary for the granting of an injunction in a case in which the parties to a contract for valuable consideration with their eyes open contract that a particular thing shall not be done. I think, for the reasons which I have given, the decision of the Vice-Chancellor was right on both points, and I think this appeal should be dismissed with costs.

ROMER, L.J.—I agree with the lord justice that we ought not in this case to differ from the view taken by the Vice-Chancellor as to the true construction of the covenant in question. I also agree in thinking that in this case, even if there had been a breach of the covenant, the administratrix of the covenantee is not entitled to an injunction. If restrictive covenants are entered into with a covenantee, not in respect of or concerning any ascertainable property belonging to the covenantee or in which he is interested, then the covenant must be regarded, so far as he is concerned, as a personal covenant, that is to say, as one obtained by him for some personal purpose or object. It appears to me that it is not legally permissible for him to assign the benefit of such a covenant to any person or persons he may choose, so as to place the assign or assigns in his position, with power again for them to assign, and so on indefinitely. Clearly at law such a right or power of assigning does not exist, and in equity up to the present time no such right has been recognised. To admit a right to obtain an injunction in such a case in any assign would be to extend the principle recognised in *Tulk v. Moxhay* (1) far beyond what is, in my opinion, justifiable. For the purposes of the present case, the administratrix can only be regarded and can only be entitled (if at all) to any relief in the capacity of an assign of the covenant, for the alleged breach of the covenant relied on took place after the death of the covenantee. I think, therefore, that on this ground also the appeal fails.

STIRLING, L.J. By a deed of July 27, 1868, Roger Hesketh Formby, upon a sale by him of certain real estate, conveyed that estate to the purchaser subject to restrictive covenants expressed to be entered into by the purchaser with him, his heirs, executors, and administrators. At the date of this deed Roger Hesketh Formby was not entitled to any land, freehold, copyhold, or leasehold, other than that which was thereby conveyed. Consequently, he was not at that date, nor (if it be material) did he subsequently become, entitled to any land for the protection or benefit of which the restrictive covenants were or could be intended. The plaintiff is his administratrix and universal legatee. In point of fact the deed of 1868 was not executed by the purchaser, and consequently there was no covenant as between vendor and purchaser which could be enforced at law; but with reference to the question whether the obligation intended to be imposed on the purchaser can be enforced in equity, this is immaterial, for the plaintiff cannot be in a better position than if such covenant had, in fact, existed, and it seems to me desirable to consider what the rights of the plaintiff would have been in that case. She might then have brought an action at law, but I have difficulty in seeing that she could have recovered more than nominal damages. However, if substantial damages could be recovered, it would seem to be the duty of the administratrix to resort to that remedy, for thus only could the personal estate, which it is her duty to protect, be benefited. I think that in the absence of special circumstances not found in the present case, damages would not only be an adequate but the most appropriate remedy. This being so, I do not think that a court of equity ought to interfere in her favour by way of injunction. If it did, I do not see why the like relief should be denied to any duly constituted legal personal representative of Roger Hesketh Formby at any time, however remote, assuming always that matters remained as they were at the date of his death. This seems to me to amount to a *reductio ad absurdum* of the plaintiff's claim. To avoid misconception I wish to add that different considerations would apply if the action had been brought by Roger Hesketh Formby in his lifetime.

Solicitors: *Pritchard, Englefield & Co.*, for *Simpson, North & Co.*, Liverpool; *Chester & Co.*, for *Alfred Stephenson*, Liverpool.

[*Reported by W. C. Biss, Esq., Barrister-at-Law.*]

SYNGE v. SYNGE

PROBATE, DIVORCE AND ADMIRALTY DIVISION (SIR FRANCIS JEAUD, P.), April 26, 27, May 1, 3, 4, 9, 10, 16, 21, 1900]

[Reported [1900] P. 180; 69 L.J.P. 106; 83 L.T. 224; 16 T.L.R. 388, 402]

COURT OF APPEAL (RIGBY, HENN COLLINS and ROMER, L.J.J.), July 29, 1901]

[Reported [1901] P. 317; 70 L.J.P. 97; 95 L.T. 83; 17 T.L.R. 718]

Divorce—Desertion—Refusal to cohabit—Justification—Refusal by wife of marital rights—Husband suffering from venereal disease—Bona fide belief—Desire of wife to pursue professional career.

A refusal of marital rights by a wife justifies her husband in declining to live with her, and by so declining he is not guilty of desertion, whereas the wife is guilty of desertion, unless her refusal is based on the fact, but not merely on a bona fide belief, that the husband is infected with a venereal disease.

A refusal of marital rights by a wife on the ground that, if she had a child, it would interfere with her professional career, the pursuit of which, owing to the limited means of the parties, is of great advantage to them, though not an absolute necessity, would not be justifiable, and the husband would not be guilty of desertion if he refused to live with his wife under such conditions.

Divorce—Conduct conducing—Conduct conducing to husband's adultery—Refusal by wife to grant husband marital rights.

While a wife who refuses her husband marital rights is to a certain extent morally responsible if he thereafter commits adultery she has not been guilty of conduct conducing to the adultery.

Notes. When this case was decided a wife could not obtain a divorce on the ground of adultery unless it were coupled with cruelty or desertion, a requirement which was altered by the Matrimonial Causes Act, 1923.

Considered: *Constantinidi v. Constantinidi*, [1903] P. 246; *Hodgson v. Hodgson* [1905] P. 233. Applied: *Davis v. Davis*, [1918] P. 85. Distinguished: *Bevor v. Bevor*, [1945] 2 All E.R. 200. Considered: *Scotcher v. Scotcher* (1946), 175 L.T. 441; *Allen v. Allen*, [1951] 1 All E.R. 724. Referred to: *Froud v. Froud*, [1904] P. 177; *Evans v. Evans and Elford*, [1906] P. 125; *Todd v. Todd and Canniam* (1906), 23 T.L.R. 9; *Hines v. Hines and Bardett*, [1918] P. 364; *Jackson v. Jackson*, [1924] P. 19; *Russell v. Russell*, [1924] A.C. 687; *Herod v. Herod*, [1938] 3 All E.R. 722; *Dailey v. Dailey (otherwise Smith)*, [1947] 1 All E.R. 847; *Weatherley v. Weatherley*, [1947] 1 All E.R. 563; *Everitt v. Everitt*, [1949] 1 All E.R. 908; *Knott v. Knott*, [1955] 2 All E.R. 305; *Brown v. Brown*, [1956] 2 All E.R. 1.

As to desertion and conduct conducing, see 12 HALSBURY'S LAWS (3rd Edn.) 241 et seq., 309, and for cases see 27 DIGEST (Repl.) 333 et seq., 422-426. For Matrimonial Causes Acts, 1857 and 1950, see 11 HALSBURY'S STATUTES (2nd Edn.) 816.

Cases referred to:

- (1) *Forster v. Forster* (1790), 1 Hag. Com. 144; 161 E.R. 504; 27 Digest (Repl.) 422, 3530.
- (2) *Russell v. Russell*, [1895] P. 315; 64 L.J.P. 105; 73 L.T. 295; 44 W.R. 210; 11 T.L.R. 579; 39 Sol. Jo. 722, C.A.; on appeal, [1897] A.C. 395; 66 L.J.P. 122; 75 L.T. 249; 61 J.P. 756, H.L.; 27 Digest (Repl.) 356, 3548.
- (3) *Oldroyd v. Oldroyd*, [1896] P. 175; 65 L.J.P. 113; 75 L.T. 281; 12 T.L.R. 442; 27 Digest (Repl.) 289, 2349.
- (4) *Mackenzie v. Mackenzie*, [1895] A.C. 384, H.L.; 27 Digest (Repl.) 306, 3097.

- (5) *Rippingall v. Rippingall and Delacour, Rippingall v. Rippingall* (1876), 24 W.R. 967; 27 Digest (Repl.) 289, 2334.
- (6) *Ousey v. Ousey and Atkinson* (1874), L.R. 3 P. & D. 223; 43 L.J.P. & M. 35; 30 L.T. 911, 22 W.R. 556; 27 Digest (Repl.) 366, 3023.
- (7) *Rowe v. Rowe* (1865), 4 Sw. & Tr. 162; 34 L.J.P.M. & A. 111; 12 L.T. 639; 11 Jur.N.S. 568; 13 W.R. 1048; 164 E.R. 1478; 27 Digest (Repl.) 446, 3780.
- (8) *Duplany v. Duplany*, [1892] P. 53; 61 L.J.P. 49; 66 L.T. 267; 8 T.L.R. 169; 27 Digest (Repl.) 446, 3778.
- (9) *Fitzgerald v. Fitzgerald* (1869), L.R. 1 P. & D. 694; 38 L.J.P. & M. 14; 19 L.T. 575; 17 W.R. 264; 27 Digest (Repl.) 334, 2784.
- (10) *R. v. Leresche*, [1891] 2 Q.B. 418; 60 L.J.M.C. 153; 65 L.T. 602; 56 J.P. 37; 40 W.R. 2; 7 T.L.R. 685; 17 Cox, C.C. 384, C.A.; 27 Digest (Repl.) 346, 2872.

Also referred to in argument :

- Haswell v. Haswell and Sanderson* (1859), 1 Sw. & Tr. 502; Sea. & Sm. 32; 29 L.J.P. & M. 21; 1 L.T. 69; 23 J.P. 825; 8 W.R. 76; 164 E.R. 832; 27 Digest (Repl.) 444, 3759.
- Yeatman v. Yeatman* (1868), L.R. 1 P. & D. 489; 37 L.J.P. & M. 37; 18 L.T. 415; 16 W.R. 734; 27 Digest (Repl.) 365, 3019.
- Buckmaster v. Buckmaster* (1869), L.R. 1 P. & D. 713; 38 L.J.P. & M. 73; 21 L.T. 231; 17 W.R. 1114; 27 Digest (Repl.) 343, 2848.
- Cooper v. Cooper* (1875), 33 L.T. 264; 27 Digest (Repl.) 343, 2852.
- Lodge v. Lodge* (1890), 15 P.D. 159; 59 L.J.P. 84; 63 L.T. 467; 27 Digest (Repl.) 349, 2889.
- Garcia v. Garcia* (1888), 13 P.D. 216; 57 L.J.P. 101; 59 L.T. 524; 52 J.P. 584; 4 T.L.R. 702; 27 Digest (Repl.) 339, 2809.

Appeal from a decision of SIR FRANCIS JEUNE, P., on a petition by Charlotte Granville Syngé for the dissolution of her marriage with her husband, Robert Follett Muter Foster Millington Syngé, on the ground of his adultery and desertion. The desertion was alleged to have taken place on or about Dec. 4, 1896, since which date the husband was said to have lived separate and apart from his wife without reasonable excuse. The husband, by his answer, denied the adultery and desertion, and alleged that his wife had deserted him. After a hearing before the President lasting several days, the jury found that the husband had committed adultery. The question of desertion was left to be decided by the President.

Bargrave Deane, Q.C., and *Le Bas* for the wife.

H. Durley Grazebrook for the husband.

SIR FRANCIS JEUNE, P., read the following judgment.—The question, and the only question, now remaining to be decided in this case is whether the husband deserted the wife without reasonable excuse. The husband has pleaded in his answer that the wife deserted him without just cause. But he asks for no relief in respect of this allegation, and it is not necessary for me to deal with any question of desertion by the wife, except in so far as it is involved in the question of desertion by the husband.

The following is an outline of the material dates in the case. The parties were married on Sept. 27, 1884. Directly after the marriage they left for India, the husband being an officer in the army, and they remained there till 1888. In that year the wife first and he afterwards returned to this country, and they lived together as husband and wife in the year 1889 until November. In that month he returned alone to India, the wife remaining in this country. He returned from India in January, 1891, and the parties lived together here under circumstances to be presently mentioned from February, 1891, to July, 1891. In that month the husband left to take up an appointment in West Africa, whence he

returned in August, 1892. He remained in England, not living with his wife, until January, 1894, and then he went alone to India to rejoin his regiment. He returned from India in 1896, and he lived, not with his wife, but by himself in barracks at Shorncliffe. In May he met the woman Miss Hooker, with whom adultery has been charged; and in October he arranged to retire from the army in the following January. In November he went to lodge at Miss Hooker's house, St. Olaves, Sandgate, where he remained for some time, and during his residence at that place, according to the finding of the jury, he committed adultery with Miss Hooker. The case of the wife is that the desertion of her by her husband commenced on Dec. 4, 1896—a date no doubt fixed because the husband on that day wrote a letter to his wife from St. Olaves, in which he said:

"I retire on Jan. 4, and am now on leave pending retirement, owing to being unable through poverty to remain in the army at home, and unable to serve in India on account of my health. Now I think you know all about me. I may add that I have virtually settled here."

But although this letter does contain a definite statement of his intention to remain at Sandgate, and although reasons which I shall presently mention were urged before me for treating this as the commencement of the period of desertion, I, on consideration of the facts of this case, have come to the conclusion that the separation between the parties which constituted a desertion by one or other of them occurred in fact at a much earlier period.

In order to explain my reasons for this view, it is necessary to consider the relations of the parties at several periods after their return from India in 1888. I have said that they lived together as husband and wife in 1889, and I will now add that I have no doubt that they so lived in great affection. On the point of the husband's departure from India in November, 1889, the wife wrote to him a long letter, which I need not read, but which conveys to my mind the strongest impression that at that time the wife regarded her husband with complete affection. It is quite true that the wife's mother, Mrs. Stuart, has said in the witness-box that her daughter was on bad terms with her husband at that time; but that statement of Mrs. Stuart's is, to my mind, completely rebutted by the wife's letter, and, indeed, it showed to me that her evidence on the subject of the relations between her daughter and son-in-law must be received with great caution. The husband remained in India in 1890, and towards the end of the year wished his wife to rejoin him there, and then occurred circumstances which are of vital importance in this case. The correspondence between the husband and wife, and the wife and a cousin of her husband's, shows that the wife was at first willing—indeed, anxious—to rejoin her husband, and took part in the arrangements which were being made to secure her a passage to India, but at that time she found an opportunity to try her powers as an actress on the stage, and afterwards secured an engagement, and then she gave up the intention of going to India, and so wrote to her husband. She did not in any way consult him prior to an acceptance of an engagement on the stage, but on Nov. 21, 1890, and Dec. 5, 1890, she wrote the following letters, which I read, not because they are very material to the question to be decided, but because they express her own explanation of her conduct:

"Nov. 21, 1890.—Dear Follett.—I received a letter from the War Office saying they would inform me in the event of a passage being available. Since applying for a passage I have been offered some employment that is likely to be lucrative to a certain extent, and when I know more about it for certain I will let you know, but it may prevent my accepting a passage even if it is offered me. I don't think you can be surprised at my trying to do something for myself and Alan to augment the miserable pittance you have sent me from India. Also I hear from Arnold through Tom of the alarming condition

A of affairs as to the Irish property, out of which when sold there will be nothing worth mentioning.—Cissy G. Synge."

Then comes the following letter :

B "Friday, Dec. 5, 1890.—Dear Follett,—In my last I told you I would let you know when anything was settled. I have been trying quietly a theatrical experiment to see if that line could be successfully worked. I was introduced to Mr. Alexander, of the Avenue, and he very kindly gave me a trial. The result was that he offered me an engagement, and I accepted it. Something had to be done. The state of affairs as regards the Irish property seems perfectly hopeless. My health would never stand such a place as Mhow. Alan's present and future had to be considered. These and other considerations to which I need not allude had their weight in shaping my decision. I have acted for the best under very difficult circumstances, as I felt that the smallness of your remittances left me in a state of dependence and penury. Your income evidently was not enough for so many, and if I could earn anything it was, I contend, my duty to earn it. At present what I earn is small and not enough to live on, but I shall get more by-and-bye, and there can be little doubt that I shall make my way. I shall continue to act under my assumed name. I am writing to your mother to-day to tell her of my decision.—Yours, etc., Cissy G. Synge."

E As soon as the husband heard of what his wife had done he determined to return, and he arrived in England at the end of January, 1891. He stated that he was met on arrival by his wife's father, General Stuart, who refused to tell him where she was and under what name she was acting. This refusal is denied by General Stuart, but I do not find it at all necessary to decide the painful question which of the two gentlemen is guilty of falsehood, because it is immaterial, inasmuch as the husband was certainly soon thereafter by some means acquainted with his wife's residence and was able to meet her. On Feb. 2, 1891, the wife wrote him the following letter :

G "Feb. 2, 1891.—Dear Follett,—I was very astonished to receive your telegram, the first intimation I have had from you that you are coming home, though I had two days previously seen in the papers that you had applied for leave. Your coming in this sudden way makes me fear you have done so in order to try and persuade me not to continue on the stage. I would remind you that I took that step at great sacrifice, not for my own pleasure, but in order to do what I could for the support of myself and our child, as your remittances were less than what you originally sent, and in the autumn they ceased, so that I was unable to carry out our arrangement for living here with my father—a cruel position which I could not consent to remain in. In addition, £12 a month after paying for our maintenance was not sufficient for me to dress myself and our child on, and for other expenses. I felt, therefore, that it was necessary that I should earn something, and the stage seemed to me the only chance, and I took the step, after well considering the matter, and having made up my mind and now actually taken the step, I am quite determined to pursue my course, and that nothing will induce me in our present circumstances to retire from it. I want you therefore to promise me that you will not in any way refer to the matter or try to dissuade me, because it can do no good and will only lead to unpleasantness, anger, and misery between us. Unless, therefore, you can feel you can make me this promise and adhere to it, I think it would be much better we should not meet. I received a message from your mother, who has been and is most kind to me about it, and, I am very glad to say, approves of the step I have taken. You desired your portmanteau to be sent to the club to await your arrival, and I have sent it there, also your hat box.—Yours, etc., Cissy."

on Feb. 4 the wife wrote another letter, which is important. I think for you would A
in it—the word “nominally.” It is as follows:

“Feb. 4, 1891.—Dear Follett,—I was going out when your letter came this morning, so could not answer it. I also got a wire from my father to say he would come and see me, so he is taking this to you to the club to save a penny. Alan is better, but I didn't let him out this morning, and I don't think I shall till it's warmer. As I said yesterday, I don't think things can be arranged all in a moment, and I think you owe me some proof that your treatment of me will be different in the future. On the whole, therefore, I think it would be best for you to go and see your mother, and, when you come back, the change of houses that has been hanging over us will be accomplished, and then things will have a very fair chance of settling down, and we can nominally live together in peace and quiet. If you like, I will meet you to-morrow morning and help you choose your clothes. If it's warm, I may bring Alan. Meet us, say, outside Percy Edwards' shop at 11.30. Hope you will have a nice evening with Heneage. Ask him about the ball.—Yours, Cissy.” B C

The full meaning of the word to which I referred is made clear by the following D
letter:

“Feb. 12, 1891.—Dear Follett,—Saw MacD. He was very nice. He said he thought this was a great opening for you, and it would be a pity to chuck it away. I am sending you a paper I want you to sign before you come back to me. I'm all right again. Alan must keep his birthday Monday or Tuesday. We go home to-morrow. My love to your mother.—Yours, Cissy G. Synge. P.S.—Going to tea with MacD. tomorrow.” E

This is the paper:

“1. You promise me most faithfully that you will not either directly or indirectly endeavour to induce me to leave the stage, or interfere with my professional life in any way whatever. 2. That when we are living together under the same roof we shall only be nominally living together as man and wife.” F

The husband did not apparently sign the conditions in accordance with his wife's request, but he accepted them in this sense, that from February to July he lived with his wife in the same house, but occupying a separate bedroom. He has G
stated, and I think truly, that he accepted this state of things unwillingly, but that the insistence of his wife's left him no alternative. In July, 1891, he went to West Africa. On April 28, 1892, the wife wrote to the husband, who was then at Warri, a letter, of which the material part is as follows:

“April 28, 1892.—My dear Johnnie,—With regard to your letter of Mar. 21, H
requesting me to inform you of my plans, I have only to say that I can make none, since, as far as I can see at present, my time will be fully taken up by my professional duties, including a tour in England and Scotland, which will probably occupy three months. The experiment we tried from January to July last year was hardly sufficiently successful to make me anxious to repeat it. The extreme insufficiency of the allowance you are pleased to make me renders this devotion to my profession absolutely necessary if I am to hope I ever to better my position, which at the present time, were it not for the money I make myself, would be one of extreme poverty, and this is a condition in which I have no intention whatever of existing if it can be avoided by any exertions of my own. Mutual recriminations are useless, but I must remind you that since you have held your present appointment and gained a large increase in your income, you have made no proportionate increase in mine. I hope you feel all the better for your change of air. Alan has had a bad I

A add lately; he is better now. He sends you his love. My mother has left the house again in Penywern Road, and is thinking of taking another.—Yours affectionately, Cissy."

In August, 1892, the husband returned from West Africa, and on the 24th he wrote to the wife the following letter :

B "24, Piccadilly, W., Aug. 24, 1892.—Dear Cissy,—Your letter has arrived. Before we go any further, will you please let me know if your letter to Warri is to be accepted by me as final or not? I have no intention of living the same sort of life as you imposed on me when I was last at home. You had better wire to me yes or no. If the former, then I shall come up and see if I can make things more comfortable for you in your mad enterprise. If no, then chaos."

C The answer of the wife, which I regard as very important, was as follows :

D "Aug 25, 1892.—My dear Johnnie,—Yours this evening. I did not wire, as I don't think matters can be arranged by a yes or no, as you seem to think. Why must you make all things hinge on the one condition?—I am perfectly willing to be the best of friends and companions to you if you would only consent to do without what you know is distasteful to me. I can't see why it should not be so, and that we should get on all right if you make up your mind to do so. Why, if you love me so much as you say, you should wish me to do what you know is not congenial to me and never was, I don't know. Why cannot we agree without that form of what is to you amusement? Surely it would be a lesser evil, looking at it from your point of view, than being altogether away from me? Now don't be silly and act hastily and be sorry for it after. We can get on easily if you will only be sensible.—Yours affectionately, Cissy."

E The wife and the husband did not live together after these letters, and they never lived together again. The husband resumed his regimental duties at Aldershot and elsewhere, and the wife remained in London pursuing the avocation of the stage. On Mar. 25, 1893, the husband wrote to the wife as follows :

F "March 25, 1893.—Dear Cissy,—Received box. If you had used your beautiful eyes you would have seen the spirit case on the mantelpiece in the back room Alan plays in. Are you still of the same mind as you were in August last year? That you owe me no duties, can get on well enough without me, and want nothing more to do with me? How long is Alan to be at Ealing?—Yours, F. M. S."

G The wife replied in the following letter :

H "April 2, 1893.—Dear Johnnie,—I have been too busy to answer your letter before as I have had influenza and also had to play Miss Terry's part as she was away for eight days. I brought Alan back from Ealing yesterday; he was there three weeks, and has quite recovered from his cold after influenza and is looking very well indeed. Do you want the spirit case sent to you?—Monday morning. Your letter came this morning. Alan's bank book is back and I will send it to-morrow. He got his Easter egg. I took it down to him at Ealing. He was very pleased with it. Claude is here. He doesn't go abroad till September. My mother is home again. As to your questions, I should rather like to know what you propose to live on and keep an establishment on, and what you have to offer in return for the independence I have earned and worked hard for myself, and which promises to increase and rapidly so. As to duties, yours seems to sit lightly upon you while you were abroad and providing a totally insufficient sum to keep us. How are the girls? My love to them. Alan sends his love. He goes back to lessons to-morrow.—Yours affectionately, Cissy."

It appears that the husband, who contemplated returning to India in 1884, was anxious that his wife should accompany him as she had previously done. We have not the letter in which he conveyed this wish, but on Jan. 3, 1894, the wife answered her husband's letter as follows:

"Jan. 3, 1894.—My dear Johnnie,—Yours last night. I was rather surprised at the contents. I'm afraid circumstances render it impossible that I should answer your question as I would have done in 1883-84 after all that has passed. Don't misunderstand me. I bear you no ill will, but I think we should be better friends at a distance, and I really could not contemplate a life that would mean constant differences of opinion. I think matters had better remain as they are at present. You see, however much you might wish it, you can never pick up a broken thread. I would like to know if Mr. Fowler expects a term's notice about Alan. You can say it's because the place doesn't suit him, and that his doctor says it's too relaxing for him.—Yours affectionately, Cissy."

Soon after the husband returned from India, and early in 1896 he wrote to the wife a letter which contains these words:

"When you have time, will you let me know whether you have made up your mind about what I asked you?"

In her reply, which appears to have been written on Feb. 16, 1896, the wife wrote:

"I don't know why you should write postcards and letters, and ask me to say yes or no. The matter is far too serious, and I gave you my views on the subject some time ago, which I thought you understood. Leave well alone."

This ended the correspondence between the parties on the subject of their living together, and, as I have said, the husband soon after met Miss Heather, and took lodgings in her house, St. Olaves, Sandgate, in the following November.

Consideration of these facts and letters in their sequence brings me clearly to the conclusion that it is impossible to say that any separation or desertion took place, in the sense of commencing at the end of 1896. I regard the period of commencement of a separation between these parties as being clearly defined, and I fix it at the time of the husband's return from West Africa in August, 1892. The parties had lived together in 1889 as husband and wife; they had again lived together under the conditions I have mentioned, not as husband and wife, but agreeing to the state of things, in 1891; but on his return from West Africa it is clear that the husband wished to live with his wife as her husband, and it is equally clear that she was willing to live with him, but not as his wife. The result was a separation, and from that time the separation so begun continued. Ever after the husband was willing to cohabit if, and only if, marital rights were allowed to him, and the wife was willing to cohabit, if and only if, such marital rights were not insisted on. I regard the letter of Dec. 4, 1896, not as announcing anything new, or as stating the husband's intention to desert his wife, but as written in view of the state of things which had been continued for more than four years, and as merely stating where his residence then was and was for some time likely to be. I may add that the evidence, both of the wife and the husband, given before me was perfectly clear and candid to the effect that at all times after the husband's return from West Africa she was willing to live with her husband only if there was no intercourse; he was desirous of living with her, but only on the ordinary terms of married life.

The learned counsel for the husband sought to extract from the evidence proof not only that the wife refused to live with the husband as his wife, but that after a certain time, which he placed in April, 1892, her conduct changed, and that thereafter she became unwilling to live with him on any terms at all.

A He based his argument on some expressions in the letters I have read. But although taken by themselves these expressions (for example, the phrase in the letter of Jan. 3, 1894: "I think we should be better friends at a distance") may look like the expression of an absolute determination to live separate, I think that, taking all the circumstances into consideration, they do not amount to more than a reiteration of the determination to live with her husband only on her own terms. On the other hand, counsel for the wife urged on me the view that not till the end of 1896 did the occasion arise when desertion by the husband could be, and, as he argued, was effected. He contended that before that time the husband was an officer in the army, and so compelled to fix his residence at Aldershot or Shorncliffe or elsewhere out of London, and that the wife was an actress and compelled to live in London, and that, as this condition of things continued by consent of both parties, it was not till the end of 1896, that the husband on retiring from the army became free to reside with his wife, and that, therefore, his letter of Dec. 4, 1896, should be taken as a declaration of his intention not to live with her, and so constituted desertion. But I do not think that this view is consistent with the facts. The necessity of the husband and wife residing at different places was never suggested by either husband or wife as the obstacle to their resuming cohabitation, nor, in fact, in my opinion, did it constitute the real obstacle to the resumption, if not of complete cohabitation, at least of such residence together, constantly or occasionally, as would negative the idea of separation or desertion. In his letter of Aug. 24, 1892, for example, the husband clearly shows that he could and would resume ordinary marital relations if his wife was willing to do so. I think the plain and simple fact is, as the parties themselves in effect stated in evidence, that the obstacle, and the only real obstacle, in the way of cohabitation after the husband's return from West Africa in August, 1892, and its continuance, with the exception of the period of his stay in India in 1894 and 1895, was the refusal by the wife to allow the exercise of his marital rights.

I may, therefore, at this point consider a question which, in my judgment, lies at the root of this case. If a wife without cause (I will presently consider the cause alleged in this case) refuses to live with her husband as his wife, has the husband a reasonable excuse within the meaning of s. 27 of the Matrimonial Causes Act, 1857 [repealed], for refusing to live with her? Counsel for the husband contended that such a cause does not constitute a reasonable excuse, and he based his argument on the undoubted principle that neither this court nor the ecclesiastical courts in former days ever enforced complete marital relations between spouses. SIR WILLIAM SCOTT said more than a hundred years ago (1 Hag. Con. at p. 154):

"The duty of matrimonial intercourse cannot be compelled by this court, though matrimonial cohabitation may":

H *Forster v. Forster* (1). From that counsel sought to draw the conclusion that the matrimonial intercourse was a matter beyond control of the cognisance of the courts of law. I entirely agree with this contention so far as it alleges that the courts of this country have never sought directly to enforce matrimonial intercourse, or, to state the same thing in other words, a refusal of matrimonial intercourse has never been regarded as a matrimonial offence, and I do not think it necessary to refer to the authorities which bear out this well-recognised principle. But I do not think that this principle carries us sufficiently far. It is clear that a reasonable excuse within the meaning of s. 27 of the Act of 1857 need not be a matrimonial offence. If authority is needed for this, it is to be found in *Russell v. Russell* (2) in the Court of Appeal. It is true that that case dealt with s. 5 of the Matrimonial Causes Act, 1884, and the words "desertion without reasonable cause" in that section; but the basis of the decision given by the majority of the court was that the words "desertion without cause" in s. 16 of the Act of 1857 did not limit this cause to the commission of a matrimonial offence. It appears to me clear that "desertion

without reasonable excuse" in s. 27 of the Act of 1867 is no more limited than the words "desertion without cause" in s. 16; and this, I think, was the view taken by GORELL BARNES, J., in *Oldroyd v. Oldroyd* (3), when he said that "excuse," "reasonable cause," and "reasonable excuse" all mean the same thing.

Does, then, a refusal of marital rights by a wife constitute a reasonable excuse for desertion by a husband? The question is one dependent on considerations of a general character, and I am not aware that this court has ever pronounced a decision on the point. There are some dicta which appear to me to point to an affirmative answer to the question which I have just stated. In *Mackenzie v. Mackenzie*, a Scottish case, LORD HERSCHELL said (1895 A.C. at p. 389):

"It appears to me that it would be essential for the party suing for a divorce to show that he or she had during that time used every reasonable endeavour to induce the other to adhere and had been ready and willing to discharge on his or her part all marital duties."

It cannot, I think, possibly be contended that consent to the ordinary rights of a husband does not fall within the marital duties of a wife. Again, in *Rippingall v. Rippingall* (5), which was a petition by a wife for restitution of conjugal rights, SIR JAMES HANNEN, P., said (24 W.R. at p. 967):

"It was proved that Mrs. Rippingall had formerly refused to perform her conjugal duties, but that is no ground for refusing the order now asked for. I cannot speculate on her motives, but it must be presumed that she is now prepared to act in a different way."

It appears to me that SIR JAMES HANNEN, P., would not have so expressed himself if he had thought that a wife, while persisting in refusing to perform her conjugal duties, was nevertheless entitled to claim cohabitation from her husband by a suit for restitution of conjugal rights. He would surely have said that the performance or non-performance of the conjugal duty in question was immaterial.

In *Ousey v. Ousey and Atkinson* (6) SIR JAMES HANNEN, P., held that desertion by a husband was excusable when a wife was unable or unwilling to consummate the marriage, and even when the husband believed that such was the case. It is quite true that that was a case of non-consummation of a marriage, which, of course, rendered the marriage itself voidable, but what SIR JAMES HANNEN said was (L.R. 3 P. & D. at p. 225):

"I think that a husband taking the view that the fault was not with him, but with the wife, and in that state of mind coming to the conclusion that the connection between them was intolerable, leading to misery and not to happiness, because his wife was either unable or resolutely unwilling to consummate, and therefore leaving her, cannot be said to have been guilty of such desertion as is contemplated by the statute."

I read these words in a large sense. I do not think it can reasonably be contended that if a wife permitted to her husband one act of intercourse and no more, that the connection between them would be more tolerable and more likely to lead to happiness and not to misery than if she refused intercourse altogether.

If, however, authority for an affirmative answer to the question I have stated is thus scanty, I can find no authority in favour of an answer in the negative. The only case I have been referred to which to my mind at all bears on the question is *Rowe v. Rowe* (7). That was a case of a petition for judicial separation of a wife on the ground of the husband's cruelty and adultery, and the husband pleaded that the wife had wilfully withdrawn herself from his bed and refused to render him conjugal rights. It was held that this plea constituted no answer. But this was not a case of desertion or separation either by the husband or the wife, and even if the wife's conduct had been supposed to amount to desertion, that would have been no answer in a suit for judicial separation on the ground of cruelty and adultery: see *Duplany v. Duplany* (8).

A If, then, there is no authority compelling me to decide that a husband in declining to live with a wife who refuses him the rights of a husband has no reasonable cause for so acting, I will not so hold. I cannot think that any husband is bound continually to expose himself to such mortification and misery as is necessarily involved in the life to which the wife in this case, in the letter of Aug. 24, 1892, invited the husband. The objects of married life as expressed in the marriage service are not the less true because they are the utterances of a more plain-spoken age than the present, and, while human nature remains what it is, I think a husband has a right to decline to submit to a groundless demand of his wife that he should live with her as a husband only in name. Neither party to a marriage can, I think, insist on cohabitation unless she or he is willing to perform a marital duty inseparable from it. I adopt the spirit of the words—the wise words—of SIR WILLIAM SCOTT in the case to which I have already referred *Forster v. Forster* (1). Speaking of a case in which a husband was alleged to have withdrawn himself from his wife's bed, he said (1 Mag. Con. at pp. 154, 155):

D “This species of malicious desertion is a ground of divorce in some countries—certainly not so here—and still less will it justify a wife, in a resort to unlawful pleasures, that lawful ones are withdrawn. It is not, however, to be considered as a matter perfectly light in the behaviour of a complaining husband that he has withdrawn himself without cause and without consent from the discharge of duties that belong to the very institution of marriage, and if he has so done, he ought to feel less surprise if consequences of human infirmity should ensue.”

E The result, therefore, is in my opinion either that the husband did not desert the wife, but rather that she deserted him, or, if he did desert her, that he did so with reasonable excuse within the meaning of the Act of 1857. The above view, I think, is decisive of this case. But counsel for the wife has presented to me the case of his client in another aspect which I must now examine. He in the first instance urged, or perhaps, rather suggested, what was not mentioned in the wife's pleadings—that the wife had the reason for refusing marital rights to her husband that he was infected with the disease of syphilis, and that, therefore, intercourse was unsafe and improper. If this could have been proved in fact it would have established the wife's case. I should have held without hesitation that for a wife to refuse marital intercourse under such circumstances constituted no ground for desertion by the husband. But not only was this not proved, but the reverse was proved. The husband was able to show by his own evidence and that of Dr. Birch, a relative who had attended him and who examined him carefully before he went to West Africa, that he had never suffered from this disease. I am glad to say that on this evidence the imputation was handsomely and completely withdrawn.

G I confess I hoped when this admission was so properly made that the wife would have gone further and would have withdrawn the petition, satisfied that the cause she alleged for her treatment of her husband was a complete mistake on her part, and perhaps also taking the kindly and considerate view that much might be forgiven to a husband who, if he had erred against her, had done so under circumstances for which she was not altogether free from responsibility. But this course was not taken, and the contention was advanced on behalf of the wife that, even if the husband had not in fact suffered from syphilis, the wife at any rate had so believed *bonâ fide*, and that such *bonâ fide* belief, justifying her refusal of marital intercourse, destroyed the ground of desertion by the husband. I am not prepared to say that a wife's belief, even if *bonâ fide*, can have any such effect as is sought for it. If the wife can prove disease in her husband as a fact, that has the result which I have already ascribed to it. But how can her mere belief, even though held *bonâ fide*, if mistaken in fact, have the same effect? Possibly, if the truth cannot be ascertained, as in *Ousey v. Ousey* (6), the belief of the parties may have an effect similar to that which SIR JAMES HANSEN gave to it. But when the fact can

be and, as in this case, has been ascertained, why should the mistaken belief of the wife, even if honest, prevail over the well-founded and equally honest belief of the husband? The primary question to be decided is: Had the husband reasonable ground for desertion? If belief is to be taken into consideration, why should not his honest belief that his wife refused him marital rights without cause justify his conduct even though the wife honestly believed that she had good grounds for such refusal? The solution of the problem presented by such a conflict of beliefs is, I think, to be found in holding that, where the fact can be determined, the fact must prevail, and that erroneous beliefs on either side are immaterial.

I should have been glad for several reasons to have left the case here, and to have avoided deciding the question whether in this case the wife *bonâ fide* believed that the husband was infected with syphilitic disease, and on that ground refused intercourse with him. But, as this case may be the subject of an appeal, I feel bound to express the opinion which I have formed on this point also.

[HIS LORDSHIP reviewed the evidence on this matter, stated his findings thereon, and concluded]: I am, therefore, compelled to say that I cannot think it proved that the wife *bonâ fide* believed that her husband's health rendered intercourse dangerous and, therefore, refused him.

I have little more that is needful to say. I have not dealt with the wife's going on the stage, and the condition she laid down in her letter of Feb. 12, 1891, as to her husband abstaining from interference with her professional life, as any cause of separation between husband and wife, because I do not think that this matter was any direct cause of that separation. If, indeed, the husband had refused to live with his wife because she had made it a condition that he should, as she asked, not "interfere with her professional life in any way whatever," I think the husband would have been within his rights in refusing any such condition. It may have been right and desirable, I do not say it was not, that the wife should go on the stage, having regard to her great aptitude for that profession and to the pecuniary means of herself and husband, and I do not wish to discuss how far, if her husband under such circumstances objected, she may not have been justified at least in strongly endeavouring to overcome his objections, but to insist that he should never interfere in any way with her professional life is quite another thing. I do not think that any husband would be bound—nay, would be entitled—to abdicate his duties of counsel, protection, and, it may be, restraint, in the case of a wife entering on a life as full of danger as it is brilliant and stimulating. But I do not think that the question of her going on the stage formed any part of the direct cause which separated this husband and wife. Counsel for the wife suggested, in the course of his argument, that if a fear of having children, with consequent interruption of her stage career, was in truth the cause of the wife's conduct, such cause constituted a justifiable reason for her conduct. He urged that her going on the stage was dictated and rendered necessary by the pecuniary position of the husband and wife with their child. It is difficult to judge of the validity of a reason the existence of which is hypothetical, and which the wife disavowed, but I am bound to say that I do not think that this could be held to be a sufficient reason for the wife's opposition to her husband's wishes as to their relations. It is not necessary to enter fully into consideration of their pecuniary means, which are not quite clear. It may be concluded that their means were small, and that the earnings of the wife are of very great advantage to herself, her husband, and their child. But I do not think it can be said that her adopting the stage as a profession was a matter of absolute necessity, and I cannot say that I think, under such circumstances, the wife had the right to dictate to her husband what the marital relations between them should be.

Her counsel also pressed the argument upon me, that if the wife did refuse marital rights to her husband without good reason, still his duty was not to sever himself from her, but to live with her and endeavour by kindness in course of time to obtain from her the fullest proofs of affection on her part towards himself. In

A many—perhaps most—cases I should say that this was a just and right-minded observation. But in this case it is to be remembered, first, that the experiment of living nominally as husband and wife was tried by these parties for some months in 1891 with results satisfactory to neither; and, secondly, that if a main cause of the wife's refusal was (as the husband no doubt believed) devotion to her acting, lapse of time could not be looked to to produce any beneficial effect. Indeed increasing **B** success on the stage would naturally increase the objection to any course which could be supposed likely to impair it. As to costs, the means of the parties are about equal or the wife's the larger. In strictness, therefore, she should pay the costs of the petition which has failed, and he the costs of the issue of adultery. But I think it will be better, and probably not materially different, that each party should bear his or her own costs.

C Counsel for the wife asked that the case might be adjourned in order that the wife might consider the question of applying for a judicial separation. The application was subsequently made, the parties being represented by the same counsel as on the hearing of the petition.

D **SIR FRANCIS JEUNE, P.**, held that the wife's conduct had rendered her guilty of desertion, but that that desertion was not a bar to her obtaining a decree of judicial separation, but see now Matrimonial Causes Act, 1950, s. 4 (2), proviso (iii), s. 14 (1), enactments to the contrary effect. His LORDSHIP added: I do not say that the wife has been guilty of conduct conducing to his misconduct within the meaning of s. 31 of the Act of 1857, because it appears to me that though no doubt a wife **E** who behaves as the petitioner in this case behaved is, to a certain extent, as **SIR WILLIAM SCOTT** said in the case to which I referred, morally responsible, still I think it is a very long step, and one I cannot take, to say that a wife who refuses matrimonial intercourse has conduced to the adultery of her husband. A husband has no right to commit adultery because she refuses it. I think that is a low and mean view to take of it. She may be perhaps morally responsible, but I do not say **F** that she has been guilty of conduct conducing to his adultery. A man has no right to commit adultery because his wife acts in that way. Therefore, I put it solely on this, that the wife in the present case has been, as I think, guilty of desertion, but I do not think that is a ground for refusing a judicial separation, and I am prepared to grant that decree.

G The wife appealed against the refusal of her petition for dissolution of marriage.

Bargrave Deane, K.C., and *Le Bas* for the wife.
Durley Grazebrook for the husband.

H **RIGBY, L.J.**—In my opinion, the learned President was right in the conclusions at which he arrived, and I think that we ought not to disturb his decision. The appeal will, therefore, be dismissed.

I **HENN COLLINS, L.J.**—I am of the same opinion. It is not necessary to go again through the facts and the correspondence which are fully dealt with in the judgment of the learned President. Nor is it necessary to repeat the reasons given by him.

He decided two points, on both of which I agree with him. He came to the conclusion, first, that there had been no desertion by the husband; and, secondly, that, if there had been desertion, there was reasonable excuse for it, so that it could not give the wife a right to treat it as a matrimonial offence and the foundation for a divorce. First, was there desertion? The facts and correspondence seem to me to show clearly that the original desire of the husband was to resume the ordinary relations of husband and wife, and that the only reason why they were not resumed was the refusal of the wife to submit to the ordinary conditions of married life. Under these circumstances the husband on his return from abroad invited the wife

to say aye or no whether she was willing to come back to him and to resume the ordinary relations of husband and wife, and all he got from her was a refusal. It was not until then that he wrote the letter of Dec. 4, 1896, which the wife sought to treat as the commencement of his desertion. It is contended that that began the desertion, and on that part of the case it is important to consider what constitutes desertion according to ecclesiastical law. In *Fitzgerald v. Fitzgerald* (9) Lord PENZANCE said (L.R. 1 P. & D. at p. 698) that

"No one can 'desert' who does not actively and wilfully bring to an end an existing state of cohabitation. Cohabitation may be put an end to by other acts besides that of actually quitting the common home. Advantage may be taken of temporary absence or separation to hold aloof from a renewal of intercourse. This done wilfully against the wish of the other party, and in execution of a design to cease cohabitation, would constitute 'desertion.' But if the state of cohabitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, 'desertion,' in my judgment, becomes from that moment impossible to either, at least until their common life and home have been resumed. In the meantime either party may have the right to call upon the other to resume their conjugal relations, and, if refused, to enforce their resumption; but such refusal cannot constitute the offence intended by the statute under the name of 'desertion without cause.'"

That decision was approved by the Court of Appeal in *R. v. Leresche* (10).

It is quite obvious what lies at the root of the matter. These cases show that a refusal by a husband to cohabit with his wife, even though it is accompanied by physical separation from her, does not of itself constitute "desertion" by him. In the present case *ex hypothesi* there was no desertion. Until the adultery was committed it is clear that the parties were living apart by mutual consent, though there was strong desire on the part of the husband to live with his wife in the ordinary way, and a refusal on the part of his wife to do so. How does that come to be desertion? The commission of a matrimonial offence by him does not convert into desertion that which was not desertion before. I can quite understand that when the court has to determine whether there has been desertion before the commission of adultery it may be material to take the adultery into consideration as evidence of the intention. But here the evidence absolutely negatives the idea that there was desertion before the adultery. The separation was not brought about by reason of the husband's desire not to return to his wife. There is no evidence of his desire to desert her. If she had been willing to allow him to come back to her in the ordinary way he was quite ready to do so. It is not necessary for us to decide whether there was desertion on the part of the wife. In my opinion, there was no desertion by the husband, and if there was desertion the circumstances amounted to such a set of facts as to be a reasonable excuse for it.

ROMER, L.J.—I agree. I am not prepared to say that, even if a husband and wife may be living apart by mutual consent, adultery may not be committed by him under such circumstances as to justify the finding of "desertion." But I do say that in the present case the wife has failed to satisfy me that any matrimonial offence in addition to the adultery has been committed by her husband. Therefore, the appeal should be dismissed.

Solicitors: *Lewis & Lewis; Berkeley-Calcott & Co.*

Appeal dismissed.

Reported by H. M. GIVEN, Esq., & E. A. SCRATCHLEY, Esq., Barristers-at-Law.

CARTWRIGHT v. SCULCOATES UNION

[House of Lords (Lord Macnaghten, Lord Morris, Lord Shand, Lord Davey, Lord Brampton and Lord Robertson), March 1, 1900]

[Reported [1900] A.C. 150; 69 L.J.Q.B. 403; 82 L.T. 157; 64 J.P. 229; 48 W.R. 394; Ryde & K. Rat. App. 167; 16 T.L.R. 238]

Rates—Assessment—Profits basis—Ascertainment of rateable value—Licensed premises—Consideration of value of trade done and goodwill.

On an appeal by the occupier against the assessment of a tied public-house to the poor rate, the case was referred to an arbitrator who rejected evidence of the weekly takings and payments at the premises and found that the rents paid for other public-houses in the district furnished no criterion of the rent which a tenant might be reasonably expected to pay for the appellant's house. He found that the personal qualities of the occupier had no effect on the value of the goodwill or the trade done at the premises, and held that in fixing the assessment of the premises it was proper to take into account the value of the trade already done there and the value of the goodwill attached to the house so far as it consisted of the probability that the customers now resorting to the house would continue to do so whether the occupier continued to occupy the house or not.

Held: the matters considered by the arbitrator were those which a hypothetical tenant would take into account in deciding what yearly rent he was willing to pay for the premises, and an assessment based on those matters was correct.

Decision of the Court of Appeal, [1899] 1 Q.B. 667, affirmed.

Notes. Considered: *Parr v. Leigh Union* (1905), 1 Konst. Rat. App. 211; *R. v. Shoreditch Assessment Committee, Ex parte Morgan*, [1908-10] All E.R. Rep. 792; *Roberts v. Poplar Assessment Committee*, [1922] 1 K.B. 25; *Robinson Bros. (Brewers), Ltd. v. Houghton and Chester-le-Street Assessment Committee*, [1937] 2 All E.R. 298; *Surrey County Valuation Committee v. Chessington Zoo, Ltd.*, [1950] 1 All E.R. 154. Referred to: *Cambridge Assessment Committee v. Ellis* (1900), 83 L.T. 201; *Mersey Docks and Harbour Board v. Birkenhead Assessment Committee*, ante p. 27; *Re Great Northern Railway and Edmonton Union and Hornsey Parish Assessment Committee* (1905), 69 J.P. 179; *Ipswich Gas Light Co. v. Ipswich Union* (1907), 2 Konst. Rat. App. 669; *I.R. Commrs. v. Fitzwilliam*, [1913] 1 K.B. 184; *Port of London Authority v. Orsett Union Assessment Committee*, [1919] 2 K.B. 1; *Coman v. Rotunda Hospital, Dublin*, [1921] 1 A.C. 1; *Appenroot v. Central Middlesex Assessment Committee*, [1937] 2 All E.R. 325; *Racecourse Betting Control Board v. Brighton County Borough Rating Authority*, [1941] 2 All E.R. 595; *Aberaman Ex-Servicemen's Club and Institute v. Aberdare U.D.C.*, [1948] 1 K.B. 332; *Amalgamated Relays, Ltd. v. Burnley Rating Authority and Burnley Assessment Committee* (1949), 113 J.P. 232.

As to the valuation for rating on a profits basis and the valuation of licensed premises, see 32 HALSBURY'S LAWS (3rd Edn.) 77-79, 96, 97, and for cases see 38 DIGEST (Repl.) 619-621, 670-674.

Cases referred to:

- (1) *R. v. Grand Junction Rail. Co.* (1844), 4 Q.B. 18; 4 Ry. & Can. Cas. 1; 1 Dav. & Mer. 237; 1 New Mag. Cas. 29; 1 New Sess. Cas. 203; 13 L.J.M.C. 94; 3 L.T.O.S. 123; 8 J.P. 358; 8 Jur. 508; 114 E.R. 804; 38 Digest (Repl.) 642. 1019.

- (12) *Pugh v. South Shields Poor Law Union Assessment Committee*, [1898] 1 Q.B. 133; 64 L.J.Q.B. 508; 72 L.T. 645; 59 J.P. 452; 43 W.R. 532; 11 T.L.R. 379; 39 Sol. Jo. 467; 14 R. 422, C.A.; 38 Digest (Repl.) 672, 1230.
- (13) *Morrey Banks v. Liverpool Overseers* (1873), L.R. 9 Q.B. 441; 48 L.J.M.C. 33; 29 L.T. 454; 38 J.P. 21; 22 W.R. 184; 38 Digest (Repl.) 669, 1204.

Also referred to in argument :

- R. v. Aylesford Union* (1872), 26 L.T. 618; sub nom. *R. v. North Aylesford Union*, 37 J.P. 148; 38 Digest (Repl.) 619, 880.
- West Mid Essex Waterworks Co. v. Coleman*, *Coleman v. West Mid Essex Waterworks Co.* (1885), 14 Q.B.D. 529; 54 L.J.M.C. 70; 52 L.T. 578; 49 J.P. 341; 33 W.R. 549; 1 T.L.R. 294, D.C.; 38 Digest (Repl.) 670, 1212.
- Clark v. Fisherton-Angar* (1880), 6 Q.B.D. 139; sub nom. *Clark v. Alderbury Union Assessment Committee*, 50 L.J.M.C. 33; 45 J.P. 358; 29 W.R. 334, D.C.; 38 Digest (Repl.) 727, 1566.
- R. v. Bradford* (1815), 4 M. & S. 317; 105 E.R. 852; 38 Digest (Repl.) 672, 1224.

Appeal by the ratepayer from a decision of the Court of Appeal (the EARL OF HALSBURY, L.C., A. L. SMITH and HENN COLLINS, L.J.J.), reported [1899] 1 Q.B. 667, affirming a decision of the Divisional Court (GRANTHAM and RIDGEY, J.J.) upon a Special Case stated by an arbitrator on an appeal to quarter sessions against a poor rate.

The appellant was the tenant and occupier of the fully licensed Star and Garter public-house in Hull. He held the house under an agreement with the Hull Brewery Co., Ltd., dated Feb. 16, 1888, which was determinable by either party on giving three months' notice, expiring at any time, at a yearly rent of £250. By the terms of the agreement the appellant was bound to purchase all liquors sold by him from the landlords or their nominees. By the rate appealed against, which was levied on or about April 10, 1897, the appellant was rated on an assessment in respect of the premises of £850 gross estimated rental and £680 net rateable value. The assessment immediately prior thereto was £257 net rateable value. On June 17, 1897, the appellant gave notice of appeal to the general quarter sessions of the peace for the city and county of Kingston-upon-Hull against the rate and assessment, on the ground that he was over-rated. By an agreement dated Dec. 18, 1897, and made between the appellant and the respondents, and by an order of DAY, J., the matters of the appeal were by consent ordered to be referred to the arbitration of Walter Cranby Ryde, barrister-at-law, as arbitrator.

On the hearing before the arbitrator the respondents endeavoured to justify the assessment of £850 gross annual value and £680 net rateable value by: (i) cross-examination of the appellant as to and evidence of his weekly takings and payments; (ii) evidence of the actual number of persons observed to enter the appellant's house during a certain period of fourteen days (during which it was under observation by the respondents), and a deduction therefrom of the amount of the annual trade done in the house by the appellant; (iii) valuations of the house on the basis that such an annual trade was done in it and including therein the value of such trade. The arbitrator rejected the evidence of and disallowed the cross-examination of the appellant as to his weekly takings and payments, and found as a fact that the public-houses in Hull which were not "tied" were so far from the appellant's house and of so little value that the rents actually paid for them furnished no criterion of the rent to be reasonably expected for the appellant's house; and also, that (i) the goodwill attached to the house so far as it consisted of the personal connection between the appellant and his customers was non-existent, or, if existent, of inappreciable value; (ii) the personal qualities and capacity for business or management possessed by the appellant had no effect on the trade done or the profits made in the house. The arbitrator held that in fixing the amount of the assessment of the appellant's house it was lawful and proper to take into account:

(a) the value of the trade already done there; (b) the value of the goodwill attached to the house so far as it consisted of the probability that the customers now resorting to the house would continue to do so whether the appellant continues to occupy the house or not. This decision was affirmed by the Divisional Court and by the Court of Appeal.

Balfour Browne, Q.C., and Cautley for the appellant.

Brett, Q.C., and R. Cunningham Glen (Grotius with them) for the respondents, the rating authority.

LORD MACNAGHTEN.—Notwithstanding the able argument on the part of the appellants, I think that this is a very simple case. To my mind it is a question of common sense having regard to the plain language of the Act of Parliament, and not a question of law.

What your Lordships have to consider is whether the learned arbitrator proceeded on the lines on which the Act of Parliament directs or fairly indicates that he ought to proceed. What has the learned arbitrator done? He has found that in this particular case there does not exist the ordinary basis of computation, and he has excluded any inquiry into profits. In that I think that he was perfectly right, not that the profits if they could be ascertained would not be an element in arriving at the rent which a tenant might reasonably be expected to pay, but that any further inquiry into profits should be avoided, because it would be oppressive. There is nothing that a tradesman so much dislikes as an inquiry into his profits. In some cases possibly it cannot be avoided, and then according to the decided cases it may be done; but in this case there has been no inquiry into profits. The learned arbitrator has taken into consideration the amount of business which this public-house was doing. Was he wrong in that? Surely the very first thing that a tenant who was going to offer for a house of this sort would do would be to consider (roughly if he could not do it accurately) what amount of business he was likely to do there. It appears to me that the volume of business done in a public-house, as apparent to the man in the street—if I may use such an expression—is the very first thing that a tenant proposing to make an offer for such a house would take into consideration. That is all that the arbitrator has done. That, according to *R. v. Grand Junction Rail. Co. (1)*, which came before LORD DENMAN, is clearly one of the circumstances which would guide a person valuing the rent of such a house as this. I think that the judgment of the Court of Appeal is perfectly right, and I do not think it necessary to say anything more, because it is very inexpedient to multiply decisions, or to paraphrase the language of an Act of Parliament, or to lay down anything which in another case could be treated as a rule. All that we have to consider is whether in the peculiar circumstances of this case the arbitrator is right or wrong. I think him perfectly right. Therefore, I move your Lordships that this appeal be dismissed with costs.

LORD MORRIS.—I concur, and I especially concur in the opinion that this is a very plain case. The Act of Parliament states very concisely that the question to be solved by quarter sessions, or by the arbitrator selected by the parties and approved, is: What would it be reasonably expected that the house would let for to a tenant? That has been paraphrased (and personally I do not object to it) into, what would a hypothetical tenant pay? There does not appear to me to be any law at all in that question. I am told that two great divisions have been made by those who have built a superstructure of law upon that rather simple line in the Act of Parliament—into what are called “exceptional cases” and “ordinary cases.” I can find no such distinction in the Act of Parliament. The Act of Parliament leaves it general. The tribunal that has to assess is to decide what the premises would be reasonably expected to be let for. That may in certain cases, like railways, gas companies, docks, etc., be most difficult to ascertain, because there is no

probability—I might almost say impossibility—of concluding that a tenant would ever arise to take such premises. Therefore, in that case the refusal is alleged to resort to a discussion as to the amount of profits that have been made, and to deduce from that some sort of estimate to solve the problem of what the hypothetical tenant would pay.

The present case relates to a public-house, and it is said that it was not competent for the arbitrator as a matter of law to take into consideration the amount of profits, or to weigh that in his mind largely or lightly—I am sure I do not know which, because this case has been rather dealt with as if appeals could be made to the Court of Queen's Bench, the Court of Appeal, and this House, on the question whether the arbitrator came to a right conclusion, not in point of law, but in point of fact. What error did he make in point of law? He asked himself almost the very first question that the hypothetical tenant would ask, namely: Is this a house doing a good business or a bad business? Is it a house with what is popularly called a roaring business, or is it a house that is going down for some reason or other, such as there being other houses in its neighbourhood? That is the very first question that a hypothetical tenant would put to himself: What have been the profits that have been made in it? Because that is the best proof whether it is doing a good business or not. True, it is said that A. B. might make good profits, but C. D. might lose. All that it is to be presumed that the arbitrator would consider; he would not value the house on the principle that it was always to have superlatively good occupiers or the worst of occupiers. I suppose he would, as a sensible man, take an average between them.

The contention, as I understand it, is that the arbitrator, in deciding that question as to what a hypothetical tenant would pay, is to be precluded, as a matter of law, from entering upon the very question which, as I have said, in my opinion, is almost the first question the hypothetical tenant would put. It is true that the best way of ascertaining what the trade was which was going on, would be the production of the books of the then tenant, but that was objected to. It is suggested that *Dodds v. South Shields Poor Law Union Assessment Committee* (2) decided that that is improper evidence. If it so decided, I can only say that I entirely disagree with it, and not being bound by it here as the Lord Chancellor was when sitting in the Court of Appeal—if it goes that length; I have not had an opportunity of looking at it—I am entirely of an opposite opinion. It is said that this would be an inquisitorial inquiry, a mischievous one, and several other adjectives are applied to it. I do not see how it is inquisitorial if the parties themselves are ready to bring the evidence forward. There is no force put on a publican to produce his books; he is not in this inquisition threatened with the screw; if he chooses not to bring forward his books he need not do so, and the arbitrator is then obliged to forage about to ascertain in the best way he can under those circumstances what the profits would be. As I have said, that question, in my opinion, is one of the most important factors in arriving at a conclusion as to what a sensible man would pay as rent for the premises. On these grounds I am clearly of opinion that the decision of the Court of Appeal should be affirmed.

LORD SHAND.—I am of the same opinion. The simple question which had to be answered by the arbitrator, and which this House has now to consider in dealing with his award is: At what rent would the house be reasonably expected to let from year to year? I am of opinion with your Lordships that the arbitrator has taken the proper elements into view in deciding that question. It may be that in a case of this class it is not competent to prove, as the courts have held in *Dodds v. South Shields Poor Law Union Assessment Committee* (2) the amount of the actual detailed profits made by the tenant in the particular house in bygone years. The true ground for so holding is, I think, that such proof is or might be of an inquisitorial character. I can very well understand that on the part of the courts it may be a very reasonable objection for them to make to evidence of that kind that

A it would disclose matters which they are not bound to disclose to the public in questions of this kind. If it were not so, it seems to me that such evidence would be admitted as an important element in ascertaining what trade has been done in the house, for really it appears to me that this would be the element of all others which a tenant might be expected to take into view in fixing the rent he ought to give for the house. In this case the arbitrator made the trade actually done the main element in ascertaining the trade which might be expected to be done, and in reaching the rent which might reasonably be expected. In doing this I am of opinion that he was right, and I, therefore, concur with your Lordship that the appeal ought to be dismissed.

C **LORD DAYEY.**—I am of the same opinion, and I am so entirely satisfied with the judgments which were delivered in the Court of Appeal that I should not trouble your Lordships with any observations were it not for the use which has been made in the argument addressed to your Lordships of *Dodds v. South Shields Poor Law Union Assessment Committee* (2). That case has been presented to us by counsel for the appellant as if it laid down some great principles of law. They elevated the distinction which is drawn in the judgments in that case between what they call exceptional cases and cases which are not exceptional into a principle of law, and they have gravely argued before your Lordships that evidence which is admissible in the one case is not admissible in the other case.

E I say at once that I do not understand *Dodd's Case* (2) to have laid down any rule of the law of evidence—in my opinion, the learned judges merely intended to sanction the practice which had obtained in dealing with cases of rating. I do not understand them to have laid down any new principle nor any old principle in the law of evidence, and if I thought that they had intended to lay it down that evidence which would be admissible in what the learned counsel is pleased to call exceptional cases would not be admissible in point of law in some other case, all I can say is that I should hesitate very long before I accepted *Dodd's Case* (2) as correctly laying down the law. The question whether evidence of a particular class is or is not admissible in prosecuting the inquiry which the statute prescribes to us, namely, what rent a tenant from year to year might reasonably be expected to give for the house, must be the same question whatever the form of the inquiry be—whether the inquiry be of an easy character or whether it be of a complex character—whether it be in a case which occurs frequently in ordinary life, or whether it be one that only occurs occasionally. It appears to me that all that *Dodd's Case* (2) purported to do was to lay down a very convenient rule of practice. It may be shortly stated, paraphrasing the language, for I am not intending to use the language that was used by the learned judges, but giving my own interpretation of it—that where the premises in question are of a character to have what may be described as a market price, where a valuer acquainted with that class of property can come and say, "Property of the class to which these premises belong lets for so much a year; I can readily procure a tenant for so much, and I cannot procure a tenant for more"—then you do not want to go into the trade done on the premises. You have there what the statute prescribes to you—and if you have evidence of that kind, if you have the market price, and what BLACKBURN, J., not using, I take the liberty to say, his own language, but the language of ADAM SMITH, calls the result of "the higgling of the market," you do not want to go into evidence of the particular character of the trade done on the premises, and in that case it is an exceedingly convenient rule of practice that you should not allow questions of an inquisitorial character which may be vexatious and mischievous to be addressed to the occupier of the premises unnecessarily.

What is the true principle upon which this inquiry is to be conducted? I conceive it to be that which is stated by BLACKBURN, J., in *Mersey Docks v. Liverpool Overseers* (3). It is quoted in the judgment of HENY COLLINS, L.J., but I will take the liberty of beginning to read a little earlier. He says (L.R. 9 Q.B. at p. 97) :

"If the hereditaments are such as to afford peculiar facilities for carrying on any kind of business, that facility does, beyond all question, enhance the value of the occupation but though the profits which may be reasonably expected to arise from such a business no doubt form an element in estimating the enhanced value of the occupation of the premises, the actual profits do not form any element, except in so far as they afford evidence of what might be reasonably expected to be made from the occupation of premises affording facility for carrying on such a business."

I say, in answer to a suggestion that was made from the Bar, that, in my opinion, BLACKBURN, J., there intended to lay down, and was laying down, a general principle applicable to all such cases, and not merely one that applied only to exceptional cases, where there is no market value, or price, or letting rent to which you can refer. And I venture to think that that is founded upon common sense. I repudiate this distinction which has been made so much of between exceptional and ordinary cases. You have in each case to find out in the best way you can what is the rent which a tenant may reasonably be expected to give, and if the best way under the particular circumstances is to ascertain the use which is made of the premises and the use which a tenant might expect to be able to make of the premises and the trade which he might reasonably expect to be able to carry on there, or, in other words, the facilities afforded by the premises for the carrying on of a large trade, that appears to me to be a most primary and elementary consideration in each case.

If you are to take into account the fact that the premises command a trade, you must surely ask what trade? Is it a large trade or is it a small trade? I do not know any better test of what trade they may be expected to command than the trade which they actually do command. It is not that you rate the profits—it is not that you rate the occupier's skill and judgment and discretion in the mode of carrying on the business, but you have to ascertain what sort of a trade the hypothetical tenant, as he is called, may reasonably expect to be able to carry on on those premises. I entirely agree in a passage in the Lord Chancellor's judgment which I will take the liberty of quoting and adopting as an expression of my own mind. His Lordship says ([1899] 1 Q.B. at p. 674):

"It would be to my mind one of the most extraordinary things in the world if you could give expert evidence that such and such a house would be likely to command such and such a business, and yet not be able to verify that a priori opinion by proof of the fact that it did command such a business."

A. L. SMITH, L.J., says:

"You may call it goodwill or you may call it anything else you like, but it is legitimate evidence to show not only that it is a house capable of carrying on a good trade according to the matters which have to be taken into consideration by the hypothetical tenant; and he fortifies that evidence by saying it is carrying on a good trade because I see such and such things going on every day to my own knowledge."

That appears to me to sum up the whole of this case.

LORD BRAMPTON.—I am of the same opinion. It appears to me that according to the dictates of good sense the arbitrator has taken a very proper and correct view of this matter. The purport of the inquiry was, what would a tenant, who desired to carry on the business for which the house is adapted, in that house, give as the rent to a landlord who was willing to let the house to him on a reasonable rent? It is said that you must look at the value of the surrounding property, or, at all events, that you are not to take into consideration the actual amount of

the profit that was capable of being made in that house which is the subject of the inquiry. In the first place the proposition which is put forward by the arbitrator in the award which I have before me is this. He says:

"I find as a fact that any person desiring to become a tenant of the appellant's premises in order to occupy them as a public-house would endeavour to ascertain the trade actually done thereon, by reference to the weekly, or yearly takings, or otherwise before deciding what rent he would pay."

Undoubtedly, it is obvious that that is the course that any prudent intending tenant would take, and the question is how he is to be satisfied with regard to what profits he could make if he did become a tenant and carried on the business in the house for which it was adapted. The house itself stands at the corner of the street—a very eligible position for a public-house to stand in. It is admirably adapted for the purpose of doing a large business and has a licence. The business carried on therein undoubtedly has yielded, as is admitted on all hands, a very considerable profit, and that profit in that position in that part of the town can only be made while the house stands there unapproached by any other of the same character. It can only be made by using that house, which has a licence already attached to it, in the way in which it has been used by the tenant for the last nineteen years. There is every reason to suppose that the customers who have been going there, spending their money and consuming liquor there will continue to do in the future just as they have done in the past.

It is said that the trade is not to be taken into consideration. How would the landlord himself look at the matter apart from the tenant altogether? He would say: "I have a house, it is a house capable of enabling a man to earn by diligence and the application of his own personal abilities £1,000 a year in that house, the tenant wants to hire it from me, I am not going to let it to him for a mere percentage representing the interest upon what I have laid out in bricks and mortar upon the house for that would not represent what I think the value of the house is, it is upon a spot where custom is attracted to it, if he can make a thousand a year, as I think he can, I must have a suitable proportion—at all events a bigger rent than I should have if the house were only capable of yielding him a profit of £100."

I will put the case in this way. Supposing in a street which runs at right angles to another street so as to form, in point of fact, two streets, two houses are built, both alike in all their materials and in the accommodation which is provided. They are each licensed, the one house is let at £200 a year, but in that house there is very little custom done, although there is enough custom there to support a man who pays his £200 a year rent, and he is quite satisfied to pay that in that house. The house at the opposite corner of the street is capable of enabling a man to earn £1,000 a year. Is it right or reasonable, or good sense, to suppose that the landlord would let both houses for the same rent simply because they were like each other? He must take into consideration the capability of the house, the position it is in, and the power it gives to a tenant who properly occupies it to make a large sum of money for his own profit. It seems to me that common sense would dictate the course which I have suggested to the landlord.

What has the arbitrator done according to the finding, for I rather prefer to take the language of the arbitrator himself? What has he found? He says:

"I hold that although the profits of trade (as such) cannot be rated yet in estimating the rateable value of a public-house, if the ability to carry on a gainful trade therein adds to the value of such public-house, that value cannot be excluded merely because it is referable to the trade."

I think that he has very properly found that, although the profits in this house cannot themselves be assessed according to their value as profits, yet the power to earn them in that house increases the value of that house. I think that that is

is to be found in the affidavit in the award which he has made, and I remain entirely in thinking that this appeal ought to be dismissed with costs.

LORD ROBERTSON.—I entirely concur, and I desire only to express my special agreement with the remarks made upon the previous cases by my noble and learned friend **LORD DAVEY**.

Appeal dismissed.

Solicitors: *Rollit & Sons*, for *Rollit & Sons*, Hull; *J. W. Sykes*, for *Chatham & Son*, Hull.

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

MOLYNEUX v. HAWTREY

[COURT OF APPEAL (Sir Richard Henn Collins, M.R., Mathew and Cozens-Hardy, L.JJ.), July 27, 1903]

[Reported [1903] 2 K.B. 487; 72 L.J.K.B. 873; 89 L.T. 350; 52 W.R. 23]

Landlord and Tenant—Lease—Sale—Unusual and onerous covenants—Duty of vendor to disclose—Constructive notice.

To succeed in an action for the breach of a contract for the sale of a lease containing unusual and onerous covenants the vendor must show either that he gave express notice of their existence to the intending purchaser or that the intending purchaser had an opportunity of ascertaining their existence for himself by examining the lease in such circumstances that inquiry or inspection ought reasonably to have been made by him.

Notes. The Conveyancing Act, 1882, s. 3 (1), was repealed and replaced by s. 199 (1) (ii) of the Law of Property Act, 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 822.

Distinguished: *Re Childe and Hodgson's Contract* (1905), 50 Sol. Jo. 59. Referred to: *Melzak v. Lilienfeld*, [1926] All E.R. Rep. 404.

As to vendor's duty to disclose unusual covenants in a lease, see 34 HALSBURY'S LAWS (3rd Edn.) 222; and for cases see 40 DIGEST (Repl.) 144-145; as to constructive notice, see 14 HALSBURY'S LAWS (3rd Edn.) 544 et seq.; and for cases see 20 DIGEST (Repl.) 335 et seq.

Cases referred to:

- (1) *Re White and Smith's Contract*, [1896] 1 Ch. 637; 65 L.J.Ch. 481; 74 L.T. 377; 44 W.R. 424; 40 Sol. Jo. 373; 40 Digest (Repl.) 144, 1103.
- (2) *Recre v. Berridge* (1888), 20 Q.B.D. 523; 57 L.J.Q.B. 265; 58 L.T. 836; 52 J.P. 549; 36 W.R. 517, C.A.; 40 Digest (Repl.) 144, 1102.
- (3) *Re Haedicke and Lipski's Contract*, [1901] 2 Ch. 666; 70 L.J.Ch. 811; 85 L.T. 402; 50 W.R. 20; 17 T.L.R. 772; 45 Sol. Jo. 738; 40 Digest (Repl.) 145, 1111.
- (4) *Hyde v. Warden* (1877), 3 Ex.D. 72; 47 L.J.Q.B. 121; 37 L.T. 567; 26 W.R. 201, C.A.; 40 Digest (Repl.) 167, 1292.
- (5) *Cosser v. Collinge* (1832), 3 My. & K. 283; 1 L.J.Ch. 130; 40 E.R. 108; 40 Digest (Repl.) 167, 1289.
- (6) *Ware v. Lord Egmout* (1854), 4 De G.M. & G. 460; 3 Eq. Rep. 1; 24 L.J.Ch. 361; 24 L.T.O.S. 195; 1 Jur.N.S. 97; 3 W.R. 48; 43 E.R. 586, L.C.; 20 Digest (Repl.) 336, 672.

- [7] *English and Scottish Mercantile Investment Co. v. Branton*, [1892] 2 Q.B. 700; 62 L.J.Q.B. 136; 67 L.T. 406; 41 W.R. 133; 8 T.L.R. 772; 4 R. 58, C.A.; 10 Digest (Repl.) 779, 5063.
- [8] *Manchester Trust v. Farness*, [1895] 2 Q.B. 539; 73 L.T. 110; 44 W.R. 178; 8 Asp.M.L.C. 57; 1 Com. Cas. 39; 14 R. 739; sub nom. *Manchester Trust, Ltd. v. Turner, Withy & Co., Ltd.*, 64 L.J.Q.B. 766; 11 T.L.R. 530, C.A.; 20 Digest (Repl.) 337, 678.
- [9] *London Joint Stock Bank v. Simmons*, 1892 A.C. 201; 61 L.J.Ch. 723; 66 L.T. 625; 56 J.P. 644; 41 W.R. 108; 8 T.L.R. 478; 36 Sol. Jo. 394, H.L.; 6 Digest (Repl.) 131, 969.

Also referred to in argument :

- Bailey v. Barnes*, [1894] 1 Ch. 25; 63 L.J.Ch. 73; 69 L.T. 542; 42 W.R. 66; 38 Sol. Jo. 9; 7 R. 9, C.A.; 20 Digest (Repl.) 341, 698.

Appeal by the plaintiff from the decision of WRIGHT, J., at the trial of the action without a jury.

On Dec. 9, 1901, negotiations were commenced for the purchase by the defendant of the plaintiff's leasehold interest in a flat. The lease was for a term of seven years from Dec. 25, 1899, and it contained certain onerous and unusual covenants.

On Dec. 12, 1901, before the parties had come to terms, the defendant's solicitor called upon the agent of the plaintiff at his office. At that interview the defendant's solicitor asked the plaintiff's agent if he could show him the lease, and the agent said that it had been stored with other property of the plaintiff and could not be produced for some days. The plaintiff's agent then produced a lease of other premises on the same estate, stating that its terms were similar to those of the plaintiff's lease. The defendant's solicitor said that he had no time to inspect the document then, and that there would be time to do that when the parties had come to terms. Nothing more then passed upon the subject, and no further reference to the terms of the lease was made at that interview. No further information with respect to the lease was given by the plaintiff or his agent to the defendant or his solicitor, and neither the defendant nor his solicitor made any inquiries or had any knowledge as to the terms of the lease. On Dec. 21, 1901, the contract for the purchase of the lease by the defendant was made, neither the defendant nor his solicitor having at that time any knowledge that the lease contained any onerous and unusual covenants. The defendant subsequently refused to take an assignment of the lease upon the ground that it contained unusual and onerous covenants of which he had no notice at the time the contract was made, and which the plaintiff ought to have disclosed, and the plaintiff brought this action for damages for breach of contract. The action was tried before WRIGHT, J., without a jury. The learned judge found that the defendant, before the contract was made, had no notice of the unusual and onerous covenants contained in the lease, and had not had a fair opportunity of inspecting the lease, and gave judgment in his favour. The plaintiff appealed.

Germaine, K.C., and *G. A. Scott* for the plaintiff.

G. Spencer Bower, K.C., and *P. Rose Innes* for the defendant.

SIR RICHARD HENN COLLINS, M.R.—This is an appeal from the decision of WRIGHT, J., who decided in favour of the defendant in an action brought by the plaintiff, the lessee of a flat, against the defendant, who had contracted to purchase an assignment of the plaintiff's lease. There was, no doubt, a contract by which the defendant agreed to take an assignment of the plaintiff's lease. The lease was subject to certain covenants. In the case of the sale of a lease the assignor is bound to make out his title. STIRLING, J., has laid down the law applicable to cases of that

kind in other forms in *Re White and Smith's Contract* (1). The learned judge there said ((1896) 1 Ch. at p. 643) :

"If, however, it be (as I think it is) the duty of the vendor to disclose the state of his title, and not the duty of the purchaser to inquire into it, and if the purchaser's attention is not called to the possible existence of onerous covenants either by the vendor himself or by information otherwise acquired, I think that a business man of ordinary caution might abstain from examining a lease in the absence of any intimation on the part of the vendor that it will not be met with a refusal if he applies to examine the lease before sale. . . . I think that it is not made out that the applicant had a fair opportunity of inspecting the lease within the meaning of the rule in *Reeve v. Berridge* (2), and consequently that he is entitled to the relief for which he asks."

The law is laid down in the same way by BYRNE, J., in *Re Huddell and Lapsley's Contract* (3), who there said ((1901) 2 Ch. at pp. 668, 669) :

"It is, I think, now well established that, whether the sale be by private contract or public auction, it is the duty of the vendor to disclose the existence of onerous and unusual covenants contained in the leases of the leasehold property sold, or at least to afford the purchaser an opportunity of inspecting the leases."

Therefore the burden of disclosure is upon the vendor.

Prima facie the contract is one for the sale of a lease without any unusual covenants. If the lease contains any unusual covenants, the burden is on the vendor to make known their existence to the purchaser. The vendor may discharge that onus by telling the purchaser of the existence of such covenants, or by showing that the purchaser knew of their existence or had such means of knowledge afforded to him that it might reasonably be inferred that he knew of their existence.

In the present case the agreement for the sale of the lease was actually made after Dec. 12; on Dec. 9 negotiations had been commenced between the representatives of the plaintiff and of the defendant for the sale of the lease. On Dec. 12 the defendant's solicitor called upon the plaintiff's agent, and in the course of conversation inquired as to the lease; he was told that it could not be shown to him then because it was somewhere else, but that he could see a lease of some other property on the same estate which was practically identical with the plaintiff's lease. The defendant's solicitor said that he was pressed for time, and could not then look at the document, and he did not look at it, and had no knowledge or information in fact as to the covenants contained in the lease. Was the onus then shifted from the vendor to the purchaser, whose solicitor had not then had any opportunity of seeing the lease because he had not then had time to do so? The solicitor had not in fact any information or knowledge as to the covenants in the lease; he had only been offered the inspection of another lease which he had no time to look at; and no further step had been taken by the plaintiff's agent to give him any information. The question, then, is whether in those circumstances a fair and reasonable opportunity of ascertaining what covenants there were in the lease had been given. That question is really one of fact, and the learned judge has found as a fact that the opportunity given was not such as to discharge the burden which lay upon the assignor.

The law upon this subject is well established. *Reeve v. Berridge* (2) only reiterates the law laid down in earlier decisions. In that case *Hyde v. Warden* (4) is dealt with, and Fry, L.J., in delivering the judgment of the Court of Appeal, said ((1888) 20 Q.B.D. at p. 527) :

"The question appears to us to be really covered by the authority of *Hyde v. Warden* (4). In that case the question arose whether the taking possession of property agreed to be underleased, with notice of the existence of the lease, was a waiver of all objections based on the terms of the lease. The question, therefore, so far as regards the question of notice, was the same as in the present

case, and the court was pressed to decide that notice of the lease was notice of its contents, and that on the authority of various cases, including *Cosser v. Collinge* (5). The court rejected the argument, and said (3 Ex.D. at p. 80):

"We think it may be considered as settled that the principle of that case can only be applied where (as, indeed, was the case in *Cosser v. Collinge* (5)) the defendant had a fair opportunity of ascertaining for himself the provisions of the original lease."

In *Re Haslinke and Lipski's Contract* (3) BYRNE, J., used practically the same language, except that he left out the word "fair."

Hyde v. Warden (4) was decided before the Conveyancing Act, 1882. Section 3 (1) of that Act provides that:

"A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing unless—(i) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or (ii) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor or other agent, as such, or would have come to the knowledge of his solicitor or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by his solicitor or other agent."

That seems to me to lay down much the same standard as that which was laid down by LORD CRANWORTH in *Ware v. Lord Egmout* (6) in the passage which has been cited. LORD CRANWORTH said ((1854), 4 De G.M. & G. at p. 473):

"But where he has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as to enable the court to say, not only that he might have acquired, but also that he ought to have acquired, the notice with which it is sought to affect him, that he would have acquired it but for his gross negligence in the conduct of the business in question."

Whether the word "gross" is a desirable addition to the word "negligence" in this connection is really not material. The question is whether in the circumstances reasonable care has or has not been exercised. It is, therefore, a question of fact in each particular case whether in the circumstances reasonable notice has been given by the person upon whom is the obligation of giving notice, or the circumstances are such that the other party is estopped from saying that he had no notice. I think that there was in this case abundant evidence to justify the finding of WRIGHT, J., upon this question, and this appeal must be dismissed.

MATHEW, L.J.—In this case two points were made on behalf of the defendant. First, that the lease contained unusual covenants; and, secondly, that the defendant and his solicitor were ignorant of the existence of those covenants. It has been contended on behalf of the plaintiff that knowledge of these covenants must be imputed to the defendant's solicitor, contrary to the fact. I entirely agree with the statement as to the equitable rule with regard to constructive notice made by KAY, L.J., in *English and Scottish Mercantile Investment Co. v. Branton* (7). KAY, L.J., there said ([1892] 2 Q.B., at p. 718):

"I venture to say that the doctrine of constructive notice, if carefully applied and limited in the way pointed out by WIGRAM, V.C., and LORD LYNDHURST, is a doctrine which will never defeat the ends of justice, but will promote them always. If we were to apply it as we are asked to apply it in this case, we should not only be extending it beyond what has been laid down in any previous case, but we should be extending it beyond the limits which LORD LYNDHURST and WIGRAM, V.C., so carefully defined."

That passage is from the judgment in a case in which the Court of Appeal was dealing the limits within which the rule as to constructive notice ought to be applied. In that case the solicitor for a person who was proposing to lend money to a company upon the security of an assignment of monies due to the company, had notice that there were debentures charging the property of the company; he inquired as to the effect of the debentures, and was told that the debentures were not secured by any trust deed which would affect the property proposed to be assigned as security; the debentures did in fact create a charge upon the property assigned and as security, and it was held by the court that the fact that the solicitor was aware of the existence of the debentures was not constructive notice of their contents.

From the cases which have been cited we can see the anxiety with which the judges of the courts of Chancery have avoided any extension of the rule as to constructive notice. In *Manchester Trust v. Furness* (8) it was attempted in the Commercial Court to apply the doctrine of constructive notice to a case where there was in bills of lading a reference to the charter-party, but it was held that the doctrine was not applicable. In that case, in the Court of Appeal, LINDLEY, L.J., said ([1895] 2 Q.B., at pp. 545, 546):

"If we were to extend the doctrine of constructive notice to commercial transactions, we should be doing infinite mischief and paralysing the trade of the country. That I am not going too far in making these observations will be found by turning to *English and Scottish Mercantile Investment Co. v. Branton* (7), and also to what LORD HERSCHELL said about constructive notice in *London Joint Stock Bank v. Simmons* (9). That case had reference to a notice in respect of debentures, but whether commercial documents are negotiable instruments, or whether they are more or less like them, is a matter, to my mind, of very little importance. LORD HERSCHELL said in that case ([1892] P.C. at p. 221):

'I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments.' "

As to the proposition that the test in these cases is whether a reasonable opportunity of inspecting the document has been given, I prefer to be guided by the language of s. 3 (1) of the Conveyancing Act, 1882, which provides that:

"A purchaser shall not be prejudicially affected by notice of any instrument, fact, or things unless—(i) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him."

It seems to me that that provision is a clear guide as to the manner in which the doctrine of constructive notice ought now to be applied. The question, then, whether the defendant ought to be held to have had notice of these covenants seems to depend upon whether his solicitor had such an opportunity of inspecting the lease that inquiry and inspection ought reasonably to have been made by him. That brings us to a question of fact in this case. Looking at all the facts and circumstances, I agree that nothing was done or took place to relieve the vendor of his obligation to disclose to the defendant the existence of the unusual provisions in the lease. That question of fact has been decided by WRIGHT, J., in favour of the defendant, and in my opinion the decision of the learned judge was right. I agree, therefore, that this appeal fails and must be dismissed.

COZENS-HARDY, L.J.—I agree that this appeal must be dismissed. This lease does contain onerous and unusual covenants. It is well settled, and it is common sense, that there is an obligation upon the vendor to disclose to the purchaser the existence of such covenants. The vendor of such a lease may discharge that burden in several ways. He may show that the purchaser had alimunde knowledge of the existence of the covenants; he may prove that he gave actual notice to the

A purchaser of their existence, or that the purchaser actually saw the lease; or he may show that events happened which prevent the purchaser from saying that he had no notice of the covenants, that is, that there is something like an estoppel. I think that this branch of the law ought now to be treated as almost entirely confined within the limits laid down in s. 3 of the Conveyancing Act, 1882, which provides that:

B "A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing unless . . . it would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him."

By s. 1 (4) (iii) of that Act [now s. 205 (1) (xxi) of the Law of Property Act, 1925],

C "purchaser includes . . . an intending purchaser."

That brings us to the question which was dealt with by WRIGHT, J., whether in this case inquiry and inspection ought reasonably to have been made. At the time when the interview took place between the defendant's solicitor and the agent of the plaintiff no agreement had been come to between the parties, but negotiations as to terms were then proceeding. I do not think that it was then the duty of the

D solicitor to peruse or inspect the other similar lease which was offered to him before the parties had come to terms. I think that we cannot in this case hold that the purchaser was affected by notice of the covenants contained in the lease, or, to put it in another way, that he had such a reasonable opportunity of inspecting the lease as to prevent him saying that he did not know its contents.

Appeal dismissed.

E Solicitors: A. J. Schweder; Valpy, Peckham & Chaplin.

[Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.]

F

G SOCIÉTÉ ANONYME DES ANCIENS ÉTABLISSEMENTS PANHARD ET LEVASSOR v. PANHARD LEVASSOR MOTOR CO. LTD. AND OTHERS

[CHANCERY DIVISION (Farwell, J.), July 15, 1901]

H [Reported [1901] 2 Ch. 513; 70 L.J.Ch. 738; 85 L.T. 20; 50 W.R. 74; 17 T.L.R. 680; 45 Sol. Jo. 641]

Passing Off—Trade name—Foreign trader with market in England.

In a passing off action, the court will protect a foreign trader who has a market in England, even though the goods are not sold by him directly to this country but are imported by others.

I *Company—Fraudulent purpose—Liability of promoters.*

When a company has been fraudulently formed with a name calculated to deceive, it can be restrained from carrying on business under that name and an action will also lie against the promoters.

Notes. Referred to: *Serville v. Constance*, [1954] 1 All E.R. 662.

As to restraining the use of a name by a company, see 38 HALSBRURY'S LAWS (3rd Edn.) 593 et seq., and for cases see 43 DIGEST 318.

Case referred to :

(1) *Collins Co. v. Brown, Collins Co. v. Cohen* (1867), 3 K. & J. 120; 29 L.T.O.S. 245; 30 L.T.O.S. 62; 3 Jur. N.S. 929; 3 W.R. 676; 63 E.R. 1174; 48 Digest 318, 1397.

Also referred to in argument :

Junisson & Co. v. Junisson (1898), 14 T.L.R. 160; 42 Sol. Jo. 197; 15 R.P.C. 169, C.A.; 48 Digest 286, 1151.

Action for an injunction restraining the defendant company and its directors from passing off its goods as those of the plaintiff, and restraining the directors from allowing the defendant company to remain registered in its present name.

The plaintiffs were a company constituted under the law of France in 1897, and carrying on the business of engineers and manufacturers of motors and motor cars at 19, Avenue d'Ivry, Paris. They were the successors in business of the former firm of Panhard et Levassor, and they claimed that the words "Panhard-Levassor" and "Panhard" were universally known in the trade in the United Kingdom and elsewhere as exclusively designating the motors and motor cars manufactured or sold by the plaintiffs and their predecessors. They had no agency in the United Kingdom for the sale of their motors and motor cars until about December, 1900, but there had been previously frequent importations of the plaintiffs' goods into this country. On Mar. 29, 1900, the Panhard-Levassor Motor Co., Ltd., was registered by the other defendants, Exell, Kent, Dawson, Bustard, Stiff, Idle, and Evannett, with a capital of £100 in £1 shares, with the object of manufacturing and selling motor cars. These other seven defendants signed the memorandum of association of the defendant company, and were the only shareholders. No other directors were appointed, and the seven signatories stated that they had chosen the name of their company with a view to preventing the plaintiffs registering themselves or their agents as a company in England under their own name or a name similar thereto; but the defendant company had not commenced business. In May, 1900, the plaintiffs commenced an action against the defendants, claiming: (i) an injunction to restrain the defendants and their agents or servants from using the names of "Panhard" and "Levassor" or either of them, or any title or description including those names or either of them, or otherwise colourably resembling the name of the plaintiffs in connection with the manufacture, use, or sale of, or other dealing in motor cars or parts thereof; (ii) an injunction to restrain the seven signatories (naming them) from allowing the defendant company to remain registered under its present name or any such title or description as aforesaid; and consequential relief.

J. F. Moulton, K.C. (A. J. Walter, J. F. Iselin, and H. F. Moulton with him) for the plaintiffs.

Upjohn, K.C. (Stewart-Smith with him) for the defendants.

FARWELL, J. This appears to me to be a plain case. The plaintiffs are a well-known firm of manufacturers of motor cars. Their reputation on the evidence has for some years been, I may say, European, including in that term England. Their reputation certainly has extended to England for several years. Although until last December they had no agency in England, and did not sell, so far as I see, directly to England, they sold indirectly in the sense that a company bought their cars and imported them into England, and individuals went over to Paris and bought cars there and imported them into England, so that England was one of their markets. The difficulty about England was that there were certain English patents, and so far as regards the great majority, at any rate, if not all of the cars formerly made by the plaintiff company, they could not be imported into England without the licence of the patentees. In many cases those licences were obtained, and the manufacturers, the plaintiffs, got the benefit of the English market, although they only got it indirectly in the way that I have mentioned.

A The defendants have registered a company in England under the name of the Panhard-Levassor Motor Co., Ltd. The seven signatories are joined as defendants. There is absolutely no sort of excuse or justification for taking the name "Panhard-Levassor." It is said that their object is not so much to annex the reputation, and get the benefit of the reputation of the plaintiff company, as it is to shut out the plaintiff company, and prevent them interfering with some other company which
B is not a party to this action. I can only say that I have nothing to do with that. I judge the case as I have it before me, and I find seven persons signing the memorandum of a company with a capital of £100 divided into 100 shares of £1 each, with seven signatories, and, therefore, an actual paid-up capital of either £7 or with an unpaid-up capital of £7, for I do not know whether that has been paid or not.

C So far as regards the question which has been argued, of the right of the plaintiffs to an injunction, it appears to me to be covered by *Collins Co. v. Brown* (1), but apart from that I should have thought it was plain that, in a case such as I have stated, this court would certainly interfere to protect a foreign trader who has a market in England, in the way I have specified, from having the benefit of his name annexed by a trader here in England who assumes that name without
D any sort of cause or justification.

The only other part of the case which has caused me a little difficulty is whether I can give any relief against the seven defendants who have signed the memorandum, and who are the directors of the company. The allegation is that they have fraudulently and wrongfully, and with intent to injure the plaintiffs in their business, conspired together to form, and have formed, and procured the defendant company
E to be registered, and so on. The conclusion I have come to is that it follows from my holding on the first point—namely, that the defendant company has the fraudulent intention of annexing the benefit of the plaintiffs' name, that the persons who have formed that company and caused it to be registered are guilty in the eye of this court of a fraudulent conspiracy to carry into effect that which the company, an entity without body or soul, has attempted to do. I think it would
F certainly be exceedingly unfortunate if the court were to hold that you could form a limited company with a very small nominal capital for the purpose of trying to do unlawful acts, fraudulent acts, illegal acts, and no one would be liable except the incorporated body, which in the particular case may or may not have £7 or 7s. capital.

G In my opinion, the relief, which I grant on the first head against the company, involves a similar relief against the defendants who have caused the company to be registered. So far as that is concerned no damages have been proved, and I do not think any have been suffered, because the defendant company has not carried on business. It really goes more to the point of the injunction, and as these defendants are the directors and the sole shareholders in the company, I see no
H reason why I should not grant an injunction against them in the terms of the second clause of the prayer of the statement of claim, and costs, and of course it is as regards costs that it is most material.

Solicitors : J. B. & F. Purchase ; Vallance, Birkbeck, & Barnard.

[Reported by E. GREENWOOD, Esq., Barrister-at-Law.]

HUGHES v. PUMP HOUSE HOTEL CO., LTD.

COURT OF APPEAL (Mathew and Cozens Hardy, L.J.J.), June 11, 1902

[Reported [1902] 2 K.B. 190; 71 L.J.K.B. 630; 86 L.T. 794;
50 W.R. 660; 18 T.L.R. 654]

Chose in Action—Assignment—Debt—Absolute assignment—Right of redemption by assignor—Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6).

An assignment of a debt which purports to pass the entire interest of the assignor **held** to be an "absolute" assignment within the Supreme Court of Judicature Act, 1873, s. 25 (6) (now s. 136 of the Law of Property Act, 1925), even though it is subject to an express or an implied right of redemption, and in such a case it is immaterial what the consideration for the assignment may be or whether the security is for a fixed or definite sum or for a current account, or whether the assignee has obtained a power of attorney and a covenant for further assurance from the assignor. An assignment which purports to be by way of charge only, however, will not come within the section.

Notes. The Supreme Court of Judicature Act, 1873, s. 25 (6), has been repealed and replaced by the Law of Property Act, 1925, s. 136.

Considered: *Horwood v. Millars Timber and Trading Co.* (1916), 114 L.T. 792; *Bank of Liverpool and Martins v. Holland* (1926), 43 T.L.R. 29; *Walter and Sullivan, Ltd. v. J. Murphy & Sons, Ltd.*, [1955] 1 All E.R. 843. Referred to: *Bateman v. Hunt*, (1904) 2 K.B. 530; *Russell v. Fryers* (1909), 25 T.L.R. 414; *Re Steel Wing Co.*, [1920] All E.R. Rep. 292.

As to assignments under the Law of Property Act, 1925, see 4 HALSBURY'S LAWS (3rd Edn.) 484 et seq., and for cases see 8 DIGEST (Repl.) 570-571. For the Law of Property Act, 1925, s. 136, see 20 HALSBURY'S STATUTES (2nd Edn.) 715.

Cases referred to :

- (1) *Comfort v. Betts*, [1891] 1 Q.B. 737; 60 L.J.Q.B. 656; 64 L.T. 685; 55 J.P. 630; 39 W.R. 595; 7 T.L.R. 475, C.A.; 8 Digest (Repl.) 571, 223.
- (2) *Durham Bros. v. Robertson*, [1898] 1 Q.B. 765; 67 L.J.Q.B. 484; 78 L.T. 438, C.A.; 8 Digest (Repl.) 570, 216.
- (3) *Mercantile Bank of London v. Evans*, [1899] 2 Q.B. 613; 68 L.J.Q.B. 921; 81 L.T. 376; 15 T.L.R. 535, C.A.; 8 Digest (Repl.) 571, 219.
- (4) *Jones v. Humphreys*, [1902] 1 K.B. 10; 71 L.J.K.B. 23; 85 L.T. 488; 50 W.R. 191; 18 T.L.R. 54; 46 Sol. Jo. 70, D.C.; 8 Digest (Repl.) 555, 90.
- (5) *Burlinson v. Hall* (1884), 12 Q.B.D. 347; 53 L.J.Q.B. 222; 50 L.T. 723; 48 J.P. 216; 32 W.R. 492, D.C.; 8 Digest (Repl.) 571, 222.
- (6) *Tancred v. Delagoa Bay and East Africa Rail. Co.* (1889), 23 Q.B.D. 239; 58 L.J.Q.B. 459; 61 L.T. 229; 38 W.R. 15; 5 T.L.R. 587, D.C.; 8 Digest (Repl.) 570, 215.
- (7) *National Provincial Bank v. Harle* (1881), 6 Q.B.D. 626; 50 L.J.Q.B. 437; 44 L.T. 585; 29 W.R. 564; 8 Digest (Repl.) 570, 214.

Also referred to in argument :

- Brice v. Bunnister* (1878), 3 Q.B.D. 569; 47 L.J.Q.B. 722; 38 L.T. 739; 26 W.R. 670, C.A.; 8 Digest (Repl.) 553, 78.
- Wiesener v. Rackow* (1897), 76 L.T. 448; 13 T.L.R. 358; 41 Sol. Jo. 422, C.A.; 8 Digest (Repl.) 571, 224.

Appeal by the defendants from a decision of WRIGHT, J., upon a point of law raised by the pleadings in the action and ordered to be disposed of before the trial of the action.

The action was brought by a builder to recover the balance of moneys which he alleged to be due to him from the building owners under a building contract. By

A a contract dated Nov. 1, 1899, the plaintiff agreed with the defendants, the Pump House Hotel Co., Ltd., to build a new pump-room and make certain alterations at the Pump House Hotel at Llandrindod Wells for the sum of £6,200. On Mar. 7, 1901, the plaintiff made an assignment in writing to Lloyds Bank, Ltd., which contained the following clauses :

B "In consideration of your continuing a banking account with me . . . and by way of continuing security to you for all moneys due or to become due to you from me alone or jointly with others either on the said account or otherwise, I hereby assign to you all moneys due or to become due to me from the Pump House Hotel Co., Ltd., of Llandrindod Wells, under or by virtue of a certain contract dated the 1st day of November, 1899 . . . and all other moneys, if any, due or to become due to me from the said company, including all C moneys due or to become due for extras in connection with the works contemplated by the said contract. And I hereby empower you, on my behalf and in my name, to settle and adjust all accounts in connection with the works and matters aforesaid, to give effectual receipts for the moneys hereby assigned, which shall discharge the person paying the same from being concerned to see D to the application thereof; also if necessary to sue for or take such other steps as you may think necessary for enforcing payment of the moneys hereby assigned or any part thereof; and to compromise and settle any such proceedings on such terms as you may think fit, it being understood that all costs and expenses of recovering the moneys hereby assigned are to be paid out of the amount recovered. And I hereby undertake at your request and my cost to do and E execute all such further acts, deeds, and things as you may reasonably require for giving full effect to the security hereby created."

On the same day the bank gave notice in writing of this assignment to the defendants, and required them "not to pay the said moneys or any part thereof to any person other than Lloyds Bank, Ltd., without their written consent." The bank F also enclosed a written request, signed by the plaintiff, authorising and requesting the defendants to pay the said moneys to the bank, whose receipt should be a sufficient discharge.

In October, 1901, the builder commenced the present action against the Pump House Hotel Co., claiming £2,788 as money due to him for work done under the contract of Nov. 1, 1899. The defendants by their statement of defence denied that G any money was due from them under the contract, and further contended that by reason of the assignment of Mar. 7, 1901, and the notice given by the bank, the plaintiff was not entitled to sue for the sums so assigned, and that the plaintiff had no interest in the same and no cause of action. The plaintiff, in his reply, said that the assignment was not an absolute assignment, but was by way of charge only as a continuing security to Lloyds Bank for all moneys due or to become due from him to them.

H The point thus raised was ordered to be argued before the trial of the action. WRIGHT, J., held that the assignment was not an absolute one, because it was a continuing security for moneys due or to become due by the plaintiff to the bank, and that the action was, therefore, maintainable. The defendants appealed.

By the Supreme Court of Judicature Act, 1873, s. 25 (6) :

I "Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action of which express notice in writing shall have been given to the debtor . . . shall be and be deemed to have been effectual in law . . . to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same. . . ."

S. T. Evans, K.C., and R. E. L. Vaughan Williams for the defendants.
Lewis M. Richards for the plaintiff.

Cur. adv. vult.

June 11, 1902. The following judgments were read.

MATHEW, L.J.—This is an appeal from a judgment of WATSON, J., in which he held that the assignment made by the plaintiff was not an absolute assignment within s. 25 (6) of the Supreme Court of Judicature Act, 1873, but was only a charge. The learned judge held, therefore, that the action had been properly brought in the name of the assignor. The defendants contended that the assignment was an absolute one, and that, therefore, the action ought not to have been brought in the name of the assignor.

In every case of this kind the terms of the assignment must be referred to in order to find out the meaning of the document. It is clear that if no more than a charge was intended by the parties, the case is not within s. 25 (6); but, on the other hand, if all the rights of the assignor were intended to pass to the assignee, the case is within the provisions of the Act. The language used in the document seems to me to indicate that the assignment was absolute. The circumstances under which it was made were these: The plaintiff was a builder, and had contracted with the defendants to erect certain buildings. Some months after he assigned to Lloyds Bank all moneys due or to become due to him from the defendants under his contract with them, and on the same day the bank gave notice of the assignment to the defendants. When the building to be done under the contract was completed, a dispute arose as to the amount of the balance due to the builder, who eventually brought the present action claiming £2,788. In their statement of defence the defendants pleaded that the plaintiff, by reason of the assignment and notice, was not entitled to bring the action. What was the effect of the assignment and notice? It seems perfectly clear to me that the intention was to pass to Lloyds Bank complete control over all moneys to be paid to the plaintiff under his contract with the defendants. The bank was for all purposes in the position of the plaintiff.

That being so, unless there is some difficulty in the way, it is clear that the assignment was an absolute one; that is to say, it was an assignment by which all the rights of the assignor under a certain contract were intended to pass to the assignee. **WRIGHT, J.**, held that the assignment was not absolute because it was a continuing security for moneys due or to become due from the bank. If that were the true criterion, a mortgage could not be an absolute assignment within s. 25 (6). A mortgage is a security, but it is an absolute assignment within the meaning of the Act, because all the rights of the mortgagor in the mortgaged property pass to the mortgagee. The principle is illustrated by the decisions of the Court of Appeal in *Comfort v. Betts* (1) and in *Durham Bros. v. Robertson* (2). In *Comfort v. Betts* (1) creditors of the defendant assigned their debts to the plaintiff on the terms that he should proceed to recover the same and pay to the creditors proportionately the amount which he might be able to recover. The document was in form an absolute assignment of the debts, but it contained a trust for payment of the moneys to be recovered to the creditors. The Court of Appeal held that the assignment was an absolute one within the Act. The principle which was there acted upon is entirely applicable to the present case.

The cases on which the plaintiff in the present case principally relied were *Mercantile Bank of India v. Evans* (3) and *Jones v. Humphreys* (4). In each of those cases general words were used, but on looking at the whole document in each case it is clear that the intention was to assign only so much of the assignor's claim as would be enough to provide the assignee with £200 in the one case, and £22 10s. in the other. It is clear, therefore, that the true character of the assignments in those cases was that of a charge only. The distinction between those cases and the present case is plain, and it is not necessary to dwell further upon them.

One of the questions raised in the argument in the present case was whether an absolute assignment of part of a particular fund is within s. 25. It is not necessary in this case to give any answer to that question, but it seems to me that there is much reason for saying that it is not within the Act. A further question was also

A raised as to who should be named as plaintiffs if this assignment were not absolute. But that question also it is not necessary to decide. In my judgment this assignment was an absolute one, and that is enough to dispose of the whole case. I think, therefore, that the appeal must be allowed.

B **COZENS-HARDY, L.J.**—The question raised by this appeal is, whether a document of Mar. 7, 1901, is an "absolute assignment (not purporting to be by way of charge only)" within the meaning of s. 25 (6), of the Supreme Court of Judicature Act, 1873. It has been repeatedly held that the word "absolute" does not mean absolute by way of sale, and that an assignment may be absolute though by way of mortgage: see *Burlinson v. Hall* (5) and *Tancred v. Delagoa Bay and East Africa Rail. Co.* (6). These were decisions of Divisional Courts; but the Court of Appeal C has adopted the same view.

In *Durham Bros. v. Robertson* (2) this court held that the particular document in question was not absolute but conditional. The judgment of CHITTY, L.J., is, however, very much in point. He there said ([1898] 1 Q.B. at p. 771):

D "To bring a case within the sub-section transferring the legal right to sue for the debt, and empowering the assignee to give a good discharge for the debt, there must be (in the language of the sub-section) an absolute assignment not purporting to be by way of charge only. It is requisite that the assignment should be, or at all events purport to be, absolute; but it will not suffice if the assignment purport to be by way of charge only. It is plain that every equitable assignment in the wide sense of the term as used in equity is not within E the enactment. As the enactment requires that the assignment should be absolute, the question arose whether a mortgage, in the proper sense of the term, and as now generally understood, was within the enactment. In *Tancred v. Delagoa Bay and East Africa Rail. Co.* (6) there was an assignment of the debt to secure advances with a proviso for redemption and re-assignment upon repayment. It was there held by the Divisional Court (disapproving of a decision F in *National Provincial Bank of England v. Harle* (7)) that such a mortgage fell within the enactment. It appears to me that the decision of the Divisional Court was quite right. The assignment of the debt was absolute; it purported to pass the entire interest of the assignor in the debt to the mortgagee, and it was not an assignment purporting to be by way of charge only. The mortgagor-assignor had a right to redeem, and on repayment of the advances a right to G have the assigned debt re-assigned to him. Notice of the re-assignment pursuant to the sub-section would be given to the original debtor, and he would thus know with certainty in whom the legal right to sue him was vested. I think that the principle of the decision ought not to be confined to the case where there is an express provision for re-assignment. Where there is an absolute assignment of the debt, but by way of security, equity would imply H a right to a re-assignment on redemption, and the sub-section would apply to the case of such an absolute assignment."

I It was suggested to us in argument that this was in some way inconsistent with the subsequent case in this court of *Mercantile Bank of London v. Evans* (3). I cannot, however, adopt this contention. On the construction of the particular document before them, the court held that there was not an assignment of the whole debt. The position of a mortgagee was not in any way challenged. I may observe that A. L. SMITH, L.J., was a party to the decision in *Burlinson v. Hall* (5).

If on the construction of the document it appears to be an absolute assignment, though subject to an equity of redemption, express or implied, it cannot in my opinion be material to consider what was the consideration for the assignment, or whether the security was for a fixed and definite sum, or for a current account. In either case the debtor can safely pay the assignee, and he is not concerned to inquire into the state of the accounts between the assignor and the assignee. Nor

does it matter that the assignee has obtained a power of attorney and a contract for further insurance from the assignor? Both these elements were found in *Bartholomew v. Hall* (5). The real question, and in my opinion the only question is this: Does the instrument purport to be by way of charge only?

It remains to apply these principles to the document of Mar. 7, 1901. In my opinion this is an absolute assignment, and it does not purport to be by way of charge only. It assigns all moneys due or to become due under the contract. It follows that the plaintiff Hughes has no right of action, and that the order of WRIGHT, J., must be discharged.

Appeal allowed.

Solicitors: *Paterson, Snow, Bloram & Kinder*, for *Hall & Dale*, Birmingham; *Vanderpump & Sons*, for *Daniel Evans*, Brecon.

[*Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.*]

BOND v. BARROW HÆMATITE STEEL CO.

[CHANCERY DIVISION (Farwell, J.), July 29, November 27, 28, 29, December 3, 1901. January 18, 1902]

[Reported [1902] 1 Ch. 353; 71 L.J.Ch. 246; 86 L.T. 10; 50 W.R. 295; 18 T.L.R. 249; 46 Sol. Jo. 280; 9 Mans. 69]

Company—Dividend—Profits “available for dividend”—Duty to keep up circulating capital—“Circulating capital”—Loss—Mining company—Surrender of mining leases and sale of miners’ cottages.

Before distributing a dividend to preference or other shareholders a company must set aside a fund sufficient to cover any realised or estimated loss on its circulating capital. Whether, in view of this, there are any profits available for distribution will depend on the circumstances of each case, the nature of the company, and the evidence of competent witnesses. It would be a very strong measure to compel directors who are acting bona fide to declare a dividend against their judgment.

A loss made by a smelting company carrying on a large business on the surrender of the leases of certain mines and the sale of certain cottages used in connection therewith held to be a loss of its circulating capital and not of its fixed capital.

Company—Shareholder—Preference shareholder—Rights—Dependence on construction of articles and resolutions—Shares “bearing interest.”

The rights of preference shareholders will depend on the construction of the articles and of the special resolutions creating the preference shares. Even though these refer to “preference shares bearing interest,” this may have to be construed as merely giving the preference shareholders a right to a dividend. “Interest” is not an apt word to express the return to which a shareholder is entitled in respect of shares paid up in due course and not by way of advance, although it may be used as an inaccurate mode of expressing the measure of the share of profits. If on the proper construction of the shareholders’ rights he is merely entitled to a dividend, then he cannot sue to recover it unless a dividend has been declared.

Notes. *Re Accrington Corp'n. Steam Tram Co.*, [1909] 2 Ch. 40. Considered *Ammonia Soda Co., Ltd. v. Chamberlain*, [1916-17] All E.R. Rep. 708. Referred

A to: *Re Spanish Prospecting Co., Ltd.*, [1908-10] All E.R. Rep. 573; *Erling v. Israel and Oppenheimer*, [1918] 1 Ch. 101; *Re Foster & Son, Ltd.*, [1942] 1 All E.R. 314; *Westminster Bank, Ltd. v. Riches*, [1945] 1 All E.R. 466; *Re Catalinas Warehouses and Mole, Ltd.*, [1947] 1 All E.R. 51; *Re Buenos Ayres Great Southern Rail. Co. v. Preston*, [1947] 1 All E.R. 729.

B As to dividends, see 6 HALSBURY'S LAWS (3rd Edn.) 396 et seq., and for cases see 9 DIGEST (Repl.) 179-182, 627-628.

Cases referred to :

- (1) *Re National Bank of Wales, Ltd.*, [1899] 2 Ch. 629; 15 T.L.R. 517; sub nom. *Re National Bank of Wales, Cory's Case*, 68 L.J.Ch. 634; 81 L.T. 363; 48 W.R. 99; 43 Sol. Jo. 705, C.A.; affirmed sub nom. *Dovey v. Cory*, [1901] A.C. 477; 70 L.J.Ch. 753; 85 L.T. 257; 17 T.L.R. 732; 50 W.R. 65; 8 Mans. 346, H.L.; 9 Digest (Repl.) 180, 1164.
- (2) *Gregory v. Patchett* (1864), 33 Beav. 595; 11 L.T. 357; 10 Jur.N.S. 1118; 13 W.R. 34; 55 E.R. 499; 9 Digest (Repl.) 662, 4384.
- (3) *Lee v. Neuchatel Asphalte Co.* (1889), 41 Ch.D. 1; 58 L.J.Ch. 408; 61 L.T. 11; 37 W.R. 321; 5 T.L.R. 260; 1 Meg. 140, C.A.; 9 Digest (Repl.) 179, 1161.
- D** (4) *Verner v. General and Commercial Investment Trust*, [1894] 2 Ch. 239; 63 L.J.Ch. 456; 70 L.T. 516; 10 T.L.R. 393; 38 Sol. Jo. 384; 1 Mans. 136; 7 R. 170, C.A.; 9 Digest (Repl.) 181, 1170.

Also referred to in argument :

- Fisher v. Black and White Publishing Co.*, ante p. 400; [1901] 1 Ch. 174; 71 L.J.Ch. 175; 84 L.T. 305; 49 W.R. 310; 17 T.L.R. 146; 45 Sol. Jo. 138; 8 Mans. 184, C.A.; 9 Digest (Repl.) 645, 4291.
- Birch v. Cropper, Re Bridgewater Navigation Co., Ltd.* (1889), 14 App. Cas. 525; 59 L.J.Ch. 122; 61 L.T. 621; 38 W.R. 401; 5 T.L.R. 722; 1 Meg. 372, H.L.; 10 Digest (Repl.) 1065, 7391.
- Lubbock v. British Bank of South America*, [1892] 2 Ch. 198; 61 L.J.Ch. 498; 67 L.T. 74; 41 W.R. 103; 8 T.L.R. 472; 9 Digest (Repl.) 178, 1155.
- Re Severn and Wye and Severn Bridge Rail. Co.*, [1896] 1 Ch. 559; 65 L.J.Ch. 400; 74 L.T. 219; 44 W.R. 347; 12 T.L.R. 262; 40 Sol. Jo. 337; 3 Mans. 90; 10 Digest (Repl.) 1251, 8807.
- Burland v. Earle*, [1902] A.C. 83; 71 L.J.P.C. 1; 85 L.T. 553; 50 W.R. 241; 18 T.L.R. 41; 9 Mans. 17, P.C.; 9 Digest (Repl.) 645, 4290.
- G** *Re Sharpe, Re Bennett, Masonic and General Life Assurance Co. v. Sharpe*, [1892] 1 Ch. 154; 61 L.J.Ch. 193; 65 L.T. 806; 40 W.R. 241; 8 T.L.R. 194; 36 Sol. Jo. 151, C.A.; 9 Digest (Repl.) 541, 3561.
- Wilmer v. McNamara & Co., Ltd.*, [1895] 2 Ch. 245; 64 L.J.Ch. 516; 72 L.T. 552; 43 W.R. 519; 11 T.L.R. 371; 39 Sol. Jo. 450; 13 R. 513; 9 Digest (Repl.) 182, 1176.
- H** *Imperial Hydropathic Hotel Co., Blackpool v. Hampson* (1882), 23 Ch.D. 1; 49 L.T. 150; 31 W.R. 330, C.A.; 9 Digest (Repl.) 553, 3655.
- Re Bank of Hindustan, China and Japan, Campbell's Case, Hippisley's Case, Alison's Case* (1873), 9 Ch. App. 1; 43 L.J.Ch. 1; 29 L.T. 519; 22 W.R. 113, L.C. & L.JJ.; 9 Digest (Repl.) 147, 863.
- Henry v. Great Northern Rail. Co.* (1857), 1 De G. & J. 606; 4 K. & J. 1; 27 L.J.Ch. 1; 30 L.T.O.S. 141; 3 Jur.N.S. 1133; 6 W.R. 87; 44 E.R. 858, L.C. & L.JJ.; 10 Digest (Repl.) 1247, 8793.
- I** *Re Ebbw Vale Steel, Iron and Coal Co.* (1877), 4 Ch.D. 827; 46 L.J.Ch. 424; 36 L.T. 308.
- Re Kingston Cotton Mill Co. (No. 2)*, [1896] 1 Ch. 331; 65 L.J.Ch. 290; 73 L.T. 745; 44 W.R. 363; 12 T.L.R. 123; 40 Sol. Jo. 144; 3 Mans. 75; affirmed, [1896] 2 Ch. 279; 65 L.J.Ch. 673; 12 T.L.R. 430; 40 Sol. Jo. 531; 3 Mans. 171; sub nom. *Re Kingston Cotton Mill Co., Ltd., Ex parte Pickering and Peasegood (No. 2)*, 74 L.T. 568, C.A.; 9 Digest (Repl.) 180, 1163.

Action by preference shareholders claiming payment of preferential dividends.

The defendant company was incorporated in 1864 as a mining company with a capital of £150,000, which had since been first increased and subsequently reduced, and at the hearing stood at £1,528,275, divided into 150,000 ordinary shares of £7 10s. each, 377 8 per cent. preference shares of £7s. each, and 50,000 6 per cent. preference shares of £7 10s. each. The plaintiffs were the holders of some of each of these classes of preference shares, and they claimed on behalf of themselves and all other the holders of preference shares to be paid the dividends and arrears of dividends on their shares out of the profits which they alleged the company had made in the years 1898, 1899, and 1900. No dividend had been paid on the 8 per cent. preference shares since 1898, or on the 6 per cent. preference shares since 1899. The preference shareholders had no votes in respect of these shares. The profit and loss account for the year 1898 showed a balance, described as "net profit for the year 1898," of £65,803 7s. 3d., and of this £20,000 was carried to the reserve fund, making it £40,000, and £10,418 10s. carried forward. The profit and loss account for 1899 showed a balance, described as "net profit for the year 1899," of £89,018 17s. 6d., and this was carried forward pending the decision of the court on an application for the reduction of the capital of the company referred to below. The profit and loss account for 1900 showed a balance of £157,605 12s. 10d., which was provisionally brought forward. The report for the year 1898 contained the following statement:

"The shareholders are aware, both from the balance-sheets themselves and the auditor's certificates which have accompanied them, that for some years past no depreciation has been written off the amount at debit of land, buildings, works, fixed plant, and mining leases. The directors have carefully considered the matter, and, having regard to the fact that many of these assets are more or less of a wasting character, they are of opinion that the time has arrived when a careful revision of their value should be made. It is, however, a subject which in all its bearings requires most mature consideration, and the deliberations of the directors are not sufficiently advanced at the present time for them to submit any recommendation to the shareholders."

Accordingly, in 1899 special resolutions were passed for the reduction of the capital of the company. The petition for the confirmation of these resolutions came before the court in August, 1900: [1900] 2 Ch. 846. It was opposed by some of the preference shareholders, the petition was dismissed by COZENS-HARDY, J., and that decision was confirmed by the Court of Appeal (85 L.T. 493). Some, but not all, of the present plaintiffs appeared and opposed that petition, which was dismissed on the ground that the alleged loss had not been proved to the satisfaction of the court, and also by COZENS-HARDY, J., on the ground that the amount standing to the credit of the reserve fund and the £89,018 17s. 6d. profit in 1899 were applicable to make good loss of capital so far as the same would extend.

Jenkins, K.C., and Kirby for the plaintiffs.

Eady, K.C., Butcher, K.C., and Cassel for the defendants.

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Jan. 18, 1902. **FARWELL, J.** (after stating the facts as above set out, continued):—The plaintiffs claim that the amount of the reserve fund and the profit in 1899 are not applicable to make good loss of capital, but belong to them by contract. It was argued on behalf of the defendants that the order of COZENS-HARDY, J., created an estoppel. That, in my opinion, is possibly correct so far as regards any of the plaintiffs who appeared and opposed the petition. But this was not pleaded, and, as there are other plaintiffs who did not appear on the petition and who could sue on behalf of others who did not oppose the petition, I do not think it necessary to express a concluded opinion on the point. Nor do I regard the decision of

A COVENS-HARDY, J., as a precedent disposing of this case, for the points argued before me were not before that learned judge. That was by no fault of the plaintiffs, because the contentions that they now raise could not have been put forward by them in support of their opposition to the petition, but were adverse to such opposition, and should, if urged at all, have been urged by the company. The contention of the plaintiffs in this action is that they are entitled by contract to be paid a preferential dividend out of the balance to the credit of profit and loss in each year, and that the company cannot appropriate any part of such balance to reserve or carry over one shilling until they have been paid in full. There is no suggestion of want of bona fides on the part of the directors or the company.

B The defendants say that that is not in accordance with the special resolutions creating the preference shares, and that, if it is, the balance to the credit of profit and loss for any year is not necessarily such profits of the company as are properly applicable to dividend, but that, if the court is satisfied by evidence that there have been ascertained losses and depreciations of capital assets exceeding the amount of the balance, these losses must be made good before any dividend can be paid.

C The first point depends on the construction of the original articles and the special resolutions creating the preference shares, for it is not contended that, if preference shareholders have such contractual rights as they claim, the company can by special resolutions deprive them of such rights or of any part thereof. Article 43 is as follows :

E "Any capital raised by the creation of new shares shall be considered as part of the original capital, and shall be subject to the same provisions with reference to the payment of calls, the forfeiture of shares on nonpayment of calls, or otherwise, as if it had been part of the original capital, except that it shall be lawful for the company in general meeting, by special resolution as aforesaid, to direct that the new shares shall have such priority in respect of dividends as it shall deem expedient."

F This article, in my opinion, provides that all new shares shall be subject in all respects to the provisions of the articles, except only that dividends payable on new shares may rank in priority to instead of *pari passu* with ordinary shares. For this purpose it is necessary only to introduce modifying words into art. 95 for the whole fasciculus of clauses relating to dividends—viz., 95 to 101—to apply.

G It is argued that the provisions as to declaration of dividend do not apply to shares on which a fixed preferential dividend is payable. I do not think so. The necessity for a declaration of a dividend is a condition precedent to an action to recover, as stated in general terms in LINDLEY ON COMPANIES (5th Edn.), p. 437, and where the reserve fund article applies it is obvious that such a declaration is essential, for the shareholder has no right to any payment until the corporate body has determined that the money can properly be paid away. It is urged that this puts the preference shareholders at the mercy of the company. But they came in on these terms, and this argument does not carry much weight in an action such as this where bona fides is conceded. The opposite conclusion might enable preference shareholders to ruin the company, and would certainly lead to great inconvenience in enabling them to compel the payment out of the last penny without carrying forward any balance. Granted that it is a hardship to go without dividends for a time, this hardship presses more heavily on the ordinary shareholders, who have to wait till the preference shareholders receive all arrears before they can get anything. It was urged that art. 97, providing for a reserve fund, could not apply to preference shares because one of its objects is to equalise dividends. But I cannot see that the mention of one object which is not applicable is any reason for excluding those objects which are applicable, and which are really for the benefit of all the shareholders.

I On the articles as they stand I have no doubt that the true construction is that which I have stated. But it is contended that the special resolutions have created larger rights, and it was, in my opinion, competent to the company by such reso-

amount to alter art. 43. The £8 per cent. preference shares were created by resolutions passed in 1872 in these terms :

"1. This company will agree to purchase from the Barrow Rolling Mills Co., Ltd., the two furnaces erected by that company and the land purchased by them, and any other property of which the rolling mills company may be possessed. 2. The consideration for the purchase shall be the sum of £37,700 in preference shares of this company bearing interest of £8 per cent. per annum from Jan. 1 last, such preference shares to be issued to the present shareholders in the rolling mills company in proportion to their holdings. 3. The directors are authorised to issue preference shares to the amount of £37,700 bearing interest at £8 per cent. per annum in perpetuity for the purpose of carrying out the above agreement. 4. The holders of the above-mentioned preference shares shall be entitled to attend the general meetings of the company, but they shall not be entitled in virtue of such shares to vote or to interfere in any way in the company's proceedings, nor shall they in virtue of such shares be eligible as directors of the company."

In my opinion, there is nothing whatever in this to alter any of the articles as I have construed them. Stress has been laid on the word "interest," but, in my opinion, that word has slipped in per incuriam and should be read as "dividend," as indeed is done when this resolution is referred to in the special resolution of 1876 to which I shall refer presently. "Interest" is not an apt word to express the return to which a shareholder is entitled in respect of shares paid up in due course, and not by way of advance. Interest is compensation for delay in payment, and is not properly applied to a share of profit of trading, although it may be used as an inaccurate mode of expressing the measure of the share of such profits. It is impossible, in my opinion, to give to the word, used as it is in this case, so pregnant a meaning as the plaintiffs derive reading it as an equivalent of an alteration of the articles, and as creating a right overriding the valuable and possibly essential article providing for reserve funds.

The £6 per cent. preference shares present more difficulty. They were created by resolutions of 1876 as follows :

"1. The capital of the company shall be and is hereby increased by the addition thereto of 50,000 preference shares of 10s. each, entitling the holder to a fixed dividend at the rate of £6 per cent. per annum on the amount for the time being paid up in respect of such shares. . . . 3. The holders of the said new preference shares shall be entitled to the dividend thereon only after payment of the interest from time to time payable in respect of mortgage and bond or debenture debts of the company, and after payment of a dividend at the rate of £8 per cent. per annum on the preference shares of the company, amounting to £37,700, created by special resolutions passed and confirmed at extraordinary general meetings of the company in the year 1872; and, in case in any year the net profits of the company shall not be sufficient for the payment in full of the dividends of such new preference shares, the net profits of any subsequent year shall (after payment thereof of interest on the mortgage bond or debenture debts of the company and of dividends on the said £8 per cent. preference shares) be applied in payment to the holders of the said new preference shares of the amount by which the dividends in any previous year or years may have fallen short of the fixed rate of £6 per cent."

These resolutions are not very happily worded, but I have come to the conclusion that this one and the first resolution read together are merely a verbose statement of a bargain that the holders of the £6 per cent. shares are to have a fixed £6 per cent. cumulative preferential dividend, subject to the rights of the debenture holders and the £8 per cent. preference shareholders. I think that the words "only after payment, etc.," are restrictive words equivalent to "subject to," and

A do not create new rights by rescinding the articles relating to declaration of dividend, reserve fund, and the like. The only difficulty I have felt has been created by the latter part of No. 3, beginning "the net profits of the company." I feel the difficulty of limiting the generality of the term "net profits," but, on the other hand, it is only the arrears to which this provision applies, and it would be strange that the preference shareholders should have to allow the reserve fund to be formed so far as their current year's dividend was concerned, but should be entitled to sweep up everything in respect of past arrears. I have come to the conclusion that the use of the words "net profits" is not sufficient to rescind the articles to which I have referred, but that the resolution must be read as subject to the provisions of those articles. For these reasons I think the plaintiffs' case fails.

C Another point has been taken by the defendants, and, as evidence has been adduced and considerable argument has been addressed to it, I feel bound to state the conclusion at which I have arrived with respect to it. The contention is that, even if the plaintiffs are right in their construction of the articles, it is said that the company cannot legally pay them the dividends that they claim, because there are no profits, so called, out of which they can be paid, and that payment, if made, would be made out of capital. It has been proved to my satisfaction (and, indeed, counsel for the plaintiffs very properly stated that he could not dispute that the result of the evidence was) that the company has sustained an actual ascertained and realised loss of capital to an amount exceeding £200,000, and has also lost capital by estimate and valuation to an amount exceeding £50,000. The various sums claimed by the plaintiffs as available to pay their dividends amount to about £240,000. If, therefore, these ascertained and estimated losses have to be made good before any dividend can properly be paid, there are obviously no funds out of which to pay dividends. The defendants allege and the plaintiffs deny that the company are bound to make good these losses before paying any dividend.

F The question is one of very considerable difficulty on the authorities. But the result of these authorities is, in my opinion, that there is no hard-and-fast rule by which the company can determine what is capital and what profit.

"The mode and manner in which a business is carried on and what is usual, or the reverse, may have a considerable influence in determining the question what may be treated as profits and what as capital":

per the EARL OF HALSBURY, L.C., in *Dovey v. Cory* (1), [1901] A.C. at p. 486.

G "It may be safely said that what losses can be properly charged to capital and what to income is a matter for business men to determine, and it is often a matter on which the opinions of honest and competent men will differ":

see *Gregory v. Patchett* (2). "There is no hard-and-fast legal rule on the subject": per SIR NATHANIEL LINDLEY, M.R., in *Re National Bank of Wales, Ltd.* (1), [1899] 2 Ch. at p. 670.

H It is, however, necessary to bear in mind that the two propositions—one that dividends must not be paid out of capital, and, second, that dividends may only be paid out of profits—are not identical, but diverse. The first is a requirement of the statutes and cannot be dispensed with. The latter is in table A, or in the articles of the particular company, and is one of the regulations of the company which has to be construed. A company which has a balance to the credit of profit and loss account is not bound at once to apply that sum in making good an estimated deficiency in value of its capital assets. It may carry it to a suspense account or to reserve, and, if the assets subsequently increase in value, the amount neither has been nor will be part of the capital. If, therefore, the said balance of the year is used in paying dividend, such dividend is not paid out of capital, because the sum has never become capital, although it still remains a question whether it has been paid out of profits or not. It has been pointed out by LINDLEY, L.J., in *Lee v. Neuchatel Asphalt Co.* (3) (41 Ch.D. at p. 22) that there is nothing in the statutes requiring a

company to keep up the value of its capital assets to the level of its nominal capital. The requirement is merely negative that dividends shall not be paid out of capital, and the balance to the credit of profit and loss account does not automatically become part of the capital assets, because the value of the actual capital assets is depreciated to an amount equal to or exceeding such balance.

The real question for determination, therefore, is whether there are profits available for distribution, and this is to be answered according to the circumstances of each particular case, the nature of the company, and the evidence of competent witnesses. There is no single definition of the word "profits" which will fit all cases. Take, for instance, PROFESSOR MARSHALL'S definition (*Principles of Economics* (Edn. 1883), vol. 1, p. 142):

"The excess of receipts from business during the year over outlay for the business, the difference between the value of the stock and plant at the end and at the beginning of the year, being taken as part of the receipts or as part of the outlay according as there has been an increase or decrease of value."

I am precluded from adopting this in its entirety by authorities which are binding on me, because in the definition "stock and plant" obviously include fixed and circulating capital as defined at p. 134 of the same treatise. See, e.g., per LINDLEY, L.J., in *Verner v. General and Commercial Investment Trust* (4), where he says ([1894] 2 Ch. at p. 266):

"Perhaps the shortest way of expressing the distinction which I am endeavouring to explain is to say that fixed capital may be sunk and lost, and yet that the excess of current receipts over current payments may be divided, but that floating or circulating capital must be kept up."

I do not understand his Lordship to be laying down a general and universal rule that in every company fixed capital may be sunk and lost, but that there are companies in which that may be the case. All the authorities, however, agree, I think, that circulating capital must be kept up.

In the present case the £200,000 realised loss arises from the surrender of the leases of certain mines, by the pulling down of certain furnaces, and on the sale of certain cottages. The company is a smelting company on a very large scale, and for the convenience of its works and by way of economy they acquired leases of certain mines in order to supply themselves with their own ore instead of buying it as required. The ore was used exclusively for the purposes of the company's works. The mines were drowned out, and the cost of pumping them out was prohibitive. The company, therefore, surrendered the leases, pulled down the blast furnaces, and sold the cottages connected therewith. The evidence before me is all on one side. The plaintiffs called none, and Sir David Dale and the defendants' other witnesses all agreed that in a company of this nature these items ought to come into account before any profit can be said to be earned. And my own opinion coincides with theirs, inasmuch as I think that the money invested in these items is properly regarded in this company as circulating capital. Suppose the company had bought enormous stocks of ore sufficient to last ten years. It could hardly be said that the true value of so much of this as remained from time to time ought not to be brought into the balance-sheet, and I can see no difference, for the purposes of the account, between ore in situ and ore so bought in advance. The blast furnaces and cottages are mere accessions to the ore, and resemble a building for burning the stores bought in advance already mentioned.

There is more difficulty, in my opinion, as to the £50,000. I think that the onus is on the plaintiffs to show that it is fixed capital, and that in a company of this nature such fixed capital may be sunk or lost. They have not done this, and the evidence, so far as it goes, is the other way. But this is not actual loss, but depreciation by estimate. The plaintiffs really relied on *Lee v. Newmarket Asphaltic Co.* (3) as an authority for this proposition as a universal one, viz., that no company

A owning wasting property need ever create a depreciation fund. In my opinion that is not the true result of the decision. It must be remembered that in that case there had been no loss of assets. The fixed assets were larger than at its formation (see 41 Ch.D. at p. 15), and the court decided nothing more than the particular proposition that some companies with wasting assets have no depreciation fund. For instance, I cannot think that it would be right for the defendant company to purchase out of capital the last two or three years of a valuable patent and distribute whole receipts in respect thereof as profits without replacing the capital expended in the purchase. It is for the court to determine in each case on the evidence whether the particular company ought or ought not to have such a fund.

C There is no doubt as to the opinion of the witnesses in this case, and, further, the opinion of the directors cannot be always disregarded. The courts have, no doubt, in many cases overruled directors who proposed to pay dividends, but I am not aware of any case in which the court has compelled them to pay when they have expressed their opinion that the state of the accounts did not admit of any such payment. In a matter depending on evidence and expert opinion, it would be a very strong measure for the court to override the directors in such a manner. I make no distinction between realised loss and estimated loss, because the witnesses declined to recognise any such distinction, and also because the decided cases deal only with the distinction between floating and fixed capital and do not distinguish between realised and estimated loss, and it would serve no useful purpose for me to express an opinion on the subject. The result is that the action fails, and must be dismissed with costs.

E Solicitors: *Walker & Pettit; Currey, Holland & Co.*

[Reported by A. W. CHASTER, ESQ., Barrister-at-Law.]

Re LAKE. Ex parte DYER

[COURT OF APPEAL (Rigby, Vaughan Williams and Stirling, L.JJ.), February 22, 1901]

[Reported [1901] 1 K.B. 710; 70 L.J.K.B. 390; 84 L.T. 430; 49 W.R. 291; 17 T.L.R. 296; 45 Sol. Jo. 310; 8 Mans. 145]

Bankruptcy—Fraudulent preference—Repayment by defaulting trustee.

Where a trustee has misappropriated trust property and makes repayment on the eve of his bankruptcy there is a presumption that the repayment is made to repair the wrong he has done by the breach of trust and that it is not a fraudulent preference within the meaning of the Bankruptcy Act, 1883, s. 48.

Notes. The Bankruptcy Act, 1883, s. 48, has been repealed and replaced by the Bankruptcy Act, 1914, s. 44, as amended by the Companies Act, 1947, ss. 92, 115 (3), (4), (6).

As to the avoidance of a fraudulent preference in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 553-561 and in winding up, see *ibid.* vol. 6, 682-685. For cases, see 5 DIGEST (Repl.) 929-954. For the Bankruptcy Act, 1914, s. 44, see 2 HALSBURY'S STATUTES (2nd Edn.) 381-382, and for the Companies Act, 1947, ss. 92 and 115, see 3 HALSBURY'S STATUTES (2nd Edn.) 447-449.

Case referred to:

(1) *Re Goldsmid, Ex parte Taylor* (1886), 18 Q.B.D. 295; 56 L.J.Q.B. 195; 35 W.R. 148; 3 T.L.R. 109, C.A.; 5 Digest (Repl.) 920, 7585.

Also referred to in argument :

Re Wilkinson, Ex parte Stabbins (1881), 15 Ch.D. 58; 50 L.J.Ch. 347; 44 L.T. 877; 29 W.R. 653, C.A.; 5 Digest (Repl.) 948, 7732.

Re Hutchinson, Ex parte Bell (1886), 35 W.R. 263; 3 T.L.R. 324, C.A.; 5 Digest (Repl.) 920, 7586.

Sharp v. Jackson, [1899] A.C. 419; 68 L.J.Q.B. 866; 80 L.T. 841; 15 T.L.R. 418; 6 Mans. 264, H.L.; 5 Digest (Repl.) 948, 7733.

Re Blackpool Motor Car Co., Ltd., Hamilton v. Blackpool Motor Car Co., Ltd., [1901] 1 Ch. 77; 70 L.J.Ch. 61; 49 W.R. 124; 45 Sol. Jo. 60; 8 Mans. 193; 5 Digest (Repl.) 920, 7589.

Appeal from a decision of WRIGHT, J., holding that a repayment made by a defaulting trustee on the eve of his bankruptcy was a fraudulent preference.

By a settlement dated April 5, 1869, and made upon the marriage of Henry Clemens Dyer and Amelia Susan Dyer, certain funds were settled upon trust as therein mentioned. Leonard Swinerton and Evelyn Henrietta Martin were the present trustees of the settlement, and were entitled to the trust funds subject to the life interest therein of Amelia Susan Dyer. In July, 1898, Benjamin Greene Lake, formerly a member of the late firm of solicitors, Lake and Lake, was appointed a trustee of the marriage settlement, jointly with Leonard Swinerton Dyer, and his said firm acted as solicitors to the trust estate. In January, 1900, a sum of £1,250, part of the trust estate, was received by B. G. Lake or his firm for investment, but was misappropriated. On May 7, 1900, B. G. Lake, being in insolvent circumstances, voluntarily and without the knowledge of his co-trustee, deposited with the trust securities, which were in the hands of his firm for safe custody, four debentures of the Didcot, Newbury, and Southampton Rail. Co., which were his own property and were standing in his own name. The deposit was accompanied by a memorandum signed by B. G. Lake as follows:

"I have just learnt that there is something like £1,000 of Dyer's trust capital in the hands of the late firm. Had I known this I could not have permitted my daughter to have accepted their most generous help without which our Streatham home could not have been secured. As I am a trustee the debt is a personal one, and one which I can properly make good out of my own assets. I therefore deposit £2,000 Didcot, Newbury, and Southampton Railway 4 per cent. debenture stock as security for whatever may be found due. Its intrinsic value now is from 60 to 70 per cent., and I have quite recently been offered and have refused 40."

On June 27, 1900, a receiving order was made against B. G. Lake, and adjudication followed. In August, 1900, B. G. Lake retired from the trust, and Evelyn Henrietta Martin was appointed trustee in his place. In September, 1900, B. G. Lake executed a transfer of the debentures, but the railway company refused to register the transfer without the consent of his trustee in bankruptcy. A question having arisen whether the above transaction was not a fraudulent preference by B. G. Lake, within the meaning of s. 48 of the Bankruptcy Act, 1883, the present trustees of the settlement applied to the court by motion for a declaration that the debentures were charged in their favour as security for the £1,250, and to make good the breach of trust committed by B. G. Lake. B. G. Lake had committed a large number of other and similar breaches of trust, some of which he had attempted likewise to repair. On Jan. 28 the motion came to be heard before WRIGHT, J., who held that the transaction was a fraudulent preference and dismissed the motion with costs. From that decision the trustees of the settlement now appealed.

Vernon Smith, K.C., and *F. E. Colt* for the trustees of the settlement.

Ravelson, K.C., and *G. R. Northcott* for the trustee in bankruptcy.

A **RIGBY, L.J.**—It is necessary for the case of the trustee in bankruptcy that he should make out that the dominant motive in the mind of the bankrupt was a desire to benefit a favoured creditor at the expense of those less favoured, and I do not think that the memorandum which has been referred to as proving that is sufficient to prove it. It is admitted that the bankrupt might have been influenced by mixed motives. There can be no doubt that he had a wish to repair his breach of duty as a trustee, and to stand on a better footing with his cestuis que trust, who had acted extremely well towards him when he had been defrauding them in the most heartless manner. I cannot in this case come to the conclusion that the dominant motive which the bankrupt had in his mind was fraudulent preference. The result is that the case of the trustee in bankruptcy fails, and the appeal must be allowed.

C **VAUGHAN WILLIAMS, L.J.**—I take the same view. If a man on the eve of bankruptcy makes a payment to a particular creditor, the presumption immediately arises that he makes that payment with the dominant view of giving preference to that creditor over others. There is no need for any evidence of intention expressed by the bankrupt. It is a presumption which arises from the transaction. Then, supposing that, in addition to that fact of payment on the eve of bankruptcy, there is also proof that the person so paid was paid by the bankrupt in order to make good a breach of trust, it seems to me that the presumption arising from payment on the eve of bankruptcy would cease to operate, it would be negatived; and *prima facie* if there is no other evidence at all, it seems to me that the proper inference would be that the presumption of an intention to prefer would be dislodged, and the presumption would be the other way.

E That presumption, however, is not conclusive. One must look round and see what other circumstances there are; whether there are circumstances which lead to the conclusion that the bankrupt, though making good a breach of trust, did not do so from a sense of duty, but from a dominant motive to prefer. Some of these circumstances, of course, would be the acts and words of the bankrupt at the time, though I doubt myself whether, strictly speaking, evidence of the bankrupt as to motive, or intention, or thoughts given long after the event would really be admissible. One has to look at the circumstances and draw the inference from them what the dominant view was. It is not necessary to decide that question now, but I doubt whether, strictly speaking, any evidence by the bankrupt with regard to his motives or intentions, given by him long after the event, would really be admissible. We must look therefore at the circumstances of this case to see whether there is anything to displace the *prima facie* inference that the bankrupt replaced the money lost by his breach of trust with a view to making good the wrong that he had done, and not with a view of preferring a creditor.

H I find nothing in the memorandum itself which leads me to draw that conclusion. That finding is a circumstance which one must look at. There is, no doubt, a circumstance in the memorandum which shows that the bankrupt was impressed with a sense of obligation, but I do not draw the inference from that that he was not influenced by a sense of duty or a sense of avoidance of shame in replacing the trust fund. One can easily think that the very fact that he or his daughter had received this kindness was one which quickened his sense of duty, and his desire to free himself from the shame which he felt in this case of breach of trust. It therefore rather leads me to the conclusion that he did in fact make this transfer under a sense of his obligation to make good the breach of trust, and under the sense of shame that rested upon him if he did not do so.

I **STIRLING, L.J.**—I am of the same opinion. One of the elements to be taken into consideration in deciding a question of this kind is the state of mind

of the debtor, so far as it can be ascertained. That was laid down by Lord James M.R., in *Re Goldcrest, Ex parte Taylor* (1) where he says (18 Q.B.D. at pp. 280-300):

"The court must find not only that a payment was made to a particular creditor, but that it was made 'with a view' of giving him a preference over the other creditors. It has been said that the court must be satisfied that the preferring of the creditor was the predominant view of the debtor—that if he acted from mixed motives, the court must find out which was the predominant view in his mind. That no doubt is so, though I should have been content to say that the payment must have been made with a view of preferring the creditor. What is meant by 'with a view'? It is the same thing as with an 'intent.' The moment you come to this, that you have to perform the metaphysical operation of finding out what a man's intent was, surely then you ought not to throw away all the tests which have been adopted by great and careful judges for the purpose of doing this. You cannot throw out of account the fact that a man was threatened with something which he would not at all like, in order to see whether he did not act with the dominant view of getting rid of that pressure. You must also, as JAMES, L.J., said, take into account the man's own mind, and see whether, if he has done a very wicked and abominable thing, he may not afterwards have been doing that which, if he had a scrap of conscience left, he ought to have done—repair his former evil deed. If you come to the conclusion that that was the dominant motive in his mind, you must hold that he made the payment, not with a view of preferring the person to whom he made it, but in order to satisfy his own conscience. It is impossible to lay down any exhaustive rule; the court must judge from the particular facts of each case whether the debtor did make the payment with the view or intent of preferring the creditor."

To my mind the document of May 7, 1900, bears strong evidence that that was the dominant motive in the mind of the bankrupt in this case. It appears from that that he or his daughter had at the time of their misfortunes received benefits from these persons, and it shows that he then for the first time became aware that he was indebted to this trust. Every man who had any conscience at all would feel a strong sense of shame in finding himself in this position. I cannot therefore take the view of this case that WRIGHT, J., did.

Appeal allowed.

Solicitors: *Lee & Pembertons; Peacock & Goddard.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

DE LASSALLE v. GUILDFORD

[COURT OF APPEAL (Sir A. L. Smith, M.R., Henn Collins and Romer, L.JJ.),
March 8, 14, 26, 1901]

[Reported [1901] 2 K.B. 215; 70 L.J.K.B. 533; 84 L.T. 549;
49 W.R. 467; 17 T.L.R. 384]

*Landlord and Tenant—Lease—Warranty—Warranty collateral to lease—Breach—
Action—Competency.*

The plaintiff, who was about to take a lease of a house from the defendant and had signed the counterpart, told the defendant that he would not exchange the counterpart for the lease unless the defendant would assure him that the drains were in good order. The defendant said that he would give his word that the drains were in good order and condition, and the plaintiff thereupon exchanged the counterpart for the lease. The lease was silent as to the state of the drains, which were subsequently found not to be in good order and condition.

Held: there was a warranty that the drains were in good order, which was collateral to the lease, and the plaintiff could recover damages for breach of that warranty.

Per SIR A. L. SMITH, M.R.: To create a warranty no special form of words is necessary. It must be a collateral undertaking forming part of the contract by agreement of the parties express or implied, and must be given during the course of the dealing which leads to the bargain, and should then enter into the bargain as part of it.

Notes. The dictum of SIR A. L. SMITH, M.R. (post at p. 499), that, in determining whether a warranty is intended, "a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment," has been disapproved by LORD Moulton in *Heilbut, Symons & Co. v. Buckleton*, [1911-13] All E.R. Rep. at p. 92.

Considered: *Lloyd v. Sturgeon Falls Pulp Co.* (1901), 85 L.T. 162. Doubted: *Heilbut, Symons & Co. v. Buckleton*, [1911-13] All E.R. Rep. 83. Considered: *Jameson v. Kinnell Bay Land Co.* (1931), 47 T.L.R. 410. Applied: *Miller v. Canon Hill Estates, Ltd.*, [1931] All E.R. Rep. 93. Referred to: *Milch v. Coburn* (1910), 27 T.L.R. 170; *Collins v. Hopkins*, [1923] All E.R. Rep. 225; *London County Freehold and Leasehold Properties, Ltd. v. Berkeley Property and Investment Co.*, [1936] 2 All E.R. 1039; *Otto v. Bolton and Norris*, [1936] 1 All E.R. 960; *Terrene, Ltd. v. Nelson*, [1937] 3 All E.R. 739; *Mahon v. Ainscough*, [1952] 1 All E.R. 337; *Roulledge v. McKay*, [1954] 1 All E.R. 855.

As to warranties of fitness for habitation in leases, see 23 HALSBURY'S LAWS (3rd Edn.) 574 et seq., and for cases see 31 DIGEST (Repl.) 191 et seq. As to misrepresentation generally, see 26 HALSBURY'S LAWS (3rd Edn.) 817 et seq., and for cases see 35 DIGEST 6 et seq.

Cases referred to:

- (1) *Pasley v. Freeman* (1789), 3 Term Rep. 51; 100 E.R. 450; 35 Digest 25, 162.
- (2) *Cross v. Gardner* (1689), 1 Show. 68; Carth. 90; Comb. 142; Holt, K.B. 5; 3 Mod. Rep. 261; 89 E.R. 453; 35 Digest 29, 203.
- (3) *Medina v. Stoughton* (1700), 1 Ld. Raym. 593; Holt, K.B. 208; 1 Salk. 210; 91 E.R. 1297; 35 Digest 29, 204.
- (4) *Best v. Edwards* (1895), 60 J.P. 9; 31 Digest (Repl.) 193, 3239.

- (6) *Morgan v. Griffith* (1871), L.R. 6 Exch. 10; 40 L.J.Ex. 46; 23 L.T. 783; 19 W.R. 957; 12 Digest (Repl.) 142, 894.
- (7) *Locking v. Mause* (1873), 8 Ch. App. 756; 42 L.J.Ch. 949; 29 L.T. 934; 38 J.P. 20; 21 W.R. 802; L.J.J.; 12 Digest (Repl.) 142, 895.
- (8) *Tagell v. Duke* (1855), L.R. 10 Q.B. 174; 41 L.J.Q.B. 78; 62 T.T. 26; 39 J.P. 247; 23 W.R. 307; subsequent proceedings, 32 L.T. 320; 23 W.R. 548; 30 Digest (Repl.) 397, 405.
- (9) *Green v. Symons* (1897), 13 T.L.R. 361, C.A.; 31 Digest (Repl.) 192, 3226.
- (10) *Kenward v. Ashman* (1894), 10 T.L.R. 213; affirmed, 10 T.L.R. 447, C.A.; 31 Digest (Repl.) 193, 3238.
- (11) *Leachman v. Blount* (1896), 12 T.L.R. 526; 31 Digest (Repl.) 192, 3227.
- (12) *Palmer v. Johnson* (1884), 13 Q.B.D. 351; 53 L.J.Q.B. 348; 51 L.T. 211; 33 W.R. 36, C.A.; 35 Digest 111, 157.

Also referred to in argument :

- Mann v. Nunn* (1874), 43 L.J.C.P. 241; 30 L.T. 526; 38 J.P. 776; 31 Digest (Repl.) 348, 4789.
- Stucley v. Bailly* (1862), 1 H. & C. 405; 31 L.J.Ex. 483; 10 W.R. 720; 15 E.R. 943; 39 Digest 419, 520.
- Kain v. Old* (1824), 2 B. & C. 627; 4 Dow. & Ry. K.B. 52; 2 L.J.O.S.K.B. 102; 107 E.R. 517; 39 Digest 475, 983.
- Brett v. Clowser* (1880), 5 C.P.D. 376; 40 Digest (Repl.) 111, 852.
- Burtsal v. Bianchi* (1891), 65 L.T. 678; 31 Digest (Repl.) 192, 3226.
- Clarke v. Ramuz*, 1891, 2 Q.B. 456; 60 L.J.Q.B. 679; 65 L.T. 657; 56 J.P. 5; 7 T.L.R. 626, C.A.; 40 Digest (Repl.) 197, 1597.
- Wilson v. Finch Hatton* (1877), 2 Ex.D. 336; 46 L.J.Q.B. 489; 36 L.T. 473; 41 J.P. 583; 25 W.R. 537; 31 Digest 196, 3268.
- Smith v. Marrable* (1843), 11 M. & W. 5; Car. & M. 479; 12 L.J.Ex. 223; 7 Jur. 70; 152 E.R. 693; 31 Digest (Repl.) 195, 3266.
- Chanter v. Hopkins* (1838), 4 M. & W. 399; 1 Horn. & H. 377; 8 L.J.Ex. 14; 3 Jur. 58; 150 E.R. 1484; 39 Digest 447, 753.
- Power v. Burham* (1836), 4 Ad. & El. 473; 1 Har. & W. 683; 6 Nev. & M.K.B. 62; 5 L.J.K.B. 88; 111 E.R. 865; 39 Digest 459, 863.
- Greswolde-Williams v. Barnaby* (1900), 83 L.T. 708; 49 W.R. 203; 17 T.L.R. 110; 40 Digest (Repl.) 379, 3045.

Appeal by the plaintiff asking for judgment or a new trial from a verdict and judgment entered at the trial of the action before Bruce, J., with a jury in Middlesex.

The action was brought by the plaintiff to recover damages from the defendant for breach of warranty that the drains of a house, of which the plaintiff had taken a lease from the defendant, were in good order and condition at the time of the demise. There were alternative claims for damages for fraudulent misrepresentation as to the condition of the drains, or for damages for breach of covenant to repair the outside of the premises after notice.

In February, 1899, the plaintiff entered into negotiations with the defendant for taking a lease of a house belonging to the defendant at Surbiton. Prior to Feb. 28 the wife of the plaintiff, who was anxious about the drainage as he had suffered from bad drains in another house, had had interviews on his behalf with the house agents about the drains of the defendant's house. On Feb. 21, 1899, the plaintiff wrote to the defendant as follows :

"I beg to acknowledge your letter of the 14th inst. with inclosure [this was the draft agreement for tenancy for three years]. I shall be prepared to exchange the counterpart for the lease when executed, and shall be glad to hear from you accordingly in due course. Will you kindly inform me if the drains and all sanitary arrangements are in good order?"

A On Feb. 22 the defendant replied :

"As regards the drainage, that was tested and put into good order by me, including a new w.c. upstairs when Mr. R. went out."

B On Feb. 28 the plaintiff sent his wife and daughter to the defendant with the counterpart executed by him, but with particular instructions that the counterpart was not to be exchanged for the lease until they got from the defendant an assurance that the drains were in good order.

C The wife stated in her evidence that, at the interview with the defendant, she told him that her husband, before exchanging the agreement, wanted a still further assurance as to the drains; that she gave as the reason for this that they had suffered from the drainage in the house in which they had been, and that made them more particular; that she said her husband would like a certificate; that he then said that he could give her his word for the perfect condition of the drains, and she need have no fear on the subject; that he repeated: "I will give you my word, will that satisfy you?" that she said she could not but be satisfied with his word, and accepted it; that her daughter then said, "We will exchange
D agreements then; I will give you the agreement," and she handed it to him. In cross-examination the plaintiff's wife said that she had in the very first instance told the house agents that she would not take a house in which the drains could not be guaranteed. The plaintiff's daughter in her evidence stated :

E "When we reached the defendant's office my mother first of all spoke on the subject of drains, and was very emphatic about wishing to know if they were in thorough good order, and suggested that we should have the sanitary inspector's certificate. The defendant said it was quite unnecessary, that the drains were in perfect condition, and we could take his word for it. He said, 'I give you my word upon the subject.' I then handed the agreement to him."

F The defendant in his evidence denied that he had ever said anything at all about the drains to the plaintiff's wife or daughter. The plaintiff entered into possession on Mar. 25, 1899. Subsequently he and his family suffered much in health, and it was discovered that the drains and sanitary arrangements were in very bad order. In consequence the house could not be inhabited for some time, and the plaintiff suffered considerable damage.

G The action was tried before BRUCE, J., with a jury. The jury, in answer to the questions left to them by the learned judge, found that there had been no fraudulent misrepresentation on the part of the defendant; that there had been no breach of covenant; that there was a distinct representation by the defendant that the drains were in good order, and that the drains were not in good order; and they assessed the damages at £75. The case was subsequently argued before BRUCE, J.,
H on further consideration and the learned judge gave judgment for the defendant, holding that the finding of the jury did not establish a warranty and even if it had, it would not have been collateral to the lease as the lease had provided for the terms on which the property was taken. The plaintiff appealed asking for judgment or a new trial.

I *Robert Wallace, K.C., and Israel Davis for the plaintiff.*

Bankes, K.C., and M. Shearman for the defendant.

Cur. adv. vult.

Mar. 26, 1901. **SIR A. L. SMITH, M.R.**, read the following judgment:—This is an action for damages by a tenant against his landlord for breach of a warranty that the drains at the time of the letting of the defendant's house to the plaintiff were in good condition, whereas they were not, whereby illness intervened and the plaintiff suffered damages, as the jury have found, to the extent of £75. There were alternative causes of action—one founded upon a false and fraudulent repre-

mentarian and the other upon a breach of covenant to repair the inside of the house after notice. But these two last points failed, because as to the one the plaintiff could not prove fraud, and as to the other he failed to prove that the money required by the covenant had been given to the defendant. The jury found, however, the alleged facts resulting to the alleged warranty in favour of the plaintiff, and the questions which now arise are, first, does what the jury have found to have been stated by the defendant, in the circumstances in which the statements were made, amount to a warranty in law, or only to a mere representation, in which case no action for damages can be maintained without proof of fraud? Secondly, if the statements found to have been made by the defendant amounted to a warranty, was such warranty a warranty collateral to the lease so as to be given in evidence and given effect to notwithstanding the lease?

Before considering these points it is necessary to see what it is that the jury have found to be the truth in this case as to the statements made by the defendant to the plaintiff's wife and daughter before the counterpart of the lease was handed over by the daughter to the defendant. The defendant's case was a flat denial that he had said anything about the drains. The jury acted upon the evidence of the wife and daughter, and, as these findings stand unimpeached, all that is left to the defendant to argue is that the statements made do not amount to a warranty, but only to a representation, and that if they amount to a warranty it is not collateral to the lease and cannot be given effect to. [The learned judge stated the facts, and continued:] As before stated, the defendant's evidence was a flat denial that he had ever said anything at all about the drains to the wife or her daughter.

Do these proved statements by the defendant to the wife and daughter, in the circumstances in which they were made, afford evidence of a warranty, or only evidence of a representation? BRUCE, J., in a clear and accurate summing up, undoubtedly directed the jury upon the question of warranty, also upon false representation, and also upon the breach of covenant. The questions he then put to the jury were these—viz., Was there a breach of covenant? Then, he said, comes the question—was there a warranty? Did he warrant and pledge himself that the drains were in perfect order? If he made the representation that the drains were in perfect order, did he do that falsely and fraudulently? The jury negatived fraud, and found no breach of covenant, on the ground that due notice had not been given thereunder. It will be seen from the shorthand notes that the jury, or some of them, for some reason had a difficulty about the word "perfect," though they unanimously found that the statement of the defendant was that the drains were in good order, and that they were not. Counsel for the defendant upon the verdict being given, said:

"Then, my Lord, it comes to this, that there is a verbal warranty, no fraudulent misrepresentation, and no breach of covenant."

BRUCE, J.: "Yes." Counsel: "That raises the question of law."—BRUCE, J.: "I will hear you on that." In my judgment, having read through the shorthand notes of BRUCE, J.'s, summing up and what took place at the end of the summing up, I think that counsel for the defendant was quite accurate in what he said was the verdict. Afterwards, upon further consideration BRUCE, J., doubted whether there was a sufficient finding that there was "something which would amount to a warranty," and he arrived at the conclusion that even if there was it would not be collateral to the lease. To get over this doubt of BRUCE, J.'s, as to no sufficient finding of a warranty, the learned counsel on each side in the court have left it to us, assuming the jury did not in fact find a warranty, though I think they did, to say whether the true inference from the proved statements made is that there was a warranty or merely a representation by the defendant. What constitutes a warranty in law, or a mere representation? To create a warranty no special form of words is necessary. It must be a collateral matter

A taking forming part of the contract by agreement of the parties express or implied, and must be given during the course of the dealing which leads to the bargain, and should then enter into the bargain as part of it. It was laid down by BUTLER, L., as long ago as 1789, in *Pasley v. Freeman* (1) (3 Term Rep. at p. 57).

B "It was rightly held by HOLT, C.J., [in *Cross v. Gardner* (2) and *Medina v. Stoughton* (3)] and has been uniformly adopted ever since, that an affirmation at the time of sale is a warranty provided it appear in evidence to have been so intended."

C And in determining whether it was so intended a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment. In the former case it is a warranty, in the latter not. See BENJAMIN ON SALE (3rd Edn.) p. 607, whose statement upon the law, in my judgment, is accurate. That the above constitutes a warranty upon the sale of a chattel cannot be doubted, and why not upon the sale of real property or upon the granting and taking of a lease, if it be collateral? I know of no authority which shows nor do I see any principle upon which it should be held that, the like conditions existing, such an affirmation does not constitute a warranty upon, as in this case, the granting of a lease.

E In the present case, did the defendant assume to assert a fact, or merely to state an opinion or judgment upon a matter of which he had no special knowledge and upon which the plaintiff's wife on behalf of her husband might be expected also to have an opinion. What is it the defendant asserts? I paraphrase the evidence: "You need have no certificate of a sanitary inspector; it is quite unnecessary; the drains are in perfect condition. I give you my word upon the subject. Will that satisfy you? If so, hand me over the counterpart." What F more deliberate and emphatic assertion of a fact could well be made during the course of the dealing which led up to the counterpart lease being handed over to the defendant? That the question asked and the answer given were seriously intended, to use the words of WILLS, J., in *Best v. Edwards* (4) to be the basis of the contractual relation between the parties, I cannot doubt. There is the evidence that the plaintiff would not take the lease unless the drains were guaranteed, and G surely the statements made by the defendant were not made on the assumption that they were to be of no avail to the plaintiff except they were made fraudulently. In my judgment, everything necessary to establish a warranty has in this case been proved.

H The next question is: Was the warranty collateral to the lease so that it might be given in evidence and given effect to? It appears to me in this case clear that the lease did not cover the whole ground, and that it did not contain the whole of the contract between the parties. The lease is entirely silent about the drains, though there is a covenant that the lessee during the term should do inside repairs, and the lessor the outside repairs, which would, I suppose, include the drains which happened to be inside or outside the house. There is nothing in the lease as to the then condition of the drains—i.e., at the time of the taking of the lease. I which was the vital point in hand. Then why is not the warranty collateral to anything which is to be found in the lease? The present contract or warranty by the defendant was entirely independent of what was to happen during the tenancy. It was what induced the tenancy, and in no way affected the terms of the tenancy during the three years which was all the lease dealt with. The warranty in no way contradicts the lease, and without the warranty the lease never would have been executed.

Three cases were cited in which parol collateral agreements outside leases had been allowed in evidence and given effect to by the court, viz., *Morgan v. Griffith* (5)

Erskine v. Adeane (6), in this court, and *Angell v. Duke* (7). The first two cases related to parol agreements collateral to leases as to keeping down rabbits, and the last case to a parol collateral agreement to do repairs and to send in additional furniture. This case was first decided in the Court of Queen's Bench upon demurrer upon the pleadings as they stood, when the parol agreement was held to be collateral and admissible in evidence; but when it came to the trial BLACKBURN, J., refused to admit the evidence about the additional furniture, and the learned judge gave the following reasons for so doing (*Angell v. Duke* (7) (32 L.T. at p. 321)):

"Here the lease expresses the whole of the terms; the defendant agrees to let, and the plaintiff to take, the house and furniture at a certain rent. There is said to have been an arrangement made beforehand during the negotiation that the defendant should let the plaintiff have more furniture for the same rent. How is this collateral? I cannot perceive that it is."

In the present case, as above stated, the lease does not contain the whole terms of the bargain. In the rabbit cases the agreements were held collateral to the leases, and did not contradict the terms of the lease. It was argued by counsel for the defendant that the collateral agreements in the rabbit cases were agreements that something should be done after the lease was taken, and that in the present case the agreement or warranty is that the drains were then in good order. This is true, but if in the rabbit cases the agreements were collateral and outside the leases, the leases not containing the whole terms and the collateral agreements not contradicting the leases, I cannot see why the warranty in this case is not collateral also.

Then some cases were cited by the defendant's counsel to show that representations as to drains were never held to be warranties, but when examined I do not think they show this; for the representations in the cases cited were by no means such complete and emphatic statements of fact as were made in this case. And, indeed, upon principle why should there be any difference in the case of drains? First came *Green v. Symons* (8), which, in my opinion, so far as it goes is an authority against the defendant, and not in his favour. The verbal warranty alleged was that the house was dry and that the drains were perfect. The jury found that there was a verbal warranty as to the house being dry, and that the house was not dry, but that the drains were not defective, and assessed damages at £50. LAWRENCE, J., who tried the case, entered judgment for the plaintiff for that amount. Upon appeal this was set aside, not upon the ground that if there had been a warranty the judgment should not have stood, but upon the ground that what was said was a mere representation without fraud, and was made without authority; and neither LORD ESHER nor LOPES nor CHITTY, L.JJ., doubted that if there had been a warranty the action would have lain, for if it had been their opinion that it would not, it would have been a short end to the case. In *Kennard v. Ashman* (9), WILLS, J., held that it was clear that there was no warranty that the house was well built, but the learned judge does not seem to me to have held that if there had been a warranty and it had been broken, no action could have been maintained. On the contrary, in *Best v. Edwards* (4) that learned judge clearly thought that if there had been a warranty an action would have lain. His decision (in *Kennard v. Ashman* (9)) was upheld upon appeal, solely upon the facts of the case. In *Longman v. Blount* (10), WRIGHT, J., held that a warranty contained in a letter that the house was in a perfect sanitary condition could not be given in evidence, and directed judgment for the defendant, and somewhat invited an appeal. This apparently was not done. I should require further argument to convince me that this direction was correct. The question about it being too late to bring this action because of the lease having been executed was settled adversely to the defendant in this court in *Palmer v. Johnson* (11).

A In my opinion, even if the jury had not found a warranty, the true inference is that there was a warranty given in this case collateral to the lease, and, therefore, the judgment entered for the defendant must be set aside, and judgment entered for the plaintiff for the £75, the amount found by the jury, and this appeal must be allowed.

B **HENN COLLINS, L.J.**—I agree.

ROMER, L.J.—I agree.

Solicitors : *Atkinson & Dresser; Woodbridge & Son.*

Appeal allowed.

[*Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.*]

C

D

THE VERITAS

E [PROBATE, DIVORCE AND ADMIRALTY DIVISION (Gorell Barnes, J.), July 15, 16, 29, 1901]

[Reported [1901] P. 304; 70 L.J.P. 75; 85 L.T. 136; 50 W.R. 30; 17 T.L.R. 721; 45 Sol. Jo. 708; 9 Asp.M.L.C. 237]

Shipping—Maritime lien—Salvage—Two salvage operations—Subsequent damage to property by salvaged ship—Priorities of liens.

F A maritime lien for damage done by a ship extends to damage done in the body of a county as well as on the high seas.

A lien for damage done by a salvaged ship takes precedence of a lien for salvage previously rendered, and an award for salvage cannot be recovered against the res to the detriment of a claimant in respect of subsequent damage.

G The V., a foreign ship, was in distress outside the Mersey and salvage services were rendered to her by the C., which towed her into the Mersey. The V. was then run into by another vessel and second salvors brought her into place alongside the dock, from which position she drifted into a landing stage belonging to the Mersey Docks and Harbour Board, and sank. The Board, under statutory powers, removed and sold her, and the proceeds of sale, less expenses, were paid into court. These were insufficient to meet the claims of the two salvors and the claim of the Board for the damage to the landing stage. On the question of priorities,

H **I** **Held:** the Board's claim for damage to the stage, being a maritime lien arising ex delicto, took priority over the salvors' claims which arose ex contractu, and even if the Board had had no lien this would still have been the case as they had a right to proceed in rem for their damage; the claim of the second salvors ranked next as liens arising ex contractu in general rank against the fund in the inverse order of their attachment to the res because services which operate for the protection of prior interests are, in general, privileged above those interests; and, therefore, the claim of the C. ranked last.

Notes. The Admiralty Court Acts, 1840 and 1861, have been repealed. For the Admiralty jurisdiction of the High Court, county courts and the Liverpool Court of Passage, see now the Administration of Justice Act, 1956 (36 HALSBURY'S STATUTES (2nd Edn.) 2 et seq.).

Considered: *Mersey Docks and Harbour Board v. Hay*, [1923] A.C. 345; *The Tullia*, [1946] 2 All E.R. 322. Related to: *The Stream Fisher*, [1926] All E.R. Rep. 313; *The Iona*, 1908 P. 148; *Frederic Fenwick Type-Writer Co. v. His Majesty's Procurator-General*, [1912] 2 All E.R. Rep. 433; *Admiralty Commissioners v. Joseph Thorden (Owners)*, *The Josefina Thorden*, [1945] 1 All E.R. 344.

As to liens on ships, freight and cargo, see 35 HALLIDAY'S LAW (3rd Edn.) 791 et seq.; and for cases see 41 DIGEST 927 et seq.

Cases referred to:

- (1) *The Africano*, [1894] P. 141; 63 L.J.P. 125; 70 L.T. 250; 42 W.R. 413; 7 Asp.M.L.C. 427; 6 R. 767; 41 Digest 950, 8447.
- (2) *Bilantyne v. Mackinnon*, [1896] 2 Q.B. 455; 65 L.J.Q.B. 616; 73 L.T. 95; 45 W.R. 70; 12 T.L.R. 601; 8 Asp.M.L.C. 173; 1 Com. Cas. 424, C.A.; 21 Digest (Repl.) 240, 296.
- (3) *Barraclough v. Brown*, [1897] A.C. 615; 66 L.J.Q.B. 672; 76 L.T. 797; 62 J.P. 275; 13 T.L.R. 527; 8 Asp.M.L.C. 290; 2 Com. Cas. 249, H.L.; 29 Digest 287, 2340.
- (4) *The Beta* (1869), 6 Moo.P.C.C.N.S. 55; L.R. 2 P.C. 417; 38 L.J.Adm. 50; 20 L.T. 988; 17 W.R. 933; 16 E.R. 647, P.C.; 1 Digest (Repl.) 168, 550.
- (5) *The Uhla* (1867), 37 L.J.Adm. 16 n.; 19 L.T. 89; 3 Mar.L.C. 148; 1 Digest (Repl.) 165, 525.
- (6) *The Sylph* (1867), L.R. 2 A. & E. 24; 37 L.J.Adm. 14; 17 L.T. 519; 3 Mar.L.C. 37; 1 Digest (Repl.) 168, 549.
- (7) *The Malvina* (1862), Lush. 493; on appeal (1863), 1 Moo. P.C.C.N.S. 357; Brown. & Lush. 57; 8 L.T. 403; 9 Jur.N.S. 527; 11 W.R. 576; 1 Mar.L.C. 341; 15 E.R. 736, P.C.; 1 Digest (Repl.) 165, 524.
- (8) *The Merle* (1874), 31 L.T. 447; 2 Asp.M.L.C. 402; 1 Digest (Repl.) 165, 526.
- (9) *Mersey Docks and Harbour Board v. Turner*, *The Zeta*, [1893] A.C. 468; 63 L.J.P. 17; 69 L.T. 630; 57 J.P. 660; 9 T.L.R. 624; 7 Asp.M.L.C. 369; 1 R. 307, H.L.; 1 Digest (Repl.) 164, 515.
- (10) *Harmer v. Bell*, *The Bold Buccleugh* (1852), 7 Moo.P.C.C. 267; 19 L.T.O.S. 235; 13 E.R. 884, P.C.; 41 Digest 927, 8168.
- (11) *Northcole v. Henrich Björn (Owners)*, *The Henrich Björn* (1886), 11 App. Cas. 270; 55 L.J.P. 80; 55 L.T. 66; 2 T.L.R. 498; 6 Asp.M.L.C. 1, H.L.; 41 Digest 942, 8333.
- (12) *Johnson v. Black*, *The Two Ellens* (1872), L.R. 4 P.C. 161; 8 Moo.P.C.C.N.S. 398; 41 L.J.Adm. 33; 26 L.T. 1; 20 W.R. 592; 1 Asp.M.L.C. 208; 17 E.R. 361, P.C.; 41 Digest 950, 8443.
- (13) *Westrup v. Great Yarmouth Steam Carrying Co.* (1889), 43 Ch.D. 241; 59 L.J.Ch. 111; 61 L.T. 714; 38 W.R. 505; 6 T.L.R. 84; 6 Asp.M.L.C. 443; 41 Digest 939, 8310.
- (14) *The Dictator*, [1892] P. 64, 304; 61 L.J.P. 73; 67 L.T. 563; 7 Asp.M.L.C. 251; 1 Digest (Repl.) 121, 68.
- (15) *Currie v. McKnight*, [1897] A.C. 97; 66 L.J.P.C. 19; 75 L.T. 457; 13 T.L.R. 53; 8 Asp.M.L.C. 193, H.L.; 41 Digest 928, 8182.
- (16) *The Sarah* (1862), Lush. 549; 167 E.R. 248; 41 Digest 930, 8274.
- (17) *The Sira* (1889), 14 App. Cas. 209; 58 L.J.P. 57; 61 L.T. 26; 38 W.R. 129; 5 T.L.R. 507; 6 Asp.M.L.C. 413, H.L.; 1 Digest (Repl.) 151, 375.
- (18) *The Hine* (1839), 1 Wm. Rob. 111; 166 E.R. 514; 41 Digest 928, 8178.
- (19) *The Bonarog* (1850), 7 Notes of Cases, Supp. 50; 5 L.T. 185; 14 Jur. 581; 41 Digest 946, 8378.
- (20) *The Gilam (Cargo Ex.)* (1863), Brown. & Lush. 167; 33 L.J.P.M. & A. 97; 167 E.R. 327; sub nom. *Clarry v. McAndrew*, *The Gilam (Cargo Ex.)*, 2 Moo.P.C.C.N.S. 216; 3 New Rep. 254; 9 L.T. 550; 10 Jur.N.S. 477; 12 W.R. 496; 1 Mar.L.C. 408, P.C.; 41 Digest 588, 4075.
- (21) *L. C. v. Nardelli* (1816), 3 Price, 97; 146 E.R. 203; 41 Digest 946, 8388.

- A (22) *The Min* (1883), 8 P.D. 129; 52 L.J.P. 55; 49 L.T. 87; 31 W.R. 736; 5 Asp.M.L.C. 120, C.A.; 41 Digest, 946, 8381.
 (23) *The Fire Steel Barges* (1890), 15 P.D. 142; 63 L.T. 499; 6 Asp.M.L.C. 580; sub nom. *The Steel Barges*, 59 L.J.P. 77; 39 W.R. 127; 41 Digest 824, 6821.
 (24) *The Devonian*, (1901) P. 221; 70 L.J.P. 66; 84 L.T. 675; 49 W.R. 665; 17 T.L.R. 532; 9 Asp.M.L.C. 179, C.A.; 41 Digest 718, 5548.

B Also referred to in argument :

- The Gustaf* (1862), Lush. 506; 31 L.J.P.M. & A. 207; 6 L.T. 660; 1 Mar.L.C. 230; 167 E.R. 230; 41 Digest 932, 8220.
The Ripon (1885), 10 P.D. 65; 54 L.J.P. 56; 52 L.T. 438; 33 W.R. 659; 4 Asp.M.L.C. 365; 41 Digest 762, 6145.
 C *The Immacolata Concezione* (1883), 9 P.D. 37; 52 L.J.P. 19; 50 L.T. 539; 32 W.R. 705; 5 Asp.M.L.C. 208; 41 Digest 935, 8250.
The Robert Pow (1863), Brown. & Lush. 99; 2 New Rep. 527; 32 L.J.P.M. & A. 164; 9 L.T. 237; 1 Mar.L.C. 392; 1 Digest (Repl.) 153, 390.
The Mary Ann (1865), L.R. 1 A. & E. 8; 35 L.J.Adm. 6; 13 L.T. 384; 12 Jur.N.S. 31; 14 W.R. 136; 2 Mar.L.C. 294; 41 Digest 934, 8235.
 D *The Vera Cruz* (1884), 9 P.D. 96; 53 L.J.P. 33; 51 L.T. 104; 32 W.R. 783; 5 Asp.M.L.C. 270, C.A.; on appeal, sub nom. *Seward v. The Vera Cruz* 10 App. Cas. 59; 54 L.J.P. 9; 52 L.T. 474; 49 J.P. 324; 33 W.R. 477; 1 T.L.R. 111; 5 Asp.M.L.C. 386, H.L.; 41 Digest 768, 6230.
The Madonna D'Ibra (1811), 1 Dods. 37; 165 E.R. 1224; 41 Digest 935, 8249.
The Selina (1842), 7 Jur. 182; 41 Digest 946, 8390.
 E *The Linda Flor* (1857), Sw. 309; 30 L.T.O.S. 234; 4 Jur.N.S. 172; 6 W.R. 197; 166 E.R. 1150; 41 Digest 946, 8380.

Motions by the owners of the tugs *Prairie Cock* and *Sea Cock*, the Mersey Docks and Harbour Board, and the owners of the steamship *Caledonian*, respectively, for payment out of court of the sum of £927 9s. 2d., the proceeds of sale of the Norwegian steamship *Veritas*.

F *Carrer, K.C.*, and *Batten* for the owners, masters, and crews of the tugs *Prairie Cock* and *Sea Cock*.

Bailhache and *W. S. Glynn* for the owners, master, and crew of the steamship *Caledonian*.

Aspinall, K.C., and *Maurice Hill* for the Mersey Docks and Harbour Board.

G *Cur. adv. vult.*

July 29, 1901. **GORELL BARNES, J.**—There are three motions in this case for payment out of court of certain sums out of the proceeds of the Norwegian steamship *Veritas* which amount to £927 9s. 2d. The motions are made in these circumstances. In October last year the *Veritas*, laden with a cargo of ice for Liverpool, was in distress outside the Mersey, and salvage services were rendered to her by the steamship *Caledonian*, by which she was brought into and anchored in the Mersey. The services of the tug *Prairie Cock* were then engaged, and, while that tug was being made fast to the *Veritas*, a collision occurred between the *Veritas* and the steamship *Devonian* in consequence of which the *Veritas* began to fill, and salvage services were rendered to her by the tugs *Prairie Cock* and *Sea Cock*, with the result that she was brought to a place alongside the dock wall to the south of the Liverpool landing stage. From this place she drifted against the said stage, doing damage to the boom and other connections of the stage, and sank, and her cargo of ice perished. She was removed by the Mersey Docks and Harbour Board under the powers conferred upon them by s. 11 of the Mersey Docks Act, 1874. The Board had also the right to detain her in respect of the damage under s. 94 of the Mersey Docks Consolidation Act, 1858.

On Oct. 15 an action was instituted in this court by the owners, master, and crew of the tugs against the *Veritas* in respect of the salvage services rendered

by them, and on the same day the *sea* was arrested in the suit. The Board later found in that suit, and on Oct. 19 an order was made, by consent, for the release of the *Veritas*, the interveners undertaking to furnish the plaintiffs with an account of receipts and expenditure in dealing with the wreck under statutory powers, and to lodge the surplus in court to the credit of this action to abide further order, without prejudice to liens, rights, or priorities of any claims on the *Veritas* or proceeds of sale. The vessel was accordingly released and afterwards sold on Oct. 23 by the Board, and, after deducting the expenses of the Board, the net proceeds amounted to the sum of £927 5s. 2d., which was brought into court to the credit of the action.

On Nov. 23 an action was instituted in this court against the proceeds of the *Veritas* by the owners, master, and crew of the *Caledonian* in respect of the salvage services rendered by them, and on Dec. 7 a caveat against the payment out of court of the proceeds was entered in the first action on behalf of the last plaintiff, who afterwards intervened in the first action, though not until after judgment was obtained in it. On June 14, 1901, judgment was obtained by the plaintiffs in the action in respect of the salvage by the *Prairie Cock* and *Sea Cock* in the sum of £520 and costs, without prejudice to claims on the funds in court, and reserving all questions of priorities. On April 29, 1901, judgment was given for the plaintiff in the action in respect of the salvage by the *Caledonian* for £400 and costs, all questions of priorities being reserved. On Feb. 8, 1901, an action was instituted in this court by the Board against the proceeds in respect of the damage done to the stage, in which the plaintiffs in the two salvage actions intervened, and on July 1, 1901, judgment was given for the plaintiff for £600 and costs, all questions of priorities being reserved. The owners of the *Prairie Cock* and *Sea Cock* appeared at the hearing. By their defence, as interveners, they had raised (inter alia) the question of whether or not the damage sustained by the Board was due to the negligence of those on board the *Veritas*, and the judgment appears to have proceeded on the ground of such negligence being found by the court, and no point was raised before me that this was not so. [His LORDSHIP, having read the formal judgment in the action brought by the Mersey Docks and Harbour Board, proceeded:] It is to be observed that all these judgments were conditional, and, as the funds are still in court, the claims have to be dealt with on their respective rights to priority: (*The Africano* (1)).

A collision action was also tried between the *Deronian* and the *Veritas* in which the *Deronian* was on Feb. 7, 1901, held to blame for a bad look-out, and the *Veritas* also to blame on the ground that the tug *Prairie Cock*, while alongside of her, was exhibiting only under-way lights, and had not a second masthead light for towing. The Board claim to have a maritime lien on the said proceeds for their damage, and to take priority over the salvors. This claim is disputed by both of the salvors. The *Prairie Cock* and *Sea Cock* claim to have priority over the damage claim, and over the claim of the prior salvors. The first salvors claim to have precedence over the second, and dispute the right of the second to claim salvage in the circumstances. These rival claims give rise to some questions of general importance and considerable difficulty which were very well argued by counsel before me.

The first question to determine is with regard to the claim of the Board. It was first argued by the salvors that the Board had waived any right against the *Veritas* and the proceeds by selling the *Veritas* under the powers conferred by the said Acts. This point was principally made by the *Prairie Cock* and *Sea Cock*, who were parties to the consent order, though the owners of the *Veritas* and the *Caledonian* were not. The answer to the point appears to be that the Board have recovered judgment against the proceeds in their action, to which both sets of salvors had become parties by intervening, and that the judgment is binding and conclusive, at any rate so far as it establishes a right on the part of the Board to proceed for their damage against the proceeds: (*Ballantyne v. Mackinnon* (2)).

A Every possible point appears to have been raised in the defence put in on behalf of the tugs, but in their rejoinder these interveners withdrew their defence, except as to the question of priorities, and stated that they were willing that the Board should have judgment for £600 against the proceeds. The judgment reserved the question of priorities. Further, as showing that the Board had not waived any right it may have to proceed against the fund, it is to be observed that, in selling under the powers aforesaid, the Board do not extinguish the claimants' claims altogether against the proceeds, but hold the same subject to such rights as could be enforced against the res. By s. 11 of the Mersey Docks Act, 1874, they are to render the overplus (if any) to the person, or persons, entitled to the same. This sale would not affect such rights as the salvors have against the proceeds, and there seems to me to be nothing inconsistent in the Board also being allowed to enforce, by proceedings against the proceeds, any rights which they may have in respect of damage done by the *Veritas* to their property; and, although they had an option to detain the wreck until their damage was paid, or a deposit made for the same, that appears to be only an additional right, and, if not exercised, that does not prevent the Board from enforcing by action any claim they may have to recover for the damage done to the stage and its connections. *Barraclough v. Brown* (3) which was cited does not apply in my opinion. That case was dealing with a liability only imposed by the Act referred to in the case.

The second point raised by the salvors was that the Board had not a maritime lien for their damage. That the Board had a right to proceed in rem under s. 7 of the Admiralty Court Act, 1861, is clear, and the judgment in favour of the Board was no doubt under this section: (*The Beta* (4); *The Uhla* (5); *The Sylph* (6); *The Malrina* (7); *The Merle* (8); *Mersey Docks and Harbour Board v. Turner, The Zeta* (9)). The judgment in favour of the Board must, at least, have proceeded on this ground, though it would not necessarily proceed on the ground that there was a maritime lien for damage.

It was argued by counsel for the salvors that although the Board might have a right to proceed in rem, yet they had no maritime lien for the damage. As the damage came last in this case it is very questionable if it matters whether the Board had a maritime lien or not, because, the Board having a right to proceed in rem for their damage, the question rather is whether the salvors' claims are to have precedence of the right of the Board to enforce payment of the damage done by the *Veritas*. But I will deal with the salvors' rights later on. However that may be, in my opinion, if it be material to decide the point (the case was argued as if it were), as the law now stands, the Board had a maritime lien for the damage. The question is one upon which a great deal of argument may be expended, but the ground is now mostly covered by authority.

It was decided in *Harmer v. Bell, The Bold Buccleugh* (10) that a maritime lien arises in the case of damage done by one ship to another in favour of the injured party. The important passage from the judgment delivered by SIR JOHN JERVIS in that case is as follows (7 Moo. P.C.C. at pp. 284, 285):

"Having its origin in this rule of the civil law, a maritime lien is well defined by LORD TENTERDEN to mean a claim or privilege upon a thing to be carried into effect by legal process; and STORY, J. (1 Sumner at p. 78) explains that process to be a proceeding in rem, and adds, that wherever a lien or claim is given upon the thing, then the Admiralty enforces it by a proceeding in rem, and indeed it is the only court competent to enforce it. A maritime lien is the foundation of the proceeding in rem, a process to make perfect a right inchoate from the moment the lien attaches; and, whilst it must be admitted that where such a lien exists a proceeding in rem may be had, it will be found to be equally true that in all cases where a proceeding in rem is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing to be carried into effect by legal process. This claim or privilege travels

with the thing, into whatsoever possession it may come. It is inadequate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding in rem, relates back to the period when it first attached."

That this reasoning is not strictly correct is shown by more recent decisions, where it has been held that there may be profits to proceed in rem without a maritime lien (*Norfolk v. Henrich Binn (Owners), The Henrich Binn* (11)), and there is no lien on a foreign ship under s. 5 of the Admiralty Court Act, 1861, for necessities.

In *Johnson v. Black, The Two Ellens* (12) it was held there was no lien for necessities under s. 5 of the Admiralty Court Act, 1861, and in *Westrop v. Great Yarmouth Steam Carrying Co.* (13) that there was no lien for towage. In all these cases a proceeding in rem lies. Dr. BROWNE, in his work on CIVIL LAW (2nd Edn.) at p. 143, has the following passage :

"The torts of the master cannot be supposed to hypothecate the ship; nor, in my humble judgment, in strictness of speech, to produce any lien on it."

I do not know of any English case earlier than *The Bold Buccleugh* (10) in which the doctrine that collision gives rise to a lien is to be found: (see the notes collected by MR. MARSDEN, at p. 187 of his work on COLLISIONS AT SEA (4th Edn.)). The growth of the idea of maritime lien is also referred to in the judgment of JEUNE, J., in *The Dictator* (14).

The decision in *The Bold Buccleugh* (10) has, however, whether rightly founded or not, been now acted on for fifty years, and in *Currie v. McKnight* (15) LORD WATSON made the following remarks ([1897] A.C. at pp. 105, 106) :

"The principle of that decision has been adopted in the American courts; and in the Admiralty Court of England it has for nearly forty years been followed in a variety of cases in which lien for damage done by the ship has been preferred to claims for salvage, and seamen's wages, and upon bottomry bonds."

He then proceeded to consider *The Bold Buccleugh* (10), and says (*ibid.* at p. 106) :

"And in my opinion it is a reasonable and salutary rule that when a ship is so carelessly navigated as to occasion injury to other vessels which are free from blame, the owners of the injured craft should have a remedy against the corpus of the offending ship, and should not be restricted to a personal claim against her owners, who may have no substantial interest in her, and may be without the means of making due compensation."

So far these observations relate to damage in collisions between ships, but the principle seems to be substantially the same so far as regards damage done by a ship, which, if done on the high seas, would formerly have been within the jurisdiction of the Admiralty Court: *The Sarah* (16) and Lord HENSCOTT's judgment in *The Zela* (9), where, after examining the cases, he came to the conclusion that it is impossible to maintain the proposition that the word "damage" was, according to the well-understood meaning of the phrase in the Admiralty Court, confined to damage due to collision between two ships.

Under s. 7 of the Admiralty Court Act, 1861, the court has jurisdiction over any claim for damage done by any ship, and, therefore, has jurisdiction over this claim by the Board. Even if it be said that the damage in question was not done on the high seas, some of the cases I have already referred to above are in point. In my opinion, it follows from the decision in *The Bold Buccleugh* (10) that there is a maritime lien for this kind of damage if it had occurred on the high seas, and it seems to follow that it was intended the law should be the same as to damage done by a ship elsewhere, and therefore whether the damage in question was

A done in the body of a county or not is immaterial, and I need not enter upon that question. This is the manner in which s. 6 of the Act of 1840 has been regarded, so far as damage received by a ship in the body of a county is concerned: see *The Bold Buccleugh* (10), where the collision occurred in the river Humber; the judgment of LORD BRAMWELL in *The Henrich Björn* (11); and the judgment of LORD HALSBURY in *The Sara* (17). It is not, in my opinion, inconsistent with these views that, while there is a lien on the ship for the damage done by her, there may be no lien in favour of an injured ship in cases like *The Zeta* (9), where the reasons which have led to the recognition of a lien on a ship are not applicable.

B The next and, in my opinion, the real question in the case is whether the claim of the Board has precedence over the prior lien of the salvors. That salvors have a lien was not disputed. In the cases for a very long time past where a lien for salvage is spoken of it is always treated as if there was no question but that there is a maritime lien for salvage. It is probably natural that the idea of this lien should have developed more readily than that of a lien for damage. There is no reported case, so far as I am aware, in which the question has been raised and considered whether a lien for damage takes precedence of a prior lien for salvage or not. There is, however, the passage from LORD WATSON's judgment in *Currie v. McKnight* (15) which I have quoted above. It is possible that LORD WATSON had not fully considered this point, but his judgments are always so full of learning and care that I do not think he would have expressed himself in these terms if he had felt any doubt about the matter. All the text-writers to whose works I have been referred give the precedence to the claim for damage: (see WILLIAMS and BRUCE'S ADMIRALTY PRACTICE (2nd Edn.), p. 80; MAUDE and POLLOCK'S MERCHANT SHIPPING (4th Edn.), by POLLOCK, B., and BRUCE, J., p. 619; MACLACHLAN ON MERCHANT SHIPPING (4th Edn.), pp. 740-741; COOTE'S ADMIRALTY PRACTICE (2nd Edn.), p. 138; ABBOTT ON SHIPPING (13th Edn.), by BUCKNILL, J., and MR. LANGLEY, p. 871, and ADMIRALTY JURISDICTION AND PRACTICE IN COUNTY COURTS, by DR. RAIKES and MR. KILBURN, p. 123). I have referred to several American text-books, but cannot find any discussion of the point I have mentioned in them. In some of the works I have mentioned the following cases are cited: *The Aline* (18), *The Benarcs* (19), *The Cargo ex Galam* (20), *Attorney-General v. Norstedt* (21), but none of these cases appears to me to be in point on the proposition in question for which they are cited.

E There is therefore this consensus of English text-writers, and no case to be found in which damage has ever been postponed to prior salvage. It would seem clear that maritime liens may be divided into two classes: first, liens arising ex delicto; and, secondly, liens arising ex contractu, or quasi ex contractu. It is almost obvious that liens of the latter class must, in general, rank against the fund in the inverse order of their attachment on the res. They are liens in respect of claims for services rendered, and it is reasonable that services which operate for the protection of prior interests should be privileged above those interests. Thus in the present case (subject to a point which will be dealt with hereafter) the second set of salvors are preferred to the first because the first share in the later benefit conferred on the common subject of the liens. It is also clear that liens arising ex delicto take precedence over prior liens arising ex contractu. The reasons for this are pointed out by Dr. LUSHINGTON in *The Aline* (18) (1 Wm. Rob. at p. 118). The principal one appears to be that the person having a right of lien ex contractu becomes, so to speak, a part owner in interests with the owners of the vessel. He has chosen to enter into relationship with the vessel for his own interests; whereas a person suffering damage by the negligent navigation of a ship has no option. Reparation for wrongs done should come first, otherwise the injured party might be unable to satisfy his claim out of the res without paying off prior claims which arise in such circumstances that the claimant may be considered to have chosen to run the risks of subsequent events affecting their claims. It has even been held that the maritime lien for damage

takes precedence of the lien of seamen for wages earned by them since a collision: *The Elin* (22).

It was argued before me that salvage claims were not on the footing of claims arising ex contractu, and that, on grounds of public policy, they should have precedence over subsequent damage claims. The right to salvage may, but does not necessarily, arise out of contract. As Sir James Hannen, P., said in *The Free Steel Barges* (23) (15 P.D. at p. 146):

"It is a legal liability arising out of the fact that property has been saved, that the owner of the property who has had the benefit of it should make remuneration to those who have conferred the benefit upon him, notwithstanding that he has not entered into any contract on the subject."

To this may be added that salvage is not governed merely by a regard to benefit received, but also, on grounds of public policy, by a due regard to the interests of commerce and humanity. At the same time the right to proceed against the *res* is to obtain payment of the reward given for services rendered, and the salvors have had the option of rendering their services, and in deciding to render them are in a position to consider the risks they may run in recovering their reward, and whether or not it is advisable to render the services. From the time of rendering the services they are practically in the same relative position as a creditor who has obtained a lien strictly ex contractu, and while taking precedence over prior claims ex contractu and prior salvage, in my opinion, the considerations I have referred to show that their claims should be postponed to subsequent damage claims; and, in my judgment, it is in the best interests of careful navigation that this should be so.

I can see no satisfactory ground on which the claims of an injured party should be postponed to the claim of one who seeks to obtain a benefit for prior services rendered to what is in the court commonly spoken of as the "wrong-doing" vessel. Such principle as can be applied and general considerations are, in my judgment, the other way, and even if the damage in this case did not give rise to a maritime lien, but only to a right to proceed in rem, it seems to me that the latter right should be enforceable in priority to the salvage claims. For all practical purposes in a case where the damage comes last the position of the injured party, so far as regards claims arising prior to the damage, is much the same, whether he has a lien or only a right of process. I may sum up these remarks thus: There is a right to arrest a ship to obtain reparation for damage done by her which is not affected by prior claims against her arising from hypothecation which creates interests in her along with those of her owners. This right was no doubt enforced by the High Court of Admiralty before the doctrine was entertained in the case of *The Bold Buccleugh* (10) that there was a maritime lien for damage, and, as regards such prior claims, the right would not seem to depend on the existence of a maritime lien for damage. A salvage claim may be regarded as if there had been a hypothecation to secure the reward of the salvors for services rendered, and that reward ought not to be recovered against the *res* to the detriment of a claimant in respect of subsequent damage. The matter is of importance when it is not possible or convenient to proceed against the owners personally, and it would be unreasonable and inequitable to satisfy out of the *res* a claim for a reward for prior salvage services which the salvors elected to render, in preference to a claim in respect of damage done.

The last point to deal with is that relating to the claims of the salvors *inter se*. Unless there is something to prevent the principles aforesaid from applying, the claim of the tugs is to be preferred to that of the *Caledonian*. But counsel for the latter vessel contended that in consequence of the decision in *The Derwent* (24) the claim of the *Prairie Cock* could not have precedence over that of the *Caledonian*, and that, as the *Sea Cock* belongs to the same owners as the *Prairie Cock*, the

A claim of the *Sea Cock*, so far as her owners are concerned, also could not have such precedence. To succeed in this contention it was practically admitted that it must be shown that the owners of the *Prairie Cock* and *Sea Cock* and the master and crew of the former could not recover salvage against the *Veritas*. But the tugs have recovered judgment for their services in their suit, the question of priorities only being reserved, and the owners, master, and crew of the *Caledonian* did not raise any objection in that suit to the plaintiffs therein recovering judgment. They did not intervene until after judgment, although they had previously entered a caveat against payment out of the proceeds. The judgment appears to conclude them now. The ground upon which it was sought to make out the point for the *Caledonian* was by applying the decision of the court in the case of the collision between the *Devonian* and the *Veritas* that the *Veritas* was to blame by reason of the wrong exhibition of lights on her tug the *Prairie Cock*.

I do not consider it necessary to examine the decision at any length. It is sufficient to notice that there was no finding that the absence of the second mast-head light in fact contributed to the collision, and, unless it did, the fact that the *Veritas* was held to blame under s. 419 (4) of the Merchant Shipping Act, 1894 [repealed] does not appear in the circumstances to make the tug guilty of negligence which caused the collision so as to deprive the tug of the right to salvage for subsequent services when the vessel was being moved with the object of beaching her. As the control rested with the pilot of the *Veritas*, whatever were the strict statutory obligations, it would have been rather hard in the circumstances to hold the tug responsible to the tow for negligence as between the tug and tow. I need not, however, go into this question any further owing to the finding of the court being as above stated, and the fact that the judgment was recovered by the tugs without any objection by the *Caledonian*.

The result is that, in my judgment, the claim of the Mersey Docks and Harbour Board comes first; then the claim of the tugs; and, lastly, that of the *Caledonian*; and payment out must be made accordingly.

Solicitors: J. H. Thompson & McMaster, Liverpool; Hill, Dickinson & Co., Liverpool; Rowcliffes, Rawle & Co., for W. C. Thorn, Liverpool.

[Reported by C. HEAD, Esq., Barrister-at-Law.]

THE DUC D'AUMALE

[PRIVILEGE, DIVORCE AND ADMIRALTY DIVISION (Guthrie Barnes, J., sitting with Tenney Masters), October 28, 29, November 2, 1903]

[Reported [1904] P. 60; 73 L.J.P. 8; 80 L.T. 486; 52 W.R. 319; 20 T.L.R. 14;
9 Asp.M.L.C. 502]

Shipping—Salvage—Towed vessel—Damage to tow—Tow and master of tug both negligent—Right to salvage by owners of tug and members of crew not guilty of negligence.

Where there has been an occurrence which requires services of a salvage nature and that occurrence has originated in the negligence of both tug and tow, the tug cannot claim any salvage for services afterwards rendered in extricating the tow from the difficulty in which she has been placed by the joint negligence. Where a tug has caused damage to a tow through the negligence of the master of the tug alone, those members of the crew who were not negligent cannot recover for salvage services since they have done nothing more than carry out their ordinary duties.

Notes. Considered: *The Kafiristan*, [1937] 3 All E.R. 747. Referred to: *The Maréchal Suchet*, [1911] P. 1; *The Clan Sutherland*, [1918] P. 332; *The Kewora*, [1921] P. 90.

As to salvage in general, see 35 HALSBURY'S LAWS (3rd Edn.) 731 et seq.; and for cases see 41 DIGEST 823 et seq.

Cases referred to:

- (1) *The Minnehaha* (1861), Lush. 335; 167 E.R. 149; sub nom. *Ward v. M'Corkill*. *The Minnehaha*, 15 Moo. P.C.C. 133; 4 L.T. 810; 7 Jur.N.S. 1257; 9 W.R. 925; 1 Mar.L.C. 111; sub nom. *The Storm King and the United Kingdom (Owners) v. The Minnehaha (Owners)*, 30 L.J.P.M. & A. 211, P.C.: 41 Digest 836, 6974.
- (2) *The Altair*, [1897] P. 105; 66 L.J.P. 42; 76 L.T. 263; 45 W.R. 622; 13 T.L.R. 286; 8 Asp.M.L.C. 224; 41 Digest 860, 7277.
- (3) *The Robert Dixon* (1879), 5 P.D. 54; 42 L.T. 344; 28 W.R. 716; 4 Asp.M.L.C. 246, C.A.; 41 Digest 836, 6971.
- (4) *The Sappho* (1871), L.R. 3 P.C. 690; 8 Moo. P.C.C.N.S. 66; 40 L.J. Adm. 47; 24 L.T. 795; 1 Asp.M.L.C. 65; 17 E.R. 238, P.C.; 41 Digest 844, 7063.
- (5) *The Glengaber* (1872), L.R. 3 A. & E. 534; 41 L.J. Adm. 84; 27 L.T. 386; 21 W.R. 160; 1 Asp.M.L.C. 401; 41 Digest 843, 7059.
- (6) *The Glenfruin* (1885), 10 P.D. 103; 54 L.J.P. 49; 52 L.T. 769; 33 W.R. 826; 5 Asp.M.L.C. 413; 41 Digest 843, 7056.
- (7) *The Capella (Cargo Ex)* (1867), L.R. 1 A. & E. 356; 16 L.T. 800; 2 Mar. L.C. 552; 41 Digest 850, 7133.
- (8) *Mills v. Armstrong, The Bernina* (1888), 13 App. Cas. 1; 57 L.J.P. 65; 58 L.T. 423; 52 J.P. 212; 36 W.R. 870; 4 T.L.R. 360; 6 Asp.M.L.C. 257, H.L.; 41 Digest 787, 6480.
- (9) *Milburn & Co. v. Jamaica Fruit Importing and Trading Co. of London*, [1901] 2 Q.B. 540; 69 L.J.Q.B. 860; 83 L.T. 321; 16 T.L.R. 515; 9 Asp.M.L.C. 122; 5 Com. Cas. 346, C.A.; 41 Digest 404, 2508.

Also referred to in argument:

The Romance, [1901] P. 15; 70 L.J.P. 1; 83 L.T. 488; 9 Asp.M.L.C. 149; 41 Digest 715, 5528.

The Five Steel Barges (1890), 15 P.D. 142; 63 L.T. 499; 6 Asp.M.L.C. 780; sub nom. *The Steel Barges*, 59 L.J.P. 77; 39 W.R. 127; 41 Digest 824, 6871.

The Maria Jane (1850), 8 L.T. 582; 14 Jur. 857; 41 Digest 844, 7061.

Action for salvage by the owners, master, and crew of the steam-tug *Challenge* against the owners of the French barque *Duc d'Aumale*.

A collision occurred on June 22, 1902, in the English Channel, between the steam-ship *Camrose* and the *Duc d'Aumale*, which at the time was on a voyage from London to Cherbourg in tow of the plaintiffs' tug *Challenge*. The *Duc d'Aumale* was considerably damaged in consequence, and, at the request of her master, was towed by the *Challenge* into Calais for repairs. At the trial of the collision action brought by the owners of the *Camrose* against the owners of the *Challenge* and the *Duc d'Aumale*, the learned judge came to the conclusion that the collision was solely caused by the negligent navigation of the *Challenge* and the *Duc d'Aumale*. By the contract of towage entered into by the owners of the *Duc d'Aumale* and the owners of the *Challenge*, it was agreed (*inter alia*) :

"That the owners of the steam-tugs are not to be answerable or accountable for any loss or damage whatsoever, by collision or otherwise, which may happen to or be occasioned by any of the cargoes on board of the same while such vessel is in tow, whether arising from or occasioned by any accident or by any omission, breach of duty, mismanagement, negligence, or default of them or their servants . . . and that the owner or persons interested in the vessel or craft so towing, or of the cargo on board of the same, shall and do undertake, bear, satisfy, and indemnify the tugowners against all liability for the above-mentioned matters; and especially that to all intents and purposes whatsoever the master and crew of the tug or tugs so towing shall be deemed and considered to be the servants of the owners, master, and crew of the vessel or craft towed, the tugowners being in no way liable for any of their acts or for any of the consequences of the causes above excepted. The acceptance, hiring, or employing of a steam-tug is not to prejudice any claim the steam-tug owners may have to salvage remuneration for any extra services that may be rendered to the ship or cargo from or arising out of circumstances not existing or contemplated at the time of such acceptance, hiring, or employment."

The services consisted in towing the *Duc d'Aumale* after the collision to Calais. There was a dense fog at the time, and the *Duc d'Aumale* was making water rapidly, and had 6ft. of water in the hold on her arrival at Calais. The facts, except as to the alleged depth of water in the hold of the *Duc d'Aumale* after the collision, and the danger of her sinking, were admitted by the defendants, but it was contended that the plaintiffs were not entitled to salvage at all as they had themselves been guilty of negligence in causing the collision. It was agreed between the plaintiffs and defendants that the negligence of the tug was that of the master alone.

Aspinall, K.C., and Nelson for the plaintiffs.

Carver, K.C., and Noad for the defendants.

GORELL BARNES, J.—In this case the Elliott Steam-tug Co. and others, the owners, master, and crew of the steam-tug *Challenge*, are seeking to recover salvage for services rendered to the *Duc d'Aumale*, her cargo, and freight. The facts in the statement of claim are admitted, except that "6ft." shall be substituted for "13ft." of water in para. 4, and that the probability of the vessel sinking shall be judged of by the court, subject to the evidence of the defendants' master and his documents. It was admitted also that what was decided in the previous case which I heard—the suit between the *Camrose* and the *Challenge* and the *Duc d'Aumale*—namely, that the collision which took place was caused by the negligence both of the *Challenge* and of the *Duc d'Aumale*, and that the negligence of the *Challenge* was that of her master. That has been admitted in this present case, so that the facts are not in dispute. They give rise to certain questions of law.

The *Challenge* and the *Duc d'Aumale* were somewhat to the west of Dungeness when the collision took place, and after the collision the *Challenge* towed the *Duc*

d'Aumale to Calais. The services for which salvage is claimed consisted in what was done subsequent to the collision and up to the time when the vessel was left at Calais. It is said, first of all, that the plaintiffs, the owners, master, and crew of the *Challenger*, can recover no salvage remuneration at all because the collision and what happened afterwards, as a consequence of it, were due to the negligence which I have referred to on board the *Duc d'Aumale* and on board the tug. I deal for a moment with the general question, because a second question has been discussed—namely, whether anybody out of the crew or the owners of the tug—anybody other than the person who was the actual negligent person—can recover salvage. The first point appears to me to depend upon the decisions and principles which have guided this court in arriving at its judgments on the subject of salvage services.

There is only one matter to refer to further before dealing with this case. Counsel for the plaintiffs, relies on the towage contract which was entered into between the owners of the *Duc d'Aumale* and the Elliott Steam-tug Co., under which the *Duc d'Aumale* was to be towed from London to Cherbourg. There are conditions on the back of it which he says affect the present case. Those conditions are very long. I have read them carefully, and I take the view presented by the defendants in connection with the exceptions referred to—namely, that they really are exceptions which excuse the owners from liability, but do not affect this present question of salvage services.

The question of the general position where what has happened is due to the negligence both of the tug and of the tow has been discussed in one or two cases, amongst others in *The Minchaka* (1), in which that well-known judgment, which is set out in so many subsequent cases, and in the text-books, is to be found. There is one passage in it which is of importance (Lush., at p. 348):

"If the danger from which the ship has been rescued is attributable to the fault of the tug; if the tug, whether by wilful misconduct, or by negligence, or by the want of that reasonable skill or equipments which are implied in the towage contract, has occasioned or materially contributed to the danger, we can have no hesitation in stating our opinion that she can have no claim to salvage."

It has been said that such observations do not apply where both tug and tow are negligent, but in my judgment that cannot be said of such a case as *The Altair* (2). There a tug was held responsible for the direction of the course, and having been found negligent in respect of it and in not taking soundings, her claim for salvage was dismissed. There was in that case a counter-claim by the defendants. It was also dismissed, because their master was held guilty of contributory negligence in allowing the tug to run on instead of ordering her to haul off when approaching a difficult port in foggy weather. There was negligence of both tug and tow, and both claim and counterclaim were dismissed. *The Robert Dixon* (3) has been cited to me, but I do not think there was any point there of negligence on the part of both tug and tow. But one part of the judgment of BRETT, L.J., is very important, where he says (5 P.D. at p. 57):

"The plaintiffs, being under a towage contract, bring this action, in which they assert that the towage service was altered into salvage; and it seems to me that the plaintiffs are in this position, that it lies on them to show that the change occurred without any want of skill on their part, but by mere accident over which they had no control. The burden of proof on both the affirmative and the negative issues is on the plaintiffs, that is, both that there was an inevitable accident beyond their control, and that they showed no want of skill."

It appears to me, apart from the question of individuals, with which I will deal in a moment, that where there is an occurrence—I will not use the word accident—which requires services of a salvage nature, and that occurrence has originated in the negligence of both tug and tow, the tug cannot claim any salvage for services

afterwards rendered in extricating the ship from the difficulty in which she had been placed by that joint negligence:

The next point which has been taken is that at any rate those persons on the tug who were not negligent, and even her owners, because they were not negligent personally, can recover for salvage services. Counsel for the plaintiffs argues for the crew, other than the master, on this point, and for the owners. As far as the owners are concerned, it seems to me that this point depends partly upon this contract which he has referred to and which to my mind does not affect the question of salvage at all; and that they really stand or fall by the negligence of their master, and cannot recover, for the reasons I have already given, for salvage services. I do not think it true in this case to say, as he contended, that the tug was under no obligation whatever afterwards to do anything for the ship. It seems to me not carrying out the principles to be found in *The Minnehaha* (1). I cannot regard the tug, in a case of this kind, as released from all duty towards the tow. It seems to me that after the accident happened she was not relieved from all obligation towards the ship, but that if salvage services were performed in getting the ship out of difficulty, there would be, to use the language of the Privy Council, "services of a different class and bearing a higher rate of payment," and it would be "held to be implied in the contract that the tug" should be "paid at such higher rate." But in this case there would be no payment for reasons I have already given, because there was negligence on the part of the master contributing to the situation from which the ship had to be relieved. So I cannot accept the view that the tug was under no obligation whatever to the tow, as contended for by the plaintiffs. A good deal seems to me to follow from that, because I have no doubt whatever, for the reasons I have given, that the tugowners and the master cannot recover in this case, because of the negligence of the master. But the contention further is that the crew at any rate can recover—those, I mean, who are not responsible for this disaster. So far as I know it is the first time this point has been raised, so as to endeavour to separate the crew from the master or the negligent person in a case of this kind, of tug and tow.

There have been one or two cases which have practically no bearing, to my mind, upon this particular question. There is first of all *The Sappho* (4), where services were performed to ships belonging to the same owner, and the master and crew were held entitled to salvage. There is also *The Glengaber* (5), where by the improper navigation of a steam-tug a vessel at anchor was sent adrift and placed in jeopardy. Another steam-tug, the *Warrior*, rendered assistance to the drifting vessel, and it was held that the owners of the *Warrior* were entitled to an award, although some of them were also owners of the vessel which occasioned the mischief. SIR ROBERT PHILLIMORE, in giving judgment in that case, said (L.R. 3 A. & E., at p. 535):

"With regard to the *Warrior*, it has been contended that that vessel is not entitled to be considered as a salvor, because it appeared in evidence that some of her owners were also owners of the *Black Prince*. This objection, if allowed to prevail, could not affect the claim of the crew, nor could it affect those owners of the *Warrior* who are not owners of the *Black Prince*, and in my opinion it cannot be sustained. I know of no authority for the proposition that a vessel wholly unconnected with the act of mischief is disentitled to salvage reward simply because she belongs to the same owners as the vessel that has done the mischief. I shall therefore hold that the *Warrior* is entitled to salvage reward."

That judgment, in the part which I have read, showed the difference between the claim of the crew and the claim of those owners who were not owners of the *Black Prince*, and he allowed the whole claim—at least he allowed, as I understand, salvage for all. But that case differs from the view expressed by BUTT, J., in *The Glenfruin* (6), where it was held that the master and crew were entitled to salvage. The headnote to that case is as follows (10 P.D. at p. 103):

"A steamship, laden with cargo, became disabled at sea in consequence of the breaking of her crank shaft. Such breakage was caused by a latent defect in the shaft, arising from a flaw in the welding, which it was impossible to discover. Her cargo was shipped under bills of lading which contained among the excepted perils, 'all and every the dangers and accidents of the sea and of navigation of whatsoever nature or kind.' Another vessel belonging to the same owners towed the disabled vessel to a place of safety. In an action of salvage brought by the owners, master, and crew of the salving vessel against the owners of cargo on the salved ship: *Held*, that the master and crew were entitled to salvage, but that the owners were not, for that there was an implied warranty by them that the vessel was seaworthy at the beginning of the voyage."

He awarded salvage to one owner who was not owner of the ship under contract, and he awarded some to the master and officers and crew of the other ship.

I can quite understand that where the vessel which renders salvage services is entirely unconnected with the ship that is saved, persons, like the master and crew or owners, who are in no way owners of the ship that is saved, or under no liability to persons on board that ship, can recover salvage. But I do not think that applies to the case of a tug and her tow. I cannot help thinking one must consider a little more fully upon what principle the court proceeds in awarding salvage. The court is guided—I am speaking generally and without that minute consideration which I should give it if I were writing my judgment—by due regard to the benefit conferred, combined with due regard to the general interests of ships and commerce. I mean the policy of what is to be done comes into consideration as well as the mere benefit received. It seems to me that both as a principle and matter of good policy it would not be desirable to encourage a crew to recover a salvage reward in such cases of tug and tow where their master had been one of the causes of the disaster from which the ship to which salvage services had been rendered was rescued.

There is a case which supports that view—*Cargo ex Capella* (7). In that case DR. LUSHINGTON said (L.R. 1 A. & E., at p. 357):

"In my mind the principle is this, that no man can profit by his own wrong. . . . The rule would bar any claim . . . for services rendered to the other ship which was a co-delinquent in the collision; but the present claim, it is to be observed, is a demand for salvage against the cargo, the owners of which were perfectly innocent."

That, therefore, was a claim by the master and crew of one of the colliding vessels. In *The Glenfruin* (6), to which I have referred, the people on the salving vessel had nothing whatever to do with the accident that happened to the salved vessel. In *The Glengaber* (5), the steam-tug which came up and rendered assistance had nothing to do with the accident which originally brought about the difficulty; and it is a remarkable fact, I think, that no case has been cited to me in which any similar suggestion has been made of the crew in a towage case recovering salvage where the master and owners could not. The point must have arisen. It was capable of being made in the *Cargo ex Capella* (7). It was capable of being made in *The Altair* (2) and in other cases. But it has never been suggested, and it seems to me that it may be that the right view to take is that the tugowners are not released entirely from their contract by what has happened, and when they proceeded to render services afterwards they were extricating themselves and their ship from a difficulty in which both had been placed by joint negligence. In this case what the tug did was, in fine weather, to tow the ship to Calais. The owners and master could not recover, and the crew did nothing more than their ordinary duties on the tug, without any risk, that I can see. They did nothing more than, it seems to me, their ordinary duties towards their owners and master. It may very well be that there might be a case of joint negligence producing a disaster to a tow, where a

A man might be put on board the tug, or required to perform services entirely outside the ordinary duties of tug and tow. When such a case arises it can be dealt with. But this case, I think, can be dealt with on that argument alone with which I have already dealt. It seems to me it would be bad policy to encourage sailors to hope and expect that their master might get the ship he was towing into danger, so that they would have to render services for which they could recover. I think that would be introducing something extremely novel into this court, and what seems to me to be a dangerous kind of policy.

On the whole, although this matter has been very fully discussed, and I have given judgment without reserving it, it seems to me that I am right in holding that no salvage award can be recovered in this case by anybody connected with the tug. One word more. I only wish to refer to *Mills v. Armstrong, The Bernina* (8) and *Milburn & Co. v. Jamaica Fruit Importing and Trading Co. of London* (9). They appear to me to have nothing whatever to do with the present case. My judgment, therefore, must be that the suit of the plaintiffs is dismissed. I think, in the circumstances under which the case has come before the court—they are peculiar—the proper order is that each should pay their own costs.

D Solicitors: *Lowless & Co.; W. A. Crump & Son.*

[Reported by C. HEAD, Esq., Barrister-at-Law.]

Re BARNETT'S TRUSTS

F [CHANCERY DIVISION (Kekewich, J.), March 18, 1902]

[Reported [1902] 1 Ch. 847; 71 L.J.Ch. 408; 86 L.T. 346; 50 W.R. 681;
18 T.L.R. 454]

Conflict of Laws—Intestate succession—Personal property in this country—Bona vacantia—No one entitled by lex domicilii—Claim by government of country of domicil.

Crown—Bona vacantia—Intestate domiciled abroad without next-of-kin—Personal property in this country.

On Mar. 9, 1883, a domiciled Austrian died in Vienna, intestate, without heir or next-of-kin. He was entitled to personal estate in England consisting of a fund in court. The Treasury Solicitor, as administrator of the personal estate, petitioned for payment out of the fund and the Crown claimed it as bona vacantia. The Austrian government claimed the property relying on the maxim *mobilia sequuntur personam*.

Held: the maxim *mobilia sequuntur personam* did not apply as there was no distribution and no persona to follow, and, therefore, the Crown took the property as bona vacantia.

Notes. As to the residuary estate of an intestate belonging to the Crown as bona vacantia, see s. 46 (1) (vi) of the Administration of Estates Act, 1925 (9 HALSBURY'S STATUTES (2nd Edn.) 752).

Considered: *Re Maldonado, State of Spain v. Treasury Solicitor*, [1953] 2 All E.R. 1579. Referred to: *In the Estate of Musurus*, [1936] 2 All E.R. 1666.

As to intestate succession where there is no one entitled by the lex domicilii of the deceased, see 7 HALSBURY'S LAWS (3rd Edn.) 397, 398, and for cases see 11 DIGEST (Repl.) 897, 898.

Case referred to :

- (1) *Dyke v. Wulford* (1848), 5 Moo.P.C.C. 434; 6 State Tr.N.S. 699; 6 Notes of Cases 309; 12 Jur. 839; 13 E.R. 557, P.C.; 24 Digest (Repl.) 958, 9697.

Also referred to in argument :

Re Hargreaves and Deane, L. ex parte A. G., [1899] 1 Q.B. 325, 326; 1 Q.B. 189; 79 L.T. 673; 47 W.R. 285; 15 T.L.R. 135; 43 Sol. Jo. 153; 5 Mans. 289, D.C.; 4 Digest (Repl.) 370, 3375.

Aspinwall v. Queen's Proctor (1839), 2 Curt. 241; 163 E.R. 398; 11 Digest (Repl.) 398, 547.

In the Goods of Beggia (1822), 1 Add. 340; 162 E.R. 119; 11 Digest (Repl.) 398, 545.

Doe d. Birtchcliffe v. Fardell (1826), 5 B. & C. 438; on appeal (1830), 2 C.B. & F. 100; 571; 9 Bli. (N.S.) 32; 6 E.R. 1270; 3 Digest (Repl.) 424, 204.

Re Ewin (1830), 1 Cr. & J. 151; 1 Tyr. 91; 9 L.J.O.S.Ex. 37; 148 E.R. 1371; 21 Digest (Repl.) 111, 560.

Bremer v. Freeman (1857), 10 Moo.P.C.C. 306; 29 L.T.O.S. 251; 5 W.R. 618; 14 E.R. 508, P.C.; 11 Digest (Repl.) 336, 85.

Enchin v. Wylie (1862), 10 H.L. Cas. 1; 31 L.J.Ch. 402; 2 L.T. 263; 8 Jur.N.S. 897; 10 W.R. 467; 11 E.R. 924, H.L.; 11 Digest (Repl.) 394, 508.

Cooper v. Cooper (1888), 13 App. Cas. 88; 59 L.T. 1, H.L.; 11 Digest (Repl.) 491, 1137.

Petition by the Treasury Solicitor, as administrator of the personal estate of Aloysius (otherwise Louis) Heller, deceased, for payment out of court of a sum of consols, representing the residuary personal estate in England of William Barnett, deceased.

William Barnett by his will gave the residue of his personal estate in England, subject to certain annuities which had ceased, to Aloysius Heller who died on Mar. 9, 1883, in Vienna, intestate, without leaving a widow, and without kindred. At the date of his death he was a domiciled Austrian. The trustees of the will of William Barnett paid the money into court. On April 27, 1900, letters of administration were granted to the Treasury Solicitor of the personal estate in England of Aloysius Heller. It appeared from an affidavit of an Austrian lawyer that the disposition of the movable property of Austrian citizens was regulated by the General Civil Code for all the German hereditary provinces of the Austrian Monarchy. By that code the right of inheritance was limited to certain degrees of relationship; the right of succession to an illegitimate child belonged to the mother only; if no relations existed within the prescribed degrees, the whole inheritance fell to the spouse. By art. 760, if the spouse was no longer alive, the succession was confiscated as heirless property, either by the fiscus or by those persons who according to the political ordinances were justified in confiscating heirless estates. In the course of the hearing of the petition the Attorney-General was added as respondent.

The Attorney-General (Sir Robert Finlay, K.C.), the Solicitor-General (Sir Edward Carson, K.C.), and R. J. Parker for the Crown.

Warrington, K.C., and A. Adams for the Finance Minister of Austria.

T. T. Methold for the official solicitor.

Herbert Robertson for the legal personal representative of William Barnett.

KEKEWICH, J. We have had a very interesting discussion, and reference has been made to many authorities, including some decided cases, and I think rather more text writers. None of these are out of place as tending to throw considerable light on the discussion, which I agree has been of an interesting character; but, after all, it seems to me we are brought back to questions of English law, which must be decided in the absence of direct authority according to principle, and that principle which governs English law on this particular subject. Reference has been made to many writers, both English and foreign, on what is termed private inter-

A national law. What these writers have said is apposite, because in dealing with a question of this kind one is thrown back on maxims and principles, and the exposition of them by text writers is important, and is always accepted as a guide, but it is admitted on all hands that they fail to deal in an authoritative manner with the particular question which I am called upon to decide. There is no doubt the dicta go to this, that in a case where a man dies heirless (I naturally use the expression in the affidavit for the respondents) his personal property must go in the manner indicated by the law of the deceased's domicile. There are dicta, and sometimes dicta that are probably clear on that point, but those dicta do not profess to lay down general propositions. In each case that has been cited to me, I think it true to say it is given with a modification, and a possibility of an application of a different rule elsewhere.

C The respondents' argument is that this case is governed by the old maxim which is embodied in our English law and which is to be found repeated in one form and another by all the text writers, *mobilia sequuntur personam*, and the respondents' point is that that maxim is applicable to the case of a man dying heirless and leaving personalty, or, strictly speaking, movable property, outside his domicile. That is the position. *Mobilia sequuntur personam* is translated over and over again by text writers, as well by foreign as English, and reduced to definition and rules, and they are all, more or less, in the same form and to the same extent. I do not know that one can find anything better than the rule from DICEY'S *CONFLICT OF LAWS* (1st Edn.), r. 179, p. 677 [see now (7th Edn.), p. 592 et seq.], which is cited on behalf of the respondents. You cannot read that rule so as to understand it without reading the preceding rule, r. 178, which deals with the payment of debts, with which we are now concerned, it being admitted on all hands that the debts of the intestate would have to be paid according to the law of the country in which the property was found. The debts being out of the way, you have to deal with what MR. DICEY calls the distributable residue, and there he lays down this rule:

F "The distribution of the distributable residue of the movables of the deceased is (in general) governed by the law of the deceased's domicile (*lex domicilii*) at the time of his death."

On the next page he describes what he means by "the law of the deceased's domicile." I need not read the passage, because I think it may be taken we all mean the same thing by that term. That seems to me to exactly illustrate the meaning and extent of the rule. It is the distribution of the distributable residue. When you come to distribute the deceased's property then you must follow the law of the deceased's domicile; whether it is according to some statute, whether it is according to what the English call common law, whether it is among relations, because they claim in that character, or among persons who are entitled under the will—in whatever aspect you look at it, the distribution must follow the law of the domicile; but that is distributing it exactly as is meant, or rather part of what is meant, by *mobilia sequuntur personam*.

H We have to deal with a case here where there is no distribution at all—where there is really no *persona* to follow. Counsel for the Finance Minister of Austria argues that the Crown or any other person, his own client, for instance, coming in and obtaining administration to the deceased's estate is for all intents and purposes the deceased's personal representative. He says that he is so, and that we call him the "legal personal representative" of the deceased. But that is only the language of our law. He does not represent him at all, except that by our law he is put in his place to defend actions brought by creditors, or it may be by persons who are claiming the estate against him. In no other sense does he claim any estate. He does not claim through the *persona*, through the deceased. He claims what in some old authorities is called the *glans caduca*—the acorn which has fallen from the tree, and not the acorn on the tree or connected with the tree. It is the acorn which has fallen on to the ground, from the tree. There is no possibility of getting at this

property through the deceased. It is because there is nobody who can claim through the deceased, no one who can be entitled, that the Crown steps in and takes the property. In other words, the Crown takes it because it is, as described in the cases, *bona vacantia*—it is property which no one claims. It is property at large. There is no succession. The Crown does not claim it by succession at all. It claims it because there is no succession.

All the learning on this subject of the *bona vacantia* is to be found in *Dyke v. Walford* (1) in the Privy Council which was cited in argument, and to which I need not refer. It was there, no doubt, a context of a peculiar character, and the judgment delivered by Lord Kingsdown goes into the duties and the powers of the ordinary, and goes to get rid of any claim on the part of the church, but the principle was that the Crown comes and claims it as *para regalis*, the right to take that which belonged to no one; and if that is really the sound view I amine see here, according to English law, there can be a right in anyone else to say that this maxim applies, and there should be an administration and distribution and attainment of rights according to the domicile of the deceased person, who in effect by dying lost the claim not only for himself, but those left behind, to his domicile. If that is the sound view, it seems to me that concludes the question. I am not dealing here with any case in which another claimant may be desirous to enforce a different rule. I may be—I do not say it will be, but it may be—that hereafter, if a case arises where there is a conflict between the two countries respecting the law on the subject, a more difficult question may have to be decided, and decided on the ground of international comity, but with that I have not to deal at all, because it seems to me perfectly clear on the statement of law in this affidavit which states the case, that as between Austria and England there is no real difference on this subject.

I have not forgotten the previous paragraphs, which have been referred to in argument, but it is really No. 760 which is directly applicable. The words with which it commences, "If the spouse is no longer alive," must be read in connection with the immediate preceding clause, which gives the whole inheritance to the spouse with certain conditions there mentioned. Reading art. 760 alone, those words, "If the spouse is no longer alive," are equivalent to this, that if there be no person to claim as heir, then the succession is confiscated as heirless property. The great difficulty in the case, to my mind, is in dealing with the poverty of language, the poverty, at any rate, of the English language. The word "confiscated" is a word capable of being used in many senses. In the ordinary sense it is where the Crown intervenes, not to take up as belonging to it a thing because it is vacant, but to take up by way of penalty in exercise of sovereign rights different from those which are asserted in a case like this, and which must be the meaning, I think, of "confiscated" here. It does not mean "confiscated" in the sense of taking by way of penalty. It is taken to the Crown, assumed by the Crown, as its own property. What the code says is it is confiscated as heirless property—that is, as property which we call in England *bona vacantia*. That is the same thing—property to which there is no heir because neither country admits the right of the passing traveller, and therefore, the property must fall to the Crown as a matter of right in the exercise of its sovereign power. The rest of it is really of no importance for this purpose. It only says: "Either by the fiscus, or those persons who, according to the political ordinances, are justified in confiscating heirless estates"—that is to say, by the person appointed for the purpose, whether it be the Minister of Finance in one country, or the Solicitor to the Treasury in another, is immaterial—it is as heirless property. That seems to me to be precisely on our lines—that when there is no heir, that some paramount authority steps in and claims it—not as against anyone else, because there is nobody to claim it at all.

But then it is said, "You must remember the law is different as regards succession in Austria from what it is here, that there is a limit to the persons to take, and that makes a difference." I notice that argument because it was urged, but I confess I fail to see the force of it. What matters it, looking at it from an Austrian

A point of view, to them, that according to English law those related by half blood are allowed to come in? What would it matter if the relation of half blood was excluded? It must come back to this: Under what circumstances does the succession stop, or, rather, perhaps that is inaccurate, I should say under what circumstances does no succession arise; under what circumstances is the paramount authority entitled to come in and say, "I take because there is nobody else to take"? That seems to me to be the whole question, and it matters not in the least whether any description of person is allowed to come in or not, or whether there is a limit or no limit to those entitled to claim. It seems to me to be all upon the same lines, and that really when once you have got at the principle which I have endeavoured to express, if not all, by far the large majority of the passages which have been quoted of the dicta, can all be construed by reference to that principle, having regard to the unfortunate poverty of language, which makes you speak of "succession" when there is no succession, simply because there is no other expression which fits in so well with ordinary parlance. An excellent illustration was given of that by the Attorney-General in opening the case, and which is to be found in several of the books (I think in *Dyke v. Wallford* (1) in the Privy Council more than once), which speaks of the Crown as *ultimus hæres*. It is not only not English, it is a Latin expression, but it is perfectly inaccurate—as inaccurate really as an expression could well be, and yet like many other inaccurate expressions, it is thoroughly well understood, and is very convenient. Only when you come to use convenient expressions which are inaccurate technically and deduced from principles, and thereon found a rule, you are almost sure to be led into error. I think the principle is that which I have stated, and that it must govern this case. There must be a declaration of the Crown's rights. The costs of the Crown, the official solicitor, and the trustee must come out of the fund in court; but the costs of the Austrian Government, as an adverse claimant, cannot be allowed.

Order accordingly.

Solicitors: *Treasury Solicitor; Tatham & Lousada; Official Solicitor; Francis Fearon.*

[*Reported by FRANCIS F. ADY, ESQ., Barrister-at-Law.*]

LEIGH AND OTHERS v. TAYLOR AND OTHERS

[HOUSE OF LORDS (The Earl of Halsbury, L.C., Lord Macnaghten, Lord Shand, Lord Brampton, Lord Robertson and Lord Lindley), February 4, 6, 1902]

[Reported [1902] A.C. 157; 71 L.J.Ch. 272; 86 L.T. 239; 50 W.R. 623; 18 T.L.R. 293; 46 Sol. Jo. 264]

Settled Land—Chattels attached to freehold—Ornament—Tapestries affixed to wall as part of scheme of decoration.

Whether a chattel has been affixed to the freehold with the intention that it should become part of it and so pass to the heir, or has been affixed only for the purpose of temporary use or ornament so as to be removable, is a question of fact in each case.

Tapestries belonging to the tenant for life were fastened to the walls of the drawing room in a mansion house by fixing small strips of wood by nails and screws to the wood with which the walls were lined. Canvas was then stretched over the strips of wood and nailed to them and the tapestries were fastened to the canvas by tacks. Mouldings were fixed round the strips of wood by small nails and screws, some of which penetrated the face of the wall. The tapestries were an essential feature of the general scheme of decoration and were removable without serious structural damage.

Held: the tapestries having been fixed for the purpose of ornament in the only way possible for their use and enjoyment, they did not form part of the freehold so as to pass to the remainderman, but were removable by the executor of the tenant for life.

Decision of the Court of Appeal, [1901] 1 Ch. 523, affirmed.

Notes. Considered: *Reynolds v. Ashby & Son, Ltd.*, [1903] 1 K.B. 87. Applied: *Re Hulse, Beattie v. Hulse*, [1905] 1 Ch. 406. Distinguished: *Re Whaley, Whaley v. Rochrich*, [1908] 1 Ch. 615. Considered: *Horwich v. Symond* (1914), 110 L.T. 1016. Applied: *Spyer v. Phillipson*, [1930] All E.R. Rep. 457. Referred to: *Bickmore v. Dimmer*, [1903] 1 Ch. 158; *Reynolds v. Ashby & Son*, [1904-7] All E.R. Rep. 401; *Hulme v. Brigham*, [1943] 1 All E.R. 204; *Gray v. Fidler*, [1943] 2 All E.R. 289.

As to what are fixtures, see 23 HALSBURY'S LAWS (3rd Edn.) 489 et seq., and for cases see 31 DIGEST (Repl.) 199 et seq.

Cases referred to in argument:

D'Eyncourt v. Gregory (1866), L.R. 3 Eq. 382; 36 L.J.Ch. 107; 15 W.R. 186; 31 Digest (Repl.) 201, 3322.

Norton v. Dashwood, 1896 2 Ch. 497; 65 L.J.Ch. 737; 75 L.T. 205; 44 W.R. 680; 12 T.L.R. 512; 40 Sol. Jo. 635; 31 Digest (Repl.) 219, 3554.

Monti v. Barnes, [1901] 1 K.B. 205; 70 L.J.Q.B. 225; 83 L.T. 619; 49 W.R. 147; 17 T.L.R. 88, C.A.; 35 Digest 302, 523.

Holland v. Hodgson (1872), L.R. 7 C.P. 328; 41 L.J.C.P. 146; 26 L.T. 709; 20 W.R. 990, Ex.Ch.; 31 Digest (Repl.) 206, 3376.

Lady Care v. Care (1705), 2 Vern. 508; 23 E.R. 925; 38 Digest (Repl.) 789, 69.

Herlakenden's Case (1589), 4 Co. Rep. 62a; 76 E.R. 1025; 31 Digest (Repl.) 216, 3489.

Squier v. Mayer (1701), Freem. Ch. 249; 22 E.R. 1189; 38 Digest (Repl.) 789, 66.

Beck v. Rebow (1706), 1 P. Wms. 94; 24 E.R. 309; 31 Digest (Repl.) 217, 3511.

Harvey v. Harvey (1740), 2 Stra. 1141; 93 E.R. 1088; 38 Digest (Repl.) 789, 68.

Lawton v. Lawton (1743), 3 Atk. 13; 26 E.R. 811, L.C.; 31 Digest (Repl.) 214, 3469.

- A *Lord Dudley v. Lord Wards* (1751), Amb. 113; 27 E.R. 73, L.C.; 31 Digest (Repl.) 212, 3450.
Fisher v. Dixon (1845), 12 Cl. & Fin. 312; 9 Jur. 883; 8 E.R. 1426, H.L.; 38 Digest (Repl.) 789, 70.
Elwes v. Maw (1802), 3 East, 38; 102 E.R. 510; 31 Digest (Repl.) 213, 3454.
Viscount Hill v. Bullock, [1897] 2 Ch. 482; 66 L.J.Ch. 705; 77 L.T. 240; 46 W.R. 84; 13 T.L.R. 554; 41 Sol. Jo. 696, C.A.; 40 Digest (Repl.) 707, 2027.

Appeal from a decision of the Court of Appeal (RIGBY, VAUGHAN WILLIAMS, and SUMMERS, L.J.J.), reported sub nom. *Re De Falbe, Ward v. Taylor*, [1901] 1 Ch. 523, reversing a decision of BYRNE, J.

- C Madame de Falbe, before her marriage with Christian Frederik de Falbe, the Danish Minister, in December, 1883, had been the wife of Mr. John Gerard Leigh, of Luton Hoo Park, who died in 1875, and by his will, dated July 15, 1872, bequeathed his personal estate to his wife, and gave all his freehold, copyhold, and leasehold estates and hereditaments to his wife for life, and after her death to such person or persons as should at her decease be his heir-at-law. Some time before 1886 Madame de Falbe re-decorated the drawing room at Luton Hoo, and affixed seven tapestries—
D said to be worth about £7,000—which were the subject of appeal to the Court of Appeal and to the House of Lords. There was some difference in the statements of the parties as to the degree of interference with the structure caused by the affixing and the subsequent removal of the tapestries, but it was not contended that any serious damage was done to the walls of the drawing room. The appellants in their case stated that the seven tapestries were an essential part and, in fact, the
E most characteristic feature in the decoration of the drawing room; that they were stretched in frames covered with canvas, and such frames were firmly fixed to the walls by nails and screws, the tapestries being enclosed and fitted into recesses or spaces formed by wooden pilasters and mouldings permanently fixed to the walls of the room and forming the main architectural design of the room. Straight and scroll mouldings were fixed round the tapestries by being nailed to the wooden
F frames, and in some cases through the wooden frames into the plaster and brickwork of the walls. Monsieur de Falbe died in 1896, and Madame de Falbe died on Dec. 16, 1899, and the respondent, Mr. St. John Stewardson Taylor, was her executor. At her death Mr. Henry Gerard Leigh, who died on Jan. 7, 1900, was heir-at-law to Mr. John Gerard Leigh, whose estates were included in the former's marriage settlement, dated Oct. 23, 1886; and the appellants claimed the tapestries under that
G settlement.

Asquith, K.C., Levett, K.C., and Methold for the appellants.

Norton, K.C., and T. L. Wilkinson for the residuary legatees under Madame de Falbe's will.

H. B. Howard for the executor.

- H **THE EARL OF HALSBURY, L.C.**—In this case we have had a long and learned argument by the counsel who have appeared for the appellants. I am not certain that I quite understand the conflict between the two propositions, or that I quite understand on what principle one is supposed to decide these cases apart from the facts of each particular case.

- I One principle, I think, has been established from the earliest period of the law down to the present time—namely, that if something has been made part of the house it must necessarily go to the heir, because the house goes to the heir and it is part of the house. That seems logical enough. Another principle appears to be equally clear—namely, that where it is something which, although it may be attached in one form or another, I will say a word in a moment about the degree of attachment, to the walls of the house, yet, having regard to the nature of the thing itself, and the purpose of its being placed there, is not intended to form part of the realty, but is only a mode of enjoyment of the thing while the person is temporarily there,

and is there for the purpose of his or her enjoyment, then it is removable and goes to the executor. We have heard something about a suggested alteration of the law: but those two principles appear to have been established from the earliest times, and they are principles still in force. But the moment one comes to deal with the facts of each particular case, I quite agree that something has changed very much. I suspect that it is not the law or any principle of law, but it is a change in the mode of life, the degree in which certain things have seemed susceptible of being put up as mere ornament, whereas at an earlier period the ruder constructions rendered it impossible sometimes to sever the thing which was put up from the realty. If that is true, it is manifest that you can lay down no rule which will in itself solve the question; you must apply yourself to the facts of each particular case; and I am content here to apply myself to the facts of this case. Here are tapestries which, it is admitted, are worth a great deal of money. I put the case: Suppose this had been a tenant from year to year, and she put up these things, is it conceivable that a person would for the purpose of a tenancy from year to year put up these things exactly in this way if thereby they made a present of £7,000 to the landlord? Counsel for the appellants would not acquiesce in that; but in logic I am unable to sever the two sets of facts which I suggest. It is all very well to say that there is a difference between the cases of an heir and an executor on the one hand, and a landlord and a tenant on the other; but if you grant the proposition that it must depend upon the purpose of the annexation, and you must attend to the degree of the annexation, I am wholly unable to frame a hypothesis of a state of things in which these two principles will not decide the question, whether you are dealing with a landlord and tenant, or whether you are dealing with a tenant for life and a remainderman, or with people standing in any other relation to these things in the way in which Madame de Falbe did as tenant for life to the remainderman.

We come then, in my view, to the determination of the question upon the principles which I have pointed out, applying them to the particular facts of this case. What are they? Here we have objects of ornamentation of very great value. Undoubtedly their only function in life, if it may be so called, is the decoration of a room. Suppose the person had intended to remove them the next month or the next year or what not, I do not know, notwithstanding the ingenious effort that has been made by counsel for the appellants, in what other way they could have been fastened than that in which they were. We have seen the hard matchboard to which they were fastened in the first instance; then canvas was stretched on it, and the decoration of the wall as it originally stood was perfectly preserved except to the extent to which the nails were driven into the wall; they were necessarily driven into the wall, because otherwise the tapestry could not have been stretched out firm, as it was. I do not know any other mode by which the large one, for example, fourteen feet long, could have been placed there as it was. One has immediately before one's mind's eyes cases of pictures of another sort; and after all, although this tapestry is very valuable, as I understand, and very beautiful, it is only a picture made in a particular form—it is a picture, whether woven or worked or what not, made for the purpose of ornamentation. When one looks at it and sees what it is, I should have thought, if ever there was an extreme case in which it would have been impossible to suppose that the person intended to dedicate it to the house, it was the case of these tapestries, which can be, and in fact have been, removed without anything but the most trifling disturbance of the material of the wall.

Under those circumstances I can entertain no doubt, now that we have had the whole case before us, that there is nothing which points to any intention to dedicate these tapestries to the house. There is nothing in the nature of the attachment which is necessarily permanent. A number of words have been used, such as "only very slightly attached" and "not permanently attached." They really often assume the very question in debate. I do not think that if anybody looked at the piece of boarding on which the canvas was stretched and on which this tapestry

A went—I can hardly imagine anything more slight as a matter of fact in this particular case than that attachment—he could entertain any doubt as to the matter; I do not know how a piece of tapestry of that extent, fourteen feet long, stretched against a wall, could be more slightly attached than this was. It appears to me that the thing is so easily susceptible of being removed (and it has in fact been removed, without any damage or material injury to the structure of the wall), that, so far as it is dependant upon a question of fact in this case, I am of opinion that it never was intended to form part of the structure of this house; and that, after all, is what the meaning of “the benefit of the inheritance” comes to, though expressed in different words. It never was intended to remain a part of the house; the contrary is evident from the very nature of the attachment, the extent and degree of which was as slight as the nature of the thing attached would admit of. Therefore, I come to the conclusion that this thing, put up for ornamentation and for the enjoyment of the person while occupying the house, is not under such circumstances as these part of the house. That is the problem one has to solve in each of these cases. If it is not part of the house, it falls under the rule now laid down for some centuries, that it is a sort of ornamental fixture, and can be removed by whoever has the right to the chattel—whose it was when it was originally put up. For these reasons I am of opinion that this appeal must be dismissed with costs.

D I only wish to say that I do not want to add to the confusion which it is suggested has been caused by differences of opinion among the learned judges below. My own view is that, going back for some centuries, the real differences of opinion, which apparently on the surface have been entertained by different judges, have not been at bottom differences in the law at all, but the facts have been regarded in different aspects according to the fashion of the times, the mode of ornamentation, and the mode in which houses were built, and the degree of attachment which from time to time became necessary or not according to the nature of the structure which was being dealt with. The principle appears to me to be the same to-day as it was in the early times; and the broad principle is that, unless it has become part of the house in any intelligible sense, it is not a thing which passes to the heir. E I am of opinion that this tapestry has not become part of the house, and was never intended in any way to become part of the house; and I am, therefore, of opinion that this appeal ought to be dismissed with costs, and I move your Lordships accordingly.

G LORD MACNAGHTEN.—I am of the same opinion. It seems to me that the only question is, Have these tapestries become part of the freehold? I think that these tapestries were purely matter of ornament, and not part of the freehold at all. Counsel for the appellants has spoken of the courts changing the law. I do not think that the law has been changed in the very least. It is said that in some cases it has been relaxed. I do not think that it has been altered. What have altered are the habits and customs of the community. The increase of luxury has made many things matters of ornament which were not so used in former times. I think the only question is, Was this part of the freehold? and I do not think that anybody can say that it was so. I think that the judgment in the Court of Appeal covers the whole ground.

H I LORD SHAND.—I am also of opinion that the decision of the Court of Appeal ought to be affirmed. It may be true, as has been observed by the Lord Chancellor and by Lord MACNAGHTEN, that there has been no change of the law; but I rather think that in the progress of time the law has been developed in the direction of holding what would at one time have been held to be parts of a building to be now temporary fixtures only, removable by the person who attached them to the building or his personal representative, and I think that this later view should be maintained. It appears to me to be a sound principle, and to be the result of the later cases (whatever may have been the older law), that where a tenant for a term or a tenant

for life has purchased tapestries or pictures and affixed them to the wall for the purposes of ornamentation, he is entitled to remove them, and his executor has the same right. That principle, as it seems to me, is decisive in this case. There has been an attempt to show that there was here such a degree or character of annexation as to make these tapestries permanent additions to the house. I doubt whether there could have been such annexation by a tenant only as could have had this effect where the purpose of the annexation is ornamental. However firmly a tenant may put up such ornaments as pictures or tapestries upon the walls, I confess that I think him entitled to remove them, if during his tenancy he desires to do so, in order, it may be, to substitute others in their place, or to take them away altogether; and the same would be true at the end of his tenancy, at least where they are not built in so as to be really parts of the permanent building. His position is that of a temporary occupant, having put up things for temporary purposes. He will be bound to take care that no damage occurs to the walls which he does not put right; but that is a different matter from an obligation to leave chattels which have not been built in as additions to the house, and remain so when his tenancy ends. Here, in fact, I think that there was no permanent attachment, and I need not repeat what has been said by the Lord Chancellor as to the character of the attachments. I entirely agree with the judgment of the Court of Appeal, and with the grounds upon which the learned judges unanimously proceeded in giving their judgment.

LORD BRAMPTON.—I am of the same opinion. I entirely agree with the exhaustive judgments in the Court of Appeal, and I agree also with all the observations which the Lord Chancellor has made with respect to this case. I confess that I see no difficulty about the case myself, and I cannot see in the least how it can be said that these tapestries could ever have formed a portion of the house. It is not as if they had been pictures painted upon the walls of the house as a fresco that could not have been removed. There I can thoroughly understand that it could not be removed, because you could not remove it without removing part of the wall itself—in which case you would probably destroy the fresco and injure the house. But there is no sense in which these tapestries can be said to have been part of the house, nor do I see how any structural injury to the house could really be caused by their removal.

LORD ROBERTSON.—I also concur. My view is completely represented by the judgment of STIRLING, L.J.

LORD LINDLEY.—I am entirely of the same opinion. I cannot bring myself to believe that Madame de Falbe, when she put up these tapestries, made a present of £7,000 to the remainderman. The tapestry remained a chattel from first to last.

Appeal dismissed.

Solicitors: Rowcliffes, Rawle & Co.; Hadden-Woodward & McLrod; Payne, Shaw-Mackenzie & Lake.

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

SERJEANT v. NASH, FIELD & CO. AND ANOTHER

COURT OF APPEAL (Sir Richard Henn Collins, M.R., Stirling and Mathew, L.JJ.),
May 20, 21, 22, 1903]

Reversed [1903] 2 K.B. 304; 72 L.J.K.B. 630; 89 L.T. 112; 19 T.L.R. 510

Landlord and Tenant—Covenant—Covenant not to assign without consent—Breach—Mortgage by sub-demise of demised property.

A mortgage by sub-demise of the demised property without the consent of the lessor is a breach by the lessee of a covenant that he will not assign, underlet, or part with the possession of the demised premises without the consent in writing of the lessor first had and obtained, even though the lessee does not part with, but remains in possession of, the premises.

Landlord and Tenant—Lease—Forfeiture—Breach of covenant—Election by lessor to treat breach as ground for forfeiture—Issue and service of writ in action for possession.

The issuing and serving of the writ in an action by a lessor to recover possession of the demised premises on the ground of a breach of covenant by the lessee is, without more, a conclusive election by the lessor to treat the act of the lessee which is alleged to be a breach of covenant as a ground of forfeiture.

Landlord and Tenant—Lease—Forfeiture—Breach of covenant—Relief—Demised property vested in under-lessee—Creation of new estate or interest.

Where, under s. 4 of the Conveyancing and Law of Property Act, 1892, [see now the Law of Property Act, 1925, s. 146 (4): 20 HALSBURY'S STATUTES (2nd Edn.) 427] the court relieves an under-lessee on a forfeiture of the superior lease and makes an order vesting in the under-lessee the property comprised in the lease on such conditions as the court thinks fit, the estate so vested in the under-lessee is a new estate or interest which may be subject to different conditions from those to which the old interest was subject.

Notes. Referred to: *Works Comrs. v. Hull*, [1922] 1 K.B. 205; *Cohen v. Dymally Tinned Co.* (1935), 79 Sol. Jo. 343; *Chelsea Investment Co. v. Marche*, 1955 1 All E.R. 195; *Leaver Finance, Ltd. v. Trustee of Property of Needleman*, 1956 2 All E.R. 378; *Driscoll v. Church Comrs. for England*, [1956] 3 All E.R. 802.

As to covenants against assignment or underletting and forfeiture of a lease for breach of covenant, see 23 HALSBURY'S LAWS (3rd Edn.) 629, 665, and for cases see 31 DIGEST (Repl.) 122, 412, 419 et seq.

Cases referred to:

- (1) *Grimwood v. Moss* (1872), L.R. 7 C.P. 360; 41 L.J.C.P. 239; 27 L.T. 268; 36 J.P. 663; 20 W.R. 972; 31 Digest (Repl.) 528, 6513.
- (2) *Jones v. Carter* (1846), 15 M. & W. 718; 153 E.R. 1040; 31 Digest (Repl.) 530, 6527.
- (3) *Dr. Grenville v. College of Physicians* (1700), 12 Mod. 386.
- (4) *Lygon v. Reed* (1844), 13 M. & W. 285; 13 L.J.Ex. 377; 3 L.T.O.S. 302; 8 Jur. 762; 153 E.R. 118; 31 Digest (Repl.) 570, 6911.
- (5) *Tolman v. Portbury* (1871), L.R. 6 Q.B. 245; 40 L.J.Q.B. 125; 24 L.T. 24; 19 W.R. 623; affirmed (1872), L.R. 7 Q.B. 344; 41 L.J.Q.B. 98; 26 L.T. 292; 20 W.R. 441, Ex. Ch.; 31 Digest (Repl.) 555, 6742.
- (6) *Re Morrish, Ex parte Hart Dyke* (1882), 22 Ch.D. 410; 52 L.J.Ch. 570; 48 L.T. 303; 31 W.R. 278, C.A.; 31 Digest (Repl.) 529, 6516.
- (7) *Walton v. Waterhouse* (1671), 2 Wm. Saund. 826.

- (8) *Mounbroy v. Collier* (1853) 1 E. & B. 630; 22 L.J.Q.B. 121; 20 L.T.O.S. 277; 17 J.P. 132; 17 Jur. 503; 1 W.R. 179; 118 E.R. 573; 30 Digest (Repl.) 372, 138.
- (9) *Doc d. Higgenbotham v. Barton* (1840), 11 Ad. & El. 307; 3 Per. & Dav. 124; 9 L.J.Q.B. 57; 4 Jur. 432; 113 E.R. 432; 30 Digest (Repl.) 378, 213.
- (10) *Fenner v. Duplock* (1824), 2 Bing. 10; 9 Moore, C.P. 38; 2 L.J.O.S.C.P. 102; 130 E.R. 207; 30 Digest (Repl.) 365, 40.
- (11) *Barber v. Braham and Norwood* (1773), 3 Wils. 368; 2 Wm. Bl. 866; 95 E.R. 1104; 21 Digest (Repl.) 555, 526.
- (12) *Smith v. Keil* (1882), 9 Q.B.D. 340; 47 L.T. 142; 46 J.P. 615; 31 W.R. 76, C.A.; 21 Digest (Repl.) 641, 1292.

Also referred to in argument :

- Pooler Corp. v. White* (1846), 15 M. & W. 571; 16 L.J.Ex. 229; 7 L.T.O.S. 232; 10 J.P. 742; 153 E.R. 976; 31 Digest (Repl.) 277, 4112.
- Roe v. Mutual Loan Association Fund, Ltd.* (1887), 19 Q.B.D. 347; 56 L.J.Q.B. 541; 33 W.R. 723; 3 T.L.R. 655, C.A.; 5 Digest (Repl.) 1075, 8670.
- Franklin v. Carter* (1845), 1 C.B. 750; 3 Dow. & L. 213; 14 L.J.C.P. 241; 5 L.T.O.S. 198; 9 Jur. 874; 135 E.R. 737; 31 Digest (Repl.) 317, 4537.
- Woolston v. Ross*, [1900] 1 Ch. 788; 69 L.J.Ch. 363; 82 L.T. 21; 64 J.P. 264; 48 W.R. 556; 18 Digest (Repl.) 267, 159.
- Owen & Co. v. Cronk*, [1895] 1 Q.B. 265; 64 L.J.Q.B. 288; 11 T.L.R. 76; 2 Mans. 115; 14 R. 229, C.A.; 12 Digest (Repl.) 621, 4798.
- Cohen v. Tannar*, [1900] 2 Q.B. 609; 69 L.J.Q.B. 904; 83 L.T. 64; 48 W.R. 642, C.A.; 31 Digest (Repl.) 135, 2744.
- Gosling v. Gaskell*, [1897] A.C. 575; 66 L.J.Q.B. 848; 77 L.T. 314; 46 W.R. 208; 13 T.L.R. 544, H.L.; 10 Digest (Repl.) 822, 5367.

Application by the defendants for judgment or a new trial in an action to recover damages for wrongful distress tried before DARLING, J., with a jury.

On May 18, 1896, a Mrs. Campbell granted a lease of certain premises for the term of thirty-five years to the plaintiff who covenanted not to

"Assign, underlet, or part with the possession of the said messuage and premises, or any part thereof, without the consent in writing of the lessor first had and obtained, but such consent shall not be unreasonably withheld if the proposed assignee or undertenant shall be a respectable and responsible person."

The lease also contained the following clause :

"Provided always and it is hereby agreed and declared that if and whenever such one of the respective rents hereby reserved as may for the time being be payable shall be in arrear for the space of twenty-one days next after any of the said days whereon the same ought to be paid as aforesaid, whether the same shall or shall not have been legally demanded, or if and whenever there shall be any breach of any of the covenants hereinbefore contained and on the part of the tenant to be observed and performed, then and in any of the said cases it shall be lawful for the lessor at any time thereafter into and upon the said demised premises or any part thereof in the name of the whole to re-enter and the same to have again, re-possess, and enjoy as in her first and former estate."

On Oct. 11, 1897, with the consent in writing of Mrs. Campbell, the plaintiff assigned the lease to one Richard Baker. On the same day, Baker let the premises to the plaintiff on a yearly tenancy, and also mortgaged the premises by way of sub-demise to a Mrs. Lewis, without having first obtained the consent of the lessor so to do. In December, 1900, a receiving order was made against Baker, and he was adjudicated bankrupt in February, 1901. Mrs. Lewis died, and her executors, as mortgagees of the premises, appointed Harrison as receiver

A Under the Conveyancing Act, 1881. On April 26, 1901, notice of the appointment of a receiver of rent was served upon the plaintiff, and he was required to pay his rent to the receiver. On July 15, 1901, the plaintiff paid to the receiver the rent due on the preceding Midsummer day. On Sept. 18, 1901, Mrs. Campbell, having received notice of the appointment of a receiver, commenced an action to recover possession of the premises, the defendants being the present plaintiff, Baker, and Baker's trustee in bankruptcy. The grounds upon which Mrs. Campbell claimed the lease to be at an end were not specified in the writ. The present plaintiff entered an appearance in that action, but judgment by default was signed against Baker and against his trustee in bankruptcy. On Oct. 11, 1901, Baker's trustee in bankruptcy disclaimed the lease. On Oct. 15, 1901, the plaintiff paid to the receiver his Midsummer rent after some correspondence in which he said that he particularly wished to continue in possession of the premises for a short time longer. The statement of claim in the action was afterwards delivered in which Mrs. Campbell made a claim for mesne profits, and specified, as the ground of forfeiture on which she claimed to be entitled to re-enter, a breach, in consequence of the mortgage granted by Baker, of the covenant not to assign or underlet without the lessor's consent in writing. In December, 1901, the receiver asked the present plaintiff for the quarter's rent due at Christmas. The plaintiff refused to pay on the ground that the mortgagees were not entitled to it, and some correspondence ensued between him and the mortgagees' solicitors. On Jan. 11, 1902, the receiver put in a distress for the rent alleged to be due. On Jan. 24, 1902, the plaintiff issued the writ in the present action against the solicitors to the mortgagees and the receiver, claiming damages for wrongful distress. On Mar. 20, 1902, Mrs. Campbell moved for judgment by consent against the present plaintiff and the mortgagees, who had by leave been joined as defendants. At the trial of the present action before DARLING, J., with a jury a verdict for £28 8s. 9d. for the plaintiff was returned, and judgment was entered accordingly. The defendants now applied for judgment or a new trial.

F *Germaine, K.C.*, and *G. A. Scott* for the solicitors to the mortgagees.
Medd for the receiver.
C. A. Russell, K.C., and *H. Owen Edwards* for the plaintiff.

G **SIR RICHARD HENN COLLINS, M.R.**—This is an application by the defendants for judgment or a new trial in an action tried before DARLING, J., with a jury which resulted in a verdict and judgment for the plaintiff. The action was brought to recover damages for wrongful distress, and the defendants contend that the distress was lawful on the grounds that there was a subsisting tenancy of the premises by the plaintiff and the distress was made by the agent of his landlords, and that the fact that the lessor, Mrs. Campbell, had commenced proceedings in ejectment to recover possession of the premises did not determine the plaintiff's tenancy or alter the rights of the parties, because nothing had been done in the action beyond the issue of the writ. The plaintiff contends that his tenancy was determined by the issue of the writ, and DARLING, J., so held.

H I agree in thinking that the tenancy was determined when the lessor by some final act which could not be withdrawn—that is to say, by issuing and serving the writ in the action of ejectment—elected to treat what the lessee, Baker, had done as an act of forfeiture. It cannot be denied that the lessee's mortgage by sub-judice without the lessor's consent in writing was a breach of covenant which the lessor was entitled to treat as involving a forfeiture of the lease. The question, therefore, comes to this. Had the lessor by issuing and serving a writ in an action to recover possession of the premises on the ground of forfeiture availed herself of her right to treat the acts of the lessee as entailing a forfeiture of the lease in such a final manner that she could not withdraw from the position she had taken? It seems to me that she had. Unless she had taken actual possession of the

premises, there was nothing more than issuing the writ which she could have done to show her intention of treating the lease as forfeited. The point has long ago been decided in *Grimwood v. Moss* (1), in which the leading judgment was delivered by WILLES, J. In that case the lease of a farm contained a condition of re-entry for breaches of covenants. Breaches of covenants took place before June 24, 1871. The lessors brought ejectment against the tenant on July 21, 1871, but the writ did not claim possession as from any antecedent date. After the commencement of the action, but before trial, the lessors distrained for rent due up to June 24, 1871. It was held that by such distress they had not precluded themselves from relying at the trial on any breach of covenant before June 24, 1871, on the ground that by bringing ejectment they had unequivocally declared their election to determine the lease on any ground of forfeiture which had not been waived before the commencement of the action, and that the subsequent distress, if not justifiable under the Landlord and Tenant Act, 1709, which enables the landlord under certain circumstances to distrain after the determination of the tenancy, was a trespass. WILLES, J., said (L.R. 7 C.P. at pp. 364, 365):

"The law does not insist on any count in which the title is set forth, nor on any particulars of breaches unless the defendant demands them; but if he demands such particulars, he can obtain them after appearance, and in some cases even before. Until, however, he applies for such particulars the cause of action is at large; and the action is to be considered as brought in respect of the landlords' right to re-enter for any previous breach of covenant which can be proved. Such right of re-entry, as in the cases to which the doctrine or remitter applies, is referred back to the earliest period at which a good title could be made—viz., to the first breach in respect of which the right to re-enter arose, and which has not been waived. This doctrine is laid down as the law in the case of *Jones v. Carter* (2) by LORD WENSLEYDALE, without any reference to the existence of particulars of demand, in the clearest and most satisfactory manner. I am not prepared to be the first to shake or fritter away the authority of that case. I entirely agree that the true principle upon which that decision was founded was that the bringing of the action of ejectment is equivalent to the ancient entry. It is an act unequivocal in the sense that it asserts the right of possession upon every ground that may turn out to be available to the party claiming to re-enter. In the case of *Dr. Grenville v. College of Physicians* (3) LORD HOLT laid it down that a person doing a lawful act was not bound by the ground he alleged for doing it, but might justify it on any ground that existed in fact. The act of entry is one of those acts in pais mentioned in the judgment in the case of *Lyon v. Reed* (4) (13 M. & W. at p. 309) which bind parties by way of estoppel, as being acts of notoriety not less formal and solemn than the execution of a deed. It is quite clear if the landlord, instead of bringing ejectment, had entered, he could have justified in an action of trespass by reference to any act of forfeiture which he could prove. In my opinion the subsequent distress could make no difference."

The principles there laid down are just as much applicable to modern procedure as to the procedure then in force under the Common Law Procedure Act—the Act which did away with the old procedure of entry and ouster. That being so, I think that the writ in the action to recover possession was a conclusive election by the lessor to treat the act of the lessee in granting a sub-demise without the lessor's consent in writing as a ground of forfeiture. It is true that when an action is brought the rights of the parties are not finally ascertained till judgment is given, so that till then a party to the action acts at his own risk in whatever step he may take. But in the present case there is no question that the right of forfeiture existed. Judgment went by default against Baker and his trustee in bankruptcy, and by consent against the other defendants. There is no doubt that when the writ was issued the right of forfeiture existed. The lease was, therefore,

A being not allowed to by the action to recover possession, and, the plaintiff's tenancy being determined, there was no right of distress against him.

The plaintiff is, therefore, entitled to judgment unless there is any other ground on which the defendants can protect themselves. The defendants say that the plaintiff is paying rent which became due after the issue of the writ has estopped himself from denying that the relationship of landlord and tenant existed between himself and the mortgagee and himself. It seems to me that that contention breaks down upon two grounds. In the first place, I doubt whether, having regard to the condition of affairs when the rent was paid, the payment can raise any estoppel between the parties. It is clear from the correspondence that the plaintiff was disputing the rights of the lessor, and, as he was desirous of remaining in possession, he paid the amount of the rent under a special arrangement with the mortgagee. Secondly, the defendant must show that the estoppel, if there ever was any, continued up to the date of the levying of the distress. It is clear law that a tenant may show that his landlord's title has determined since the granting of the lease. An estoppel implies a representation acted upon by someone else, and here there can be no estoppel against the plaintiff, because he did nothing which could induce the defendants to suppose that they were acting on any relationship of landlord and tenant admitted by him. That ground also, therefore, fails the defendants. Another point was taken on behalf of the solicitors to the mortgagees, who are defendants in this action. It was said that they are not liable to the plaintiff, because they only acted as solicitors and agents. In an ordinary case where solicitors simply perform their duties in advising their clients they may not be liable for what is done, but here one of the members of the firm was also one of the mortgagees, and, further, the correspondence shows that these solicitors were giving direct orders to the receiver to levy the distress. There was abundant evidence justifying the jury in finding against them. I think that the application must be dismissed.

F **STIRLING, L.J.**—I am of the same opinion. The first question in this case is whether the lessor had the right to put an end to the lease. That is a question of the construction of the covenant by the lessee not to assign, underlet, or part with possession of the premises without the lessor's consent in writing being first had and obtained. The question is whether a mortgage by sub-demise is a breach of that covenant. In my opinion, it is a breach. It is a breach both of the letter and of the spirit of the covenant. It was argued that it would be a breach only in a case where the mortgagor parts with the possession of the premises. In my opinion, a mortgage by sub-demise is just as much a breach of the covenant in question as a mortgage by assignment. The object of the covenant is that any assignee or sub-tenant of the premises shall be a respectable and responsible person. If we were to hold that a mortgage by way of sub-demise was not a breach of this covenant, the mortgagee might obtain a judgment by which the whole of the lessee's interest in the lease would be vested in him, and thus the property might pass into the hands of a person who was not a respectable and responsible person within the meaning of the covenant.

I think, therefore, that there was here a breach of covenant which gave the lessor a right to re-enter. The lessor then issued a writ in an action to recover possession of the premises. No grounds were assigned in the writ for the relief which the lessor claimed. The writ was served on the person in occupation of the premises, and the question thereupon arises whether that amounted to a determination of the lease. The weight of authority seems to me in favour of the proposition that the lease was determined. The decision of the Court of Common Pleas in *Greenwood v. Moss* (1), is an express authority to that effect, and the *dicta* made in *Tolman v. Portbury* (5) point in the same direction, although the case is not an express decision of the Exchequer Chamber on that point. Nor is *Greenwood v. Moss* (1) in any way impeached by the decision of the Court of

Appealed in *Re Morrish, Ex parte Hart Dyke* (6). All that was said in that case was that it was unnecessary to decide the point, and the court, therefore, expressed no opinion as to it.

Our attention was very properly called to s. 4 of the Conveyancing and Law of Property Act, 1892 (now the Law of Property Act, 1925, s. 146 (4)), on which it was contended that the commencement of an action such as was brought by the lessor in this case did not put an end to the lease. That section simply provides that where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under a covenant in a lease, a person claiming as underlessee any estate or interest in the property comprised in the lease may apply to the court for an order vesting the property in him. An estate vested under that section would appear to me to be a new estate or interest. In making an order under that section, the court is enabled to make such conditions as to the execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security or otherwise, as it shall think fit. That shows that there is no restoration or re-affirmance of an old estate or interest, but the creation of a new interest which may be subject to different conditions from those to which the old interest was subject. The early part of the section speaks of a "person claiming as underlessee," not a "person who is underlessee." It is true that later on the expression "person entitled as underlessee" is used, but I do not think that the legislature meant to decide at what period a lease subject to forfeiture for breach of covenant is to be taken to be determined, whether on the issue of the writ in the action or on judgment being obtained. It was then said that, judgment in the action being by consent, it must be treated as a voluntary act on the part of the lessees. They saw fit to yield because they had no defence to the action, so that I cannot see that the judgment can be treated as a voluntary act on their part. I come to the conclusion, therefore, that the lease was forfeited and gone when the writ in the action to recover possession was issued and served.

It was next contended that the tenant had recognised the tenancy as still in existence after the action had been commenced, and that he was, therefore, precluded from asserting that the tenancy was at an end, at least until a stage in the action was reached when it could truly be said that the lease was determined. In my judgment, that is not an accurate statement of the law. Although a tenant is stopped from saying that his landlord had no title to the land at the commencement of the tenancy, yet he is entitled to show that subsequent events have determined the landlord's title. The cases which settle that point are collected in the notes to *Wallon v. Waterhouse* (7). In *Mountney v. Collier* (8) the law was so laid down by COLERIDGE, WIGHTMAN, ERLE, and CROMPTON, JJ. In *Doe d. Higginbotham v. Barton* (9), which was a case of a tenant holding under a mortgagor, the law was stated by LORD DENMAN, C.J. Speaking of the rule with regard to landlord and tenant, he said :

"That rule is fully established—viz., that the tenant cannot deny that the person by whom he was let into possession had title at that time; but he may show that such title is determined."

In the present case the plaintiff was not let into possession by the mortgagees, but by the mortgagor, Baker. It is true that he paid to the mortgagees the rent due at Midsummer and Michaelmas, 1901, and the latter payment was made after the issue of the writ in the action to recover possession. It is to be observed, however, that this payment was made before the writ was amended by adding a claim for mesne profits, and before the statement of claim was delivered. The plaintiff did not know, at the time of making the payment, what was the exact ground on which the plaintiff was basing his claim. Under those circumstances the payment of rent was not decisive upon the question whether the tenant had so recognised the tenancy that he was prevented from showing that his landlord's title had come to an end.

A Upon that point there is express authority in *Fenner v. Duple* (10). In that case it was held by the Court of Common Pleas that payment of rent by a lessee to a landlord after the lessor's title has expired, and after the lessee has notice of an adverse claim, does not amount to an acknowledgment of title in the lessor, or to a virtual attornment, unless at the time of payment the lessee knows the precise nature of the adverse claim, or the manner in which the lessor's title has expired.

B Best, C.J., in delivering judgment, said (2 Bing. at pp. 11, 12):

"Although, however, a tenant may show that his landlord's title has expired, yet if he enters on a new tenancy, he shall be bound; but before he can be so bound, it must appear that he was acquainted with all the circumstances of the landlord's title. The landlord, before he enters into any new contract, must say openly: 'My former title is at an end; will you, notwithstanding, go on?' The defendant in the present case knew that his title was at an end. Was it honest in him to persist in his claim, and to call for rent under such circumstances? There is no ground whatever for saying that any attornment took place; payment of rent may, indeed, be evidence of an attornment, but before we can decide whether an attornment has taken place, we must look at the circumstances, and see whether they do not rebut the presumption of an attornment, and the circumstances of the present case repel any such presumption."

It seems to me, looking at the law as laid down in those two cases, payment of rent to a person by whom the tenant has not been let into possession of the property does not create an estoppel, but is simply in the nature of an admission which can be explained; and, unless it can be inferred that a new tenancy has been created, the lessee is not bound by what he has done. On that point, therefore, the appeal fails.

Another point was raised as to whether the solicitors for the mortgagees are liable. It was long ago laid down in *Barker v. Braham and Norwood* (11) that trespass will lie against the plaintiff's attorney who sues out an illegal and void *ex. sa.* against the defendant, and delivers it himself to the officer, who by his order arrests the defendant thereon. And in *Smith v. Keal* (12) the Court of Appeal held that it is not within the scope of the implied authority of the solicitor of a judgment creditor issuing a *fi. fa.* to direct the sheriff to seize particular goods. SIR GEORGE JESSEL, M.R., there said (9 Q.B.D. at p. 351):

"In the first place, it is clear that on principle a man is liable for another's tortious act if he expressly directs him to do it, or if he employs that other person as his agent, and the act complained of is within the scope of the agent's authority. . . . What we have to find out is what is the extent of the authority of a solicitor who is employed by a plaintiff in an action. It is clear that it is no part of his duty to interfere with the sheriff in the performance of his duty. It is the sheriff's duty to levy execution on the goods of the judgment debtor. If, therefore, the solicitor interferes and directs the sheriff to levy on the goods of another person, he is answerable on the same principle as anyone else who directs a trespass."

I It is a question of fact whether the solicitors directed the distress to be levied, and there was evidence on which the jury were justified in coming to the conclusion which they did. I agree that the application must be dismissed.

MATHEW, L.J.—I am of the same opinion. The first question is as to the construction of the covenant not to assign without the lessor's consent. It is said that a mortgage by sub-demise is not a breach of that covenant. It is argued that the covenant ought to be construed, not according to its language, but according to its spirit, and that, as the object of the covenant is to secure a respectable

and responsible person as tenant and the mortgagee would not be put into possession, a mortgage is not a thing contemplated by the covenant. It is true a mortgagee is not put into possession of the mortgaged premises at once, but a mortgage often results in the mortgagee taking possession, and the mortgagee may not be a respectable and responsible person within the meaning of the covenant. I am, therefore, of opinion that a mortgage by sub-demise is a breach of this covenant.

The next point taken was that there was no forfeiture of the lease by the commencement of the action by the landlord to recover possession of the demised premises. The case for the plaintiff was that there was a clear breach of covenant, and upon the issue of the writ in the action to recover possession the lease was forfeited and determined. For the defendants it was urged that the mere issue of the writ did not complete the forfeiture that had been incurred so as to determine the lease, and that there was no determination of the lease until judgment was obtained in the action. For an authority that the issue and service of the writ were enough to determine the lease, I will only refer to *Grimwood v. Moss* (1). It was said that doubt was cast upon that case by BOWEN, L.J., in *Re Morrish, Ex parte Hart Dyke* (6), but I see no ground for that suggestion. All that BOWEN, L.J., said was that it was not desirable to discuss matters which did not arise in the case, there being another ground upon which he gave judgment. There is nothing in his judgment which can be cited as any authority against *Grimwood v. Moss* (1).

Then it was contended that the plaintiff was estopped from denying that he was tenant to the mortgagees. Reliance was based upon the fact that he had paid the receiver the rent due in September, 1901, and it was said that he had thereby admitted that he was at that time tenant to the mortgagees. But under the position of affairs at that time, which were well known to all the parties, the plaintiff never made any admission or representation sufficient to form an estoppel against him. The plaintiff was desirous of remaining in occupation of the premises for a short time after the action had been brought, and by arrangement with the mortgagees, who were interested in defending the action, he put off the evil day for a few months. There is no ground whatever for saying that he made any representation to the mortgagees which would act as an estoppel against him in this action. As to the point that the solicitors to the mortgagees ought not to be made liable in this action, there is abundant evidence that the receiver put in the distress under pressure from them, and we cannot interfere with the finding of the jury. I agree that the application must be dismissed.

Application dismissed.

Solicitors: *T. P. Hugill; Nash, Field & Co.*

[*Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.*]

JAEGER v. MANSIONS CONSOLIDATED LTD.

[CHANCERY DIVISION (Buckley, J.), December 15, 1902]

[Reported 87 L.T. 690; 19 T.L.R. 114; 47 Sol. Jo. 147]

COURT OF APPEAL (Sir Richard Henn Collins, M.R., Stirling and Cozens-Hardy, L.JJ.), January 12, 1903]

[Reported 87 L.T. 694; 19 T.L.R. 145]

Landlord and Tenant—Flats—Letting scheme—Common covenant by tenants—No user of flat for unlawful or immoral purpose—Breach by some tenants—Consent of landlord—Action by aggrieved tenant against landlord—Competence.

By a clause in an agreement for the letting of a flat in a block of flats the tenant agreed that he would not permit the premises to be used for any unlawful or immoral purpose, but would as much as possible contribute to the respectability of the building and keep the demised premises as a private dwelling-house or residential chambers only. The tenancy agreements for all the other flats in the building contained this clause.

Held, by the Court of Appeal: the clause was part of a general scheme for the benefit of the tenants of the flats, and, if it could be established that with the knowledge and consent of the landlord some of the flats were being used for immoral purposes, the landlord would be bound by the scheme equally with the tenants, and an action by an aggrieved tenant would lie against him for damages and other appropriate remedies.

Landlord and Tenant—Covenant—Quiet enjoyment—Breach—Proof—Disturbance in possession or occupation by physical interference—Insufficiency of evidence of nuisance.

Per BUCKLEY, J.: A covenant in a lease by which the landlord agrees that the tenant shall, so long as he pays the rent and observes the stipulations therein contained, quietly hold and enjoy the demised premises without any interruption by the landlord or any person claiming under him relates only to freedom from actual disturbance in the possession of the premises or disturbance of the occupation by physical interference of some kind, e.g., flooding the premises, causing them to be affected by smoke, interference with their lighting, or obstruction in their use, but does not extend to the disturbance of comfortable enjoyment by such things as noise, discreditable sights and sounds, and the like. The landlord cannot be made responsible for acts of the tenants which he has not authorised, but if, with knowledge, he accepts rent from the tenants that may be held to constitute authority to do the acts.

Notes. Followed: *Malay v. Eichholz*, [1916] 2 K.B. 308. Considered: *Newman v. Real Estate Debenture Corp., Ltd. and Flower Decorations, Ltd.*, [1940] 1 All E.R. 131. Referred to: *Reid v. Bickerstaff*, [1908-10] All E.R. Rep. 298; *Kelly v. Battershell*, [1949] 2 All E.R. 830.

As to covenants for quiet enjoyment and a landlord's obligation to observe a letting scheme, see 23 HALSEBURY'S LAWS (3rd Edn.) 601-609, 648, 649, and for cases see 31 DIGEST (Repl.) 97 et seq., 128 et seq.

Cases referred to:

- (1) *Sanderson v. Berwick upon-Tweed Corp.* (1884), 13 Q.B.D. 547; 53 L.J.Q.B. 559; 51 L.T. 495; 49 J.P. 6; 33 W.R. 67, C.A.; 31 Digest (Repl.) 141, 2801.
- (2) *Harrison, Ainslie & Co. v. Lord Muncaster*, [1891] 2 Q.B. 680; 61 L.J.Q.B. 102; 65 L.T. 481; 56 J.P. 69; 40 W.R. 102; 7 T.L.R. 688, C.A.; 31 Digest (Repl.) 137, 2754.
- (3) *Tebb v. Carr*, [1900] 1 Ch. 612; 69 L.J.Ch. 282; 82 L.T. 115; 48 W.R. 318; 44 Sol. Jo. 262; 31 Digest (Repl.) 142, 2809.

- (4) *Jenkins v. Jackson* (1888), 40 Ch.D. 71; 58 L.J.Ch. 124; 60 L.T. 105; 37 W.R. 253; 4 T.L.R. 747; 31 Digest (Repl.) 141, 2804.
- (5) *Robinson v. Kilvert* (1889), 41 Ch.D. 88; 58 L.J.Ch. 392; 61 L.T. 60; 37 W.R. 545, C.A.; 31 Digest (Repl.) 130, 2676.
- (6) *Hudson v. Cripps*, [1896] 1 Ch. 265; 65 L.J.Ch. 328; 73 L.T. 741; 60 J.P. 353; 11 W.R. 200; 12 T.L.R. 102; 40 Sol. 131; 31 Digest (Repl.) 142, 2805.
- (7) *Reynolds v. Corbishaw* (1878), 9 Ch.D. 125; 48 L.J.Ch. 33; 38 L.T. 593; affirmed (1879), 11 Ch.D. 866; 48 L.J.Ch. 830; 41 L.T. 116; 28 W.R. 9, C.A.; 40 Digest (Repl.) 346, 2796.
- (8) *Martin v. Spicer* (1886), 34 Ch.D. 1; 56 L.J.Ch. 393; 55 L.T. 821, C.A.; on appeal sub nom. *Spicer v. Martin* (1888), 14 App. Cas. 12; 58 L.J.Ch. 309; 60 L.T. 516; 53 J.P. 516; 37 W.R. 689, H.L.; 40 Digest (Repl.) 336, 2744.
- (9) *Hall v. Evis* (1887), 37 Ch.D. 74; 57 L.J.Ch. 95; 57 L.T. 831; 36 W.R. 84; 4 T.L.R. 46, C.A.; 31 Digest (Repl.) 449, 5761.
- (10) *Tulk v. Moxhay* (1848), 2 Ph. 774; 1 H. & Tw. 105; 18 L.J.Ch. 83; 13 L.T.O.S. 21; 13 Jur. 89; 41 E.R. 1143, L.C.; 40 Digest (Repl.) 342, 2774.

Also referred to in argument :

- Manchester, Sheffield and Lincolnshire Rail. Co. v. Anderson*, [1898] 2 Ch. 394; 67 L.J.Ch. 568; 42 Sol. Jo. 609; sub nom. *Anderson v. Manchester, Sheffield and Lincolnshire Rail. Co.*, *Manchester, Sheffield and Lincolnshire Rail. Co. v. Anderson*, 78 L.T. 821; 14 T.L.R. 489, C.A.; 31 Digest (Repl.) 143, 2813.
- Dennett v. Atherton* (1872), L.R. 7 Q.B. 316; 41 L.J.Q.B. 165; 20 W.R. 442, Ex.Ch.; 31 Digest (Repl.) 130, 2679.
- Kemp v. Bird* (1877), 5 Ch.D. 974; 46 L.J.Ch. 828; 37 L.T. 53; 42 J.P. 36; 25 W.R. 838, C.A.; 31 Digest (Repl.) 180, 3128.
- Ashby v. Wilson*, [1900] 1 Ch. 66; 69 L.J.Ch. 47; 81 L.T. 480; 48 W.R. 105; 44 Sol. Jo. 43; 31 Digest (Repl.) 180, 3130.
- Shaw v. Stenton* (1858), 2 H. & N. 858; 27 L.J.Ex. 253; 30 L.T.O.S. 352; 6 W.R. 327; 157 E.R. 353; 31 Digest (Repl.) 143, 2815.

Points of Law raised on the pleadings in an action for breach of a covenant for quiet enjoyment and breach of contract.

In May, 1901, Harry Jarvis Cave was the lessee for a long term of years of a building known as Lauderdale Mansions, Lauderdale Road, Maida Vale, which was laid out and exclusively used as residential flats, the building being divided into blocks having outer doors and staircases for the common use of all the tenants of flats in such blocks. On May 23, 1901, the plaintiff, Frederick Jaeger, entered into an agreement with Cave for a tenancy of flat No. 161, in the building for a term of three years from Aug. 11, 1901, at a rent of £75 per annum. The agreement was in the lithographed form in use in the case of all tenancies of flats in the building, and contained a clause whereby the landlord agreed that the tenant should so long as he should pay the rent and observe the stipulations therein contained quietly hold and enjoy the flat without any interruption by the landlord or any person claiming under him. The agreement also contained clauses whereby the tenant agreed that he would not permit the premises to be used for any unlawful or immoral purpose, but, on the contrary, would as much as possible contribute to the respectability of the building, and keep the premises as a private dwelling-house or residential chambers only; that he would not do or suffer to be done any act or thing on the premises or any part thereof to the annoyance or injury of the landlord, or his superior landlord, or other tenants of the building or of adjoining premises; and that if there should be a breach of any of the tenants' agreements the landlord might re-enter upon any part of the premises in the name of the whole without giving notice to quit to the tenant, and thereupon the tenancy created should be determined. The plaintiff alleged that Cave had omitted to enforce the stipulations on the part of certain tenants of flats in the building, and had allowed some of the flats to be used as places of meeting between men and women for improper purposes or otherwise

A In such a way as to cause a nuisance to the plaintiff and to prevent him from quietly, peacefully, and with reasonable comfort possessing and enjoying the flat sold by him under his agreement. In December, 1901, Harry Jarvis Cave assigned the lease of the building to William Francis Cave. By an agreement dated Dec. 27, 1901, William Francis Cave agreed to sell to Edward Bailey, and by an agreement dated Jan. 1, 1902, Edward Bailey agreed to sell to the defendants, who were a
B company incorporated under the Companies Acts.

The plaintiff brought an action against the defendants claiming a declaration that the defendants were bound by the covenant for quiet enjoyment of the flat contained in the agreement for the lease between him and Harry Jarvis Cave of May 23, 1901, and for an injunction to restrain the defendants from permitting any
C of the other flats in the building to be used so as to interfere with the quiet enjoyment by the plaintiff of his flat, and from doing or permitting any act inconsistent with the terms of the agreement of May 23, 1901, and from using or permitting any part of the building to be so used as to cause a nuisance to the plaintiff. He contended that he was entitled to sue on the covenant for quiet enjoyment, and, alternatively, if this were not so, the agreements by a common lessor with a number
D of lessors of the flats constituted a general scheme so that each tenant was entitled to the benefit of the obligation entered into by his fellow tenants with the common lessor as to the user of the flats. The defendants said that the statement of claim disclosed no cause of action on the ground that the facts therein alleged, if true (which were denied), did not constitute any breach of the agreement for quiet enjoyment.

E On Dec. 15, 1902, the points of law came on for argument before **BUCKLEY, J.**, who delivered the following judgment. —This action came into my paper for trial in the ordinary way on Nov. 27 last. It then appeared that the parties were at issue upon the facts. But the defendants' counsel suggested that they had an answer to the whole of the action on certain points of law, and invited me to put the matter in train for those points of law to be decided first, because, of course,
F if they were decided in the defendants' favour it would save all the cost of taking the evidence. I acceded to that application, and allowed the action to stand over, giving the defendants an opportunity of stating what the points of law were upon which their counsel said that they were entitled to succeed in the action against them. That they have done, and the matter comes before me now. What I have to see is whether the defendants are right in asserting— for the purposes of the present
G discussion I am to assume that the plaintiff's allegations are true— that the action cannot be maintained. I propose to deal with the two points separately.

First, as regards the breach of covenant for quiet enjoyment. The acts or disturbances which are alleged are substantially that the use of the flats led to a great nuisance and annoyance by noise, improper conduct, obscene language, disturbances
H on the common staircase of the flats and so on—disturbances to the happy and peaceful occupation of the premises. Further, although this may be but slight, it is alleged that there is some disturbance of the physical occupation of the premises denied to the plaintiff—such as that he has a right to the enjoyment without interference of the lights upon the common staircase up to an hour which, according to the practice of the flats, is eleven o'clock at night. It is alleged that
I persons who were going up the common staircase for an immoral purpose turned the lights out and left the staircase in darkness in order to assist themselves in following their course of conduct, and that he is thus deprived of the physical enjoyment of the lights upon the staircase. Secondly, it is alleged that to some extent the physical use and enjoyment of the staircase is interfered with by its being improperly used by the persons who are resorting to the flats complained of. That is the general nature of the allegations.

In my opinion, a covenant such as this, that the lessee shall quietly hold and enjoy without any interruption, relates only to freedom from disturbance by adverse

claimants. That expression is not, I think, to be confined necessarily to disturbance in the possession in the sense of turning the tenant out of possession. It means disturbance of the occupation by physical interference of some kind or other as distinguished from disturbance of comfortable enjoyment by noise or the like. The disturbance must be of a physical and not of a metaphysical nature. It means in some way or other taking away or affecting or disturbing the physical enjoyment, as, for instance, by pouring water over the land: *Sanderson v. Berwick-upon-Tweed Corpn.* (1); or swamping a man's mines so that he cannot work them: *Harrison, Ainslie & Co. v. Lord Muncaster* (2); or causing smoke to be driven down a man's chimney: *Tebb v. Cane* (3); as distinguished from affecting the enjoyment in a metaphysical sense as by the noise of dancing: *Jenkins v. Jackson* (4). If the demised premises are so saturated with water as in *Sanderson v. Berwick-upon-Tweed Corpn.* (1); or so filled with water as in *Harrison, Ainslie & Co. v. Lord Muncaster* (2); or so filled with smoke as in *Tebb v. Cane* (3); or—and perhaps this is the case which goes farthest—rendered so hot, as in *Robinson v. Kilvert* (5), that their physical enjoyment is substantially affected, that may be a breach of the covenant for quiet enjoyment.

The case which I last mentioned of *Robinson v. Kilvert* (5) was not on a covenant for quiet enjoyment, but LINDLEY, L.J., was dealing with the case of an implied covenant for quiet enjoyment. He said this (41 Ch.D. at p. 88):

"If the effect of what the defendants are doing had been to make the plaintiffs' room unfit for storing paper, I should have been prepared to hold that there was a breach."

The matter is, I think, correctly summed-up in what NORTH, J., said in *Hudson v. Cripps* (6) in these words ([1896] 1 Ch. at p. 268):

"I do not understand the stipulation for quiet enjoyment to be one which means that the plaintiff is to enjoy the premises without the nuisance of a noise in the neighbourhood. A covenant for quiet enjoyment is a covenant for freedom from disturbance by adverse claimants to the property."

That expression, "disturbance by adverse claimants to the property," has been carried to the extent shown by the cases to which I have referred, but, in my opinion, it goes no further.

The result is that, so far as the plaintiff is complaining of noise, the discreditable sights and sounds, and the like, it appears to me that he cannot sue upon the covenant for quiet enjoyment. But I think that there are some matters upon which it is possible that he may be entitled to sue. The demise of the premises is together with the free right of ingress and egress to and from the dwelling-rooms and premises out of, along, and through the passages, stairs, and doors, together with all lights. If at the trial he proves that his lights are turned out so that he cannot use a properly lighted passage at a proper hour, I think that that will be regarded as an interference with the property in respect of which he might claim under the covenant for quiet enjoyment. And as regards the use of the staircase itself, it seems to me that it will turn upon what is proved at the trial as to interference with his proper use whether he can bring that within the covenant for quiet enjoyment or not.

Secondly, it is urged that, assuming that the plaintiff can sue for breach of the covenant for quiet enjoyment, he cannot sue these defendants for it, for the reason that the persons who are doing the acts are not lawfully claiming under the defendants for this purpose. In *Sanderson v. Berwick-upon-Tweed Corpn.* (1) the plaintiff succeeded as to one part, but failed as to another part of the relief which he claimed. He succeeded so far as the tenant was doing something which the landlord had authorised him to do. But he failed so far as he was doing something which his landlord had not authorised him to do. The same thing is to be found in *Harrison, Ainslie & Co. v. Lord Muncaster* (2), where LORD ESHER, commenting upon the

A language of Fry, L.J., in *Sanderson v. Berwick-upon-Tweed Corpn.* (1), where he used the words "lawfully claiming," said this ([1891] 2 Q.B. at p. 685):

"Considering what was being discussed [in *Sanderson v. Berwick-upon-Tweed Corpn.* (1)] I have no doubt that the proper meaning of those words [the words 'or those lawfully claiming under him'] is 'by the acts of the lessor, or of those claiming under him the right to do the acts which caused the interruption.' "

Therefore, I think that the defendants in the present case are well justified in saying that, assuming that there is a breach of the covenant for quiet enjoyment, if the tenants of the flats complained of are doing that adversely to them, they are not liable. It cannot be suggested that the tenants are doing it under any authority given by the written agreement.

C But then it is admitted that the defendants have received rent in March of the present year and onwards in respect of the flats complained of, and in respect of the plaintiff's flat. It may turn out that on the evidence the court may arrive at the conclusion that the defendants, by the acts which they did, authorised the tenants of the flats complained of to go on in the future and do that which they had been doing in the past. An inference may be drawn that the defendants were minded to go on and take the accruing rents because they did not intend to interfere with the practices which were carried on there. That may amount to an authority to do the acts complained of. If so, the action could, to the extent which I have mentioned, be maintained against them.

I pass to the second head of the claim—namely, that founded upon the existence, which is not denied, of a general scheme, all the flats in the building being let under a common form of agreement. This is based, of course, upon the passage in *HALL*, V.C.'s judgment in *Renals v. Cowlshaw* (7), which was emphatically approved of in *Martin v. Spicer* (8) in the Court of Appeal and the House of Lords; and also upon such a decision as that in *Hudson v. Cripps* (6). The defendants, as I have already said, do not seek to show that there is not here a general scheme. But then it is said that the defendants cannot be sued upon the grounds of the decision of the Appeal Court in *Hall v. Ewin* (9). The facts in *Hall v. Ewin* (9) were these. The plaintiff Hall had demised to one Tarlington for a term of eighty years, with a covenant not to carry on any noisome or offensive business. Tarlington mortgaged to one Ruddach for the residue of the term less three days. He created a derivative term. Ruddach assigned to Ewin under the power of sale. Ewin was not, therefore, an assign for the full term; but, on the doctrine of *Tulk v. Moxhay* (10), he was bound by the covenant in the original lease with notice. Ewin then demised for twenty-one years to one McNeff who covenanted with Ewin not to carry on a noisome or offensive business, and McNeff opened an offensive business upon the premises. He kept a wild beast show. An action was brought in which Ewin was joined as a defendant, on the ground that he was liable for McNeff's breach of a covenant not to carry on any noisome or offensive business. It was held that the action could not be maintained as to Ewin, and for this reason. The court was satisfied that Ewin had not authorised McNeff in any way to do that which he, McNeff, was doing, and that he could not be rendered liable to commence an action to enforce against McNeff his covenant with him. The court would not order him to put his hand into his pocket to commence an action against McNeff.

I No doubt that is an authority for the proposition that—but for what I am going to mention—the plaintiff cannot sue these defendants unless they have authorised or done some act to enable the offending tenants to do the acts complained of. But it seems to me that there are two grounds upon which the plaintiff may succeed under this head. In the first place, as I said before, the court at the trial may come to the conclusion that the defendants' acts, by receipt of rent and so on, infer or lead to the inference that they are authorising the offences committed, in which case the action could be maintained on that ground. Then there is another ground upon which, as it seems to me, the plaintiff might succeed. There being here a

general scheme under which the covenant by each tenant cures for the benefit of all, the plaintiff is in a position to say that the acts complained of amounted to a breach of the covenant not to use the flats for immoral purposes, and gave rise to a right in the defendants to re-enter for the breach, granted that he could not call upon the defendants at their own expense to bring an action to assert that right—in other words, to bring an action for eviction. At the same time it is true that each time the defendants accept the rent, as they have done here, they waive the breach which upon a general scheme gives one tenant as against another tenant a right to say that there must be a re-entry under the agreement between him and his landlords. Each acceptance of rent is an act which is an affirmation or waiver of a breach for which under the general scheme a remedy is by a circuitous course provided for the other lessees. It seems to me that it is possible that an injunction might be granted to restrain the defendants from so receiving rent as to affirm and waive a breach which gave rights to the other lessees. This also is possible if the general scheme is such as that the defendants are trustees for each of the tenements of the benefit of the covenant entered into by each with them. One tenant might be entitled to bring an action for leave to use the defendants' name to enforce the clause for re-entry. He cannot make the defendants bring such an action. But it seems to me that it is possible that he might put the machinery in motion upon which he, upon giving a proper indemnity to the defendants, might be entitled to bring such an action.

Upon all these grounds it seems to me that, whether under the covenant for quiet enjoyment or on the ground that there is here a general scheme, the action is one which is capable of being maintained. I, therefore, hold that the action must go for trial.

From that decision the defendants appealed.

Henry Terrell, K.C., and *A. Houston* for the defendants.

Astbury, K.C., and *Howland Jackson* for the plaintiff.

SIR RICHARD HENN COLLINS, M.R.—We are not called upon to decide whether there is or is not a cause of action that can be and must be proved. All that we have to consider is whether it is possible at this stage of the case to say that there can be no reasonable cause of action proved under that statement of claim with such amendments as counsel are authorised to make. It seems to me that, when one reads the claim as we had it read to us and the facts that it sets forth, it is impossible to say that there may not be a perfectly reasonable cause of action capable of proof. It is not necessary, I think, to formulate very distinctly what that cause of action must be. We are dealing with this case at the very outset of it; and it is always very undesirable, when a case is at its present stage and has not been tried, to lay down what must be proved in order to establish the right of the plaintiff. If one once comes to the conclusion that the defendant is wrong in saying that no cause of action can be maintained upon the statement of claim as it stands, then I think that it would be very undesirable for us to go very far into the details of what ought to be proved in the conduct of the case. That would be anticipating a duty which may arise after the case has been tried.

The present case arises in this way. The tenant of a flat in a large building laid out for the purposes of flats complains of what is practically a nuisance arising from the mode in which other adjoining flats are occupied. They are occupied, as he alleges, for immoral purposes, and particulars were given which show that, if the facts there stated are proved, it must be a nuisance and certainly something entirely incompatible with the reasonable occupation by respectable people of adjoining flats. The flat in the occupation of the plaintiff was let—as all the other flats in the building are let—upon a document drawn up in the same form for all the tenants. That document shows on its face that one of the main purposes of the defendants, the landlords, is to secure that the flats shall not be used for immoral purposes, and every kind of precaution in the shape of agreement is taken

A authorising the summary eviction of any person who contravenes that obligation. That shows that the scheme upon which these flats are let is that they shall all be occupied in a respectable manner, and entirely negatives the possibility of anything like a use for immoral purposes of any part of the premises. As it saves in the statement of them setting out shortly the nature of the obligations undertaken.

B The plaintiff entered into negotiations with the said Harry Jarvis Cave for a tenancy of a flat in the said building, and in the course of such negotiations the said Harry Jarvis Cave represented to the plaintiff, as was the fact, that in respect of all tenancies of such flats, agreements in writing were entered into between the said Harry Jarvis Cave, as landlord, and the tenant in similar form, and that each of such agreements contained a clause enabling the landlord forthwith to determine any tenancy if the tenant used the flat occupied by him or her for any unlawful or immoral purpose."

C The plaintiff became the tenant of one of the flats. He now alleges that the provisions and stipulations contained in the tenancy agreement were part of a general scheme for the benefit of the tenants of flats in the building, and that such tenants had entered into agreements in similar form. The allegation is that some of the adjoining flats have, as I have said, been occupied for immoral purposes. That would not in itself be enough to ground proceedings against the landlord, and it has been very properly admitted by the plaintiff's counsel that unless they can adduce evidence from which a jury might fairly infer that the acts of the persons using these flats for immoral purposes can be construed to be the acts of the defendants in the sense that they authorised them—not merely that they did not stop them, but that they were in effect a party to them—they cannot pray against them, as giving a cause of action, the fact that these premises are conducted and used for immoral purposes. Counsel for the defendants says that there can be no evidence to support the cause of action which I have named. That is a matter which must depend upon what is heard at the trial. This is not the time for us to determine whether there may not be evidence. It is perfectly clear that it is a possible cause of action, if these allegations are supported, that this is part of a common scheme, that the central provision of that scheme was that these flats should be used for private residences to be respectably occupied by respectable persons, and that with the knowledge and assent of the landlord some parts of these buildings were used for improper purposes. That is as clear a cause of action as you can get. Whether it is proved at the trial is a totally different matter.

I do not know that it is necessary to go into it. But we have had certain broad facts alleged before us which, if proved, appear to me to be evidence—I do not for a moment suggest that they are conclusive evidence, but which appear to be evidence—that certainly could not be withheld from any jury on the question whether or not the landlord himself was a party to the misconduct carried on on some part of the premises. It is proved that the reversion of the premises has been agreed to be assigned to the defendants. It is true that they have not as yet got the legal estate, but that makes no difference in point of law to their liability on this particular cause of action. They have not got the legal estate, but they had before action made an agreement whereby they became equitably entitled and are at this moment equitably entitled to the reversion in the premises. By that agreement they acquired the right to back rents payable by the very tenants who are charged with carrying on this immoral trade upon their premises; they have received those rents; and they have received and kept them although they had notice, it is alleged, of the fact that complaints had been made by the plaintiff, and the nature of those complaints fully made known to them. I do not know whether more may not be proved at the trial, but it seems to me that on those facts alone a question would have to go to the jury. It seems to me that the learned judge could not on those facts without more withdraw the question from the jury whether or not the defen-

dants, the landlords, were parties to the carrying on of this immoral trade or business on part of the premises constituting the flats in this building. A

Having got that far, it seems to me that it is perfectly clear, on authority as well as on principle, that there is an obligation upon the landlord who is lessor for the purposes of such a scheme as it is here alleged exists. It is perfectly clear that the landlord himself, there being these covenants, the object of which is to secure that these premises shall be properly and respectably occupied, cannot be allowed himself to violate that obligation and assist in conducting them as brothels. That is the only word which will describe what is the mode in which certain of these flats are conducted, if the facts stated in the particulars are true. It is perfectly clear law that if you once get a scheme established which is incompatible with any part of these premises being conducted as brothels, then the person who conducts them—be he the landlord or be he the tenant—is equally bound by the scheme, and can be visited with damages or such proper legal consequences as would follow. B C

In *Hudson v. Cripps* (6), a lady was the owner of a flat in a large building the scheme of which was that it should be let out in residential flats. The lady claimed against the lessor an injunction because in such a scheme as that he contemplated turning a considerable portion of the premises into a club. There was no express covenant by him that he would not turn it into a club, but the inference was drawn that it was part of the scheme that all the premises should be used for residential flats and nothing else. The lady brought an action to restrain the lessor from using the rest of the premises as a club, and NORTH, J. says this ([1896] 1 Ch. at p. 268): D

"But I think the plaintiff is entitled to relief to a limited extent in this case by reason of an obligation arising out of the signed agreement between the parties. The agreement shows on its face that it was made with respect to a certain flat forming part of a large building all used for this particular purpose, subject, however, to an exception which I will mention presently. . . . No one can read those provisions without seeing that there was a scheme for the general management of this building composed of several flats, in such a way as to be suitable to the convenience of all the persons who should be tenants of the respective flats. It would be idle to suppose that those requirements were made except for the purpose of the convenience of all the tenants; and where the landlord enters into such an arrangement with each tenant, it is obviously intended to be, and is as a matter of fact, for the benefit of all the tenants." E F G

Having arrived at that conclusion with respect to the scheme itself, he proceeds to restrain the landlord from acting in a manner incompatible with that scheme by using a part of the premises for purposes other than those comprised in the scheme. That is clear authority that the landlord under such circumstances is liable. However you frame it, he is clearly liable to the same extent as he would be if he had directly covenanted not to do the thing which he is here doing and can be restrained by injunction from continuing to do. H

Therefore, I repeat, it seems to me that that is clear authority that there being here a scheme quite as clear as that which existed in *Hudson v. Cripps* (6), and there being an even more glaring breach, if it be proved against the defendants, there is in point of law an obligation which can be imposed upon them. It is not, it seems to me, necessary to consider whether technically the cause of action can be described as one of breach of the covenant for quiet enjoyment. I am very far from saying that it cannot. But it is not necessary in this case to decide that it can, because I am perfectly clear upon the point that a right such as I have indicated does exist by reason of the fact that there is this common scheme imposing obligations not only on the tenants, but on the landlord also. Therefore, assuming that evidence can be given in support of the allegations made, it seems to me that I

A this is a case which it certainly would be impossible for the court to try at this stage. It may turn out when the case is tried that no evidence to the satisfaction of the jury will be given connecting the landlords with the acts done by the tenants of these flats. If not, of course the plaintiff's action will fail. But if evidence is adduced, it will be for the learned judge who tries the action to say whether it does or does not amount to evidence from which an inference might be drawn that the landlords themselves are an active party in carrying on this nefarious trade in certain parts of the building. If the jury come to that conclusion, it seems to me quite clear in point of law that this is a conclusion which would justify a decision in favour of the plaintiff. It is not necessary to go more into detail in the matter, because it has not yet been tried; but for these reasons it seems to me that the judgment of Buckley, J., was perfectly right, and that this appeal must be dismissed. I think, as it is a somewhat peculiar case, it ought to be dismissed with costs in the ordinary way.

STIRLING, L.J.—I entirely agree, both in the conclusions which the Master of the Rolls has arrived at and the reasons which he has given.

D COZENS-HARDY, L.J.—I agree.

Appeal dismissed.

Solicitors: *H. Percy Becher; Leesmith & Munby.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

E

F

OSBORNE v. BRADLEY

[CHANCERY DIVISION (Farwell, J.), May 1, 2, 5, 1903]

G

[*Reported [1903] 2 Ch. 446; 73 L.J.Ch. 49; 89 L.T. 11*]

Sale of Land—Restrictive covenant—Building scheme—Need to prove all purchasers intended to contract subject to covenants applicable to whole estate—Similar covenants by vendor—Reservation by vendor of right to waive or vary conditions regarding unsold lots—No knowledge by purchasers of covenants by other purchasers—Covenant for benefit of vendor alone.

H

To establish a building scheme it must be shown that all the purchasers of land alleged to be within the scheme intended to contract subject to covenants which were applicable to the whole estate. Where the vendor retains a number of plots it must be inferred that he will himself enter into similar covenants. The mere fact that the vendor reserves the right to waive or vary "any of the conditions with regard to the unsold lots" is not sufficient to prevent a scheme in respect of the plots already sold, but if purchasers are not aware at the date of their common purchase of the existence of any such covenants, that fact is almost conclusive evidence of an intention that the covenants were not entered into for the benefit of the purchasers inter se, but for the vendor himself. To bind people with covenants not called to their attention, and to draw the inference of an intention to enter into indiscriminate covenants is too strong an inference for any court to draw.

I

Notes. Considered: *Hooper v. Bromet, Raphael, Third Party* (1904), 90 L.T. 234. Explained: *Elliston v. Reacher*, [1908-10] All E.R. Rep. 612. Considered: *Sharp v. Harrison*, [1922] 1 Ch. 502. Referred to: *Reid v. Bickerstaff*, [1908-10] All E.R. Rep. 238; *Sobey v. Sainsbury*, [1913] 2 Ch. 513; *Kelly v. Barrett*, [1924] All E.R. Rep. 503; *Re Ballard's Conveyance*, [1937] 2 All E.R. 691; *Zelland (Marquess) and Zelland Estates Co. v. Driver*, [1938] 2 All E.R. 158; *Lawrence v. South County Freeholds, Ltd.*, [1939] 2 All E.R. 503; *Re Pinewood Estate, Farnborough, New Ideal Homesteads, Ltd. v. Levack*, [1957] 2 All E.R. 517.

As to building schemes, see 14 HALSBURY'S LAWS (3rd Edn.) 565-568, and for cases see 40 DIGEST (Repl.) 337 et seq.

Cases referred to:

- (1) *Doherty v. Allman* (1878), 3 App. Cas. 709; 39 L.T. 129; 42 J.P. 788; 26 W.R. 513, H.L.; 31 Digest (Repl.) 391, 5169.
- (2) *Sayers v. Collyer* (1884), 28 Ch.D. 103; 54 L.J.Ch. 1; 51 L.T. 723; 49 J.P. 244; 33 W.R. 91; 1 T.L.R. 45, C.A.; 40 Digest (Repl.) 361, 2893.
- (3) *Craig v. Greer*, [1899] 1 L.R. 258; 31 Digest (Repl.) 392, *1737.
- (4) *Davis v. Marshall* (1861), 4 L.T. 216; 9 W.R. 520; 34 Digest 56, 313.
- (5) *Williams v. Earl of Jersey* (1841), Cr. & Ph. 91; 10 L.J.Ch. 149; 5 Jur. 426; 41 E.R. 424, L.C.; 21 Digest (Repl.) 455, 1564.
- (6) *London and South Western Rail. Co. v. Gomm* (1882), 20 Ch.D. 562; 51 L.J.Ch. 530; 46 L.T. 449; 30 W.R. 620; 40 Digest (Repl.) 331, 2716.
- (7) *Duke of Bedford v. British Museum Trustees* (1822), 2 My. & K. 552; 1 Coop. temp. Cott. 90, n.; 2 L.J.Ch. 129; 39 E.R. 1055, L.C.; 40 Digest (Repl.) 360, 2887.
- (8) *Keates v. Lyon* (1869), 4 Ch. App. 248; 38 L.J.Ch. 357; 20 L.T. 255; 33 J.P. 340; 17 W.R. 338, L.J.J.; 40 Digest (Repl.) 343, 2780.
- (9) *Spicer v. Martin* (1888), 14 App. Cas. 12; 58 L.J.Ch. 309; 60 L.T. 546; 53 J.P. 516; 37 W.R. 689, H.L.; 40 Digest (Repl.) 336, 2744.
- (10) *Renals v. Corlshaw* (1878), 9 Ch.D. 125; 48 L.J.Ch. 33; 38 L.T. 503; 26 W.R. 754; affirmed (1879), 11 Ch.D. 866; 48 L.J.Ch. 830; 41 L.T. 116; 28 W.R. 9, C.A.; 40 Digest (Repl.) 346, 2796.
- (11) *Richards v. Revitt* (1877), 7 Ch.D. 224; 47 L.J.Ch. 472; 37 L.T. 632; 26 W.R. 166; 40 Digest (Repl.) 361, 2890.

Also referred to in argument:

- Tulk v. Moxhay* (1848), 2 Ph. 774; 1 H. & Tw. 105; 18 L.J.Ch. 83; 13 L.T.O.S. 21; 13 Jur. 89; 41 E.R. 1143, L.C.; 40 Digest (Repl.) 342, 2774.
- Rogers v. Hosegood*, post; [1900] 2 Ch. 388; 69 L.J.Ch. 652; 83 L.T. 186; 48 W.R. 659; 16 T.L.R. 489; 44 Sol. Jo. 607, C.A.; 40 Digest (Repl.) 340, 2769.
- Sidney v. Clarkson* (1865), 35 Beav. 118; 14 W.R. 157; 55 E.R. 839; sub nom. *Sydney v. Clarkson*, 13 L.T. 659; 40 Digest (Repl.) 310, 2554.
- Hepworth v. Pickles*, [1900] 1 Ch. 108; 69 L.J.Ch. 55; 81 L.T. 818; 48 W.R. 184; 44 Sol. Jo. 44; 40 Digest (Repl.) 158, 1217.
- Nottingham Patent Brick and Tile Co. v. Butler* (1886), 16 Q.B.D. 778; 55 L.J.Q.B. 280; 51 L.T. 444; 34 W.R. 405; 2 T.L.R. 391, C.A.; 40 Digest (Repl.) 343, 2781.

Action for an injunction to restrain the breach of a restrictive covenant in a conveyance.

The plaintiff was the owner of property at Leigh-on-Sea, Essex, including land and buildings in the Broadway there. The defendant was an ironmonger carrying on business in a shop and premises belonging to the plaintiff in the Broadway aforesaid. By an indenture dated Oct. 31, 1889, made between James Thomas Smith, of the one part, and the plaintiff, of the other part, a piece of freehold land situate at Leigh, containing 3a. 1r. 38p., being a portion of the Great Shore Field, bounded on the north by the High Road leading from Leigh to Southend and on the

A west by land then lately sold by James Thomas Smith to William Beecroft, was
conveyed to the plaintiff. The High Road leading from Leigh to Southend was
known as to that part of it which concerned this action as the Broadway. By the
indenture the plaintiff covenanted with Smith, to the intent that the burden thereof
might run with the hereditaments conveyed and every part thereof, that the
B plaintiff, his heirs or assigns, would within three months from the date thereof
erect and ever after maintain a strong post and rail or other good and sufficient
boundary fence on the eastern side of the hereditaments thereby conveyed, and,
further, that no building except a boundary wall or fence should be erected on the
frontage of the land next the High Road leading from Leigh to Southend, which
measured 254 feet, other than and except private residences, and that no such
house should be of less cost than £300, and that all such houses should front the
C High Road and stand in a line parallel to such High Road, and should not be
used or occupied for any trade or business unless purely professional business.
Smith, being very advanced in years, had not for a long time past enforced these
covenants.

By an indenture dated May 3, 1890, and made between the plaintiff, of the one
D part, and George Bavin, of the other part, the plaintiff conveyed to Bavin all
that parcel of land in the parish of Leigh formerly part of the Great Shore
Field, but then known as the Cliff estate, bounded on the north side by the High
Road leading from Leigh to Southend and on the west by a new road called Victoria
Road, and containing on the north side next to the High Road 52ft. 6in. or
thereabouts, and by that indenture the purchaser covenanted with the vendor to
E the intent that the burden of the covenant might run with the premises and every
part thereof in manner following—viz., every house erected upon the premises
should be occupied as and for a private dwelling-house only, and no manufacture,
trade, or business should be carried on thereon, nor should any operative machinery
be fixed or placed thereon. This land formed part of the 254ft. frontage. George
Bavin built two houses on the land, and by an indenture dated Dec. 23, 1891,
F sold the land and houses to John Arthur Hills subject to the covenants as to
building, etc., contained in the indenture of May 3, 1890. Subsequently, by an
indenture dated April 23, 1897, Hills sold the land and two houses to the defendant
subject to the same conditions.

Besides the 254ft. frontage there were several other conveyances of land fronting
the Broadway from Smith to Osborne and Beecroft, some with restrictions and
G some perhaps without. All the remainder of the Leigh Hall estate was subsequently
conveyed to a land company. Down to the year 1890 there were only three shops
fronting on the Broadway, Leigh, but, owing to the large development of the
Leigh Hall estate belonging to the company and other land in the neighbourhood,
the Broadway became the principal business thoroughfare of the town. The old
part of Leigh was crowded into a very small space at the foot of the hill immediately
H abutting on the sea front. The High Street was narrow and confined between the
London, Tilbury and Southend Railway and the sea shore. To the north of the
railway there were one or two streets of old houses, then the hill began, and on
top of the hill the development had taken place. Large numbers of chais-à-bancs
and other pleasure vehicles passed along the Broadway every day throughout the
summer, while within the last year or two the electric tramways running from
I Southend to Leigh had been introduced, and they by rails on the ground and electric
wires overhead also ran along the Broadway.

In 1894 the plaintiff himself built on a part of the 254ft. frontage four shops, all of
which had since been used for business purposes. One of these shops had been
and still was in the occupation of the defendant in his business as an ironmonger.
Apart from this particular frontage of 254ft. the plaintiff had erected buildings on
other land adjoining and opposite, all fronting on the Broadway, which had been
used as shops. The plaintiff had thus built no less than sixteen shops fronting the
Broadway in the immediate vicinity of the property the subject of this action,

while since the year 1890 more than twenty shops had been erected on land restricted to private houses. Owing to the great change which had taken place in the neighbourhood houses in the Broadway had become, the defendant alleged, unfit for use as private residences. It was difficult to let such houses for private occupation. There were then only eleven private houses in the vicinity, three of these being used as a house agent's offices or in an auctioneer's business, one by a doctor as a surgery, one by a London builder, one by a rate collector, and one by a retired tradesman, while another was empty. While the defendant had been the owner of the two houses in question there had been frequent changes of tenancy. One was occupied for a year and nine months by a house agent, with his business board always up, and the defendant has found it impossible to let the houses for any private purpose. He, therefore, found it necessary to consider the possibility of converting the private houses into shops, and, with a view to this, he submitted plans to the Leigh Urban District Council for their approval.

The plaintiff was a member of the council, and in his official capacity he came to know of these plans being submitted. On Oct. 23, 1902, the plaintiff's solicitors wrote to the defendant, drawing his attention to the covenant in the conveyance from the plaintiff to Bavin and objecting to the defendant going forward with the proposed alteration of the private houses into shops. On Dec. 3, 1902, the defendant saw the plaintiff and told him that, owing to the character of the neighbourhood having changed from a residential to a business one, and also to the fact that the plaintiff had built sixteen shops on land intended for private property, he would be unable to prevent the defendant from making the alteration proposed. The plaintiff claimed to have the right still to enforce the covenant, and the plaintiff expressed his view that for the release of the covenants the value of the land would increase by £10 per foot frontage. Correspondence ensued between the parties and their solicitors, and ultimately on Mar. 2, 1903, the writ in this action was issued claiming an injunction to restrain the defendant from converting the houses into shops in breach of the covenants contained in the indenture of May, 1890.

Davis, K.C., and Renshaw for the plaintiff.

Upjohn, K.C., and MacSwinney for the defendant.

FARWELL, J.—This is an action on a covenant in a deed made between the plaintiff, Mr. Osborne, and one Bavin. Mr. Bradley, the defendant, was a purchaser from Bavin. The conveyance to Bradley was made expressly subject to the covenants contained in the conveyance from Osborne to Bavin. It is a conveyance in fee.

Negative covenants in a conveyance in fee restricting the right of the purchaser to use the land purchased may, I think, for the purposes of a case like the present, be considered as falling under the following classes. First of all there is the case where the vendor simply obtains a covenant from the purchaser for his own benefit; the second is where the vendor obtains covenants from the purchaser for his own benefit in his capacity of owner of a particular property; and the third is where the covenant is entered into for the benefit of the vendor, in so far as he reserves unsold property, and also of other purchasers as part of what is called a building scheme. So far as all these classes are concerned, the rule established on the principles laid down by the House of Lords, as enunciated by LORD CAIRNS in *Doherty v. Allman* (1), apply, namely, that, where there are negative covenants the court has, speaking generally, no discretion to consider the balance of convenience or matters of that nature, but is bound to give effect to the contract between the parties, unless the plaintiff seeking to enforce the covenant has by his own misconduct, delay, laches, or the like, disentitled himself to sue, that is to say, has raised against himself a personal equity. I think it is now well settled since *Sayers v. Collyer* (2), to take LORD BOWEN's statement there, that contractual obligations do not disappear as circumstances change, but that a person who is entitled to the

benefit of a covenant may by his conduct or omission put himself in such an altered position to the person bound by it as makes it manifestly unjust for him to ask a court to insist on its enforcement by injunction. That has been followed and adopted by the Court of Appeal in Ireland in *Craig v. Green* (3), the headnote of which states accurately what the decision was—the right of a person to enforce a restrictive covenant by injunction could not be defeated by mere change in the character of the neighbourhood unless there was an equity against him arising from his acts or conduct in sanctioning or knowingly permitting such change as to render it unjust for him to seek relief by injunction. That I respectfully agree to and adopt.

As regards all these three cases, it may be said that they may arise either in law or in equity, and for some purposes it is still necessary to consider the difference between law and equity. In the case of persons such as the covenantor and covenantee and persons claiming through them, the action would be one of covenant, and I apprehend that nothing short of such conduct as would have supported an equitable plea under the Common Law Procedure Act, or, to put it in other words, before that Act would have justified the Court of Chancery in granting an injunction restraining the action, will amount to a bar to the plaintiff's right to sue on his covenant. That right of equitable plea and the jurisdiction is dealt with in *Davis v. Marshall* (4) and *Williams v. Earl of Jersey* (5). The right of the covenantee in each of these cases to which I have referred and of the various purchasers inter se in the third case is a right in equity only. There is no privity at law between the parties, because at law the covenant does not run with the land. The covenants may be said, however, to run with the land in equity, if that be an appropriate phrase, because the right to sue in equity arises, not from notice, but by reason of the covenant attaching to the equitable interest in the land. As SIR GEORGE JESSEL, M.R., pointed out in *London and South Western Rail. Co. v. Gomm* (6), it is the possession of the legal estate without notice by a purchaser for value that enables him to plead an effectual legal bar to the equitable right to enforce that equitable covenant. When you have once established the absence of the legal estate, the equitable interest, as he points out, remains unaffected. This is to some extent material, because I think that in *Sayers v. Collyer* (2) the Court of Appeal considered that something less than that would have enabled the defendant to resist an action at law on a covenant to which he was party or privy, and would have sufficed to allow a court of equity to refuse to grant relief in a case in which the rights of the plaintiff are purely equitable. *Sayers v. Collyer* (2) was a case of the third class to which I have referred between two persons claiming as purchasers under a building scheme. I think that is sufficient to show the distinction that may arise between the various classes of cases.

In the present case the defendant was not legally bound. The question is one of equitable liability, and the real point for determination is whether the covenants fall within the first or the third class. There is no question, I think, that the case does not fall under the second head, of which *Duke of Bedford v. British Museum Trustees* (7) is one. In that case, on the construction of the deed, it is apparent that the covenant was entered into for the better protection and enjoyment of Southampton House, then the property of the Duke of Bedford. When Southampton House as a residential mansion was taken away, the Court of Chancery held that they would not grant an injunction, but would leave the question open whether there was any legal remedy or not. By which I apprehend they must have meant that the point was not then settled, as I believe it has been now, that the liability or the burden of covenants of this nature does not run with the land. That point, I think, was intended to be the question of law which was left open, and that bears out my view, confirmed by *Sayers v. Collyer* (2), that there is a difference in the amount of conduct which will justify a court of law in saying there has been a release of the covenant at law and that which will justify a court of equity as to the equitable right. We do not require so much as a court of law would

require in a similar or corresponding case to enable us to say we will not enforce the covenant. The present defendant has the advantage that his liabilities are equitable.

Then there comes the question of what nature is this covenant, and I have come to the conclusion that it falls under the first class—namely, that it was a covenant taken by Osborne for his own benefit. If, therefore, a purchaser went to buy from Osborne, there was nothing on the face of any document or of the plan which showed him whether there was a single lot sold or almost every one. There is no evidence to show what took place between Bayin and Osborne beyond the fact that Osborne says he showed Bayin the conditions, but he did not think that they saw the plan. To arrive at a conclusion, which is an inference to be drawn from the circumstances, as to whether a building scheme was intended by the parties. I find that all the purchasers intended to contract subject to covenants which were made applicable to the whole estate. I apprehend also that you infer in a case like this, where the vendor retains a number of plots, that he will himself enter into similar covenants. But I cannot draw that inference here. Moreover, it seems to me to be impossible to draw the inference that any one person coming in and buying would intend to bind himself to an unknown number of persons in respect of the estate, which was so far undefined, and undertake a liability except there be a corresponding liability on the others. Neither the persons nor the estate with respect to which lots the covenants are entered into are in any way defined. If it is intended that the vendor should be bound, he would, of course, enter into his covenants. The whole, then, of the defendant's covenants point to an arrangement made once for all, either by a sale by auction and a plan exhibited at the sale and conditions of sale stating the covenants and that other persons will enter into similar covenants, or, if that be necessary, by a scheme entered into already by antecedent sales which are stated to have taken place and displayed upon the plan drawn on the purchaser's deed. That is what happened in *Spicer v. Martin* (9). There Martin took a lease, so far as I can gather, of seven plots, which were conveyed in fee by the commissioners to the lessor. They were all subject to restrictive covenants, and each conveyance contained a ground plan showing all the seven plots leased were taken by Martin and the ground plan accepted, and that Spicer had told Martin that six plots had been already leased subject to similar covenants. It was held by the House of Lords that that was for his own benefit.

The circumstances of the present case were that Mr. Osborne owned a considerable tract of land at Leigh-on-Sea, and he was desirous of selling portions on both sides of the Broadway for building lots. The two agreements relating to these plots are practically identical. One or other of these agreements was, I think the evidence shows, shown to purchasers, and they were told as to the form to be adopted. The agreement first refers to the plot of land by reference to the plan of the Cliff building estate, Leigh. There are two estates, but the agreements are practically the same, and these forms were used apparently indiscriminately without making any distinction between the Cliff building estate and the other. These conditions contain various clauses and conclude: "The vendor reserves the right of waiving or varying any of the conditions with regard to the unsold lots." As regards some purchasers, at any rate, the plan which is referred to was produced, and I should infer that in every case practically it was produced as sufficient statement of a building scheme. One has to bear in mind that you have to infer an intention by a number of persons to enter into covenants inter se; it seems to me impossible here to impute such an intention when the covenant itself is silent, though it might have very well expressed the fact if so desired. We know some two or three lots had been sold, and I have to infer that the purchaser made himself liable not merely with the vendor, with whom he might contract to obtain a release as was done in *Kcates v. Lyon* (8), but also with an indemnity as to a quantity of persons in respect of other plots so as to enter blindfold into a bargain

A when he cannot know the particulars. I think it would be wrong for any court to draw an inference so strong as that.

B The mere fact that the vendor reserved to himself certain conditions as regards the unsold property is not sufficient to prevent a scheme in respect of the plots sold before that period if there were no evidence, such as in *Spicer v. Martin* (9), that the bargain was entered into with reference to the plots there sold. On the facts before me there is nothing whatever to show that Boyin knew that any one single plot was sold. For anything that appears he might have been the first, second, or third purchaser, or there might have been 100 sold. There were a great many lots shown on the plan. It is inconceivable, to my mind, that he should have been willing to enter into a contract or covenant with such persons as the vendor should have sold portions to under similar conditions and covenants and for such other purposes as the vendor, being at liberty as regards the lots that remain to be disposed of, thinks fit. I think such a contract as that would be too far fetched. Lord MACNAGHTEN, in addressing the House of Lords in *Spicer v. Martin* (9), said that it was not intended to extend the doctrine of *Renals v. Coughlin* (10). In this view you must imply covenants between a number of persons who have not in fact entered into them. I do not feel disposed to extend in any manner that doctrine. The statement in DART'S VENDOR AND PURCHASER (3rd Edn.), p. 867 :

E "The fact that the several purchasers were not aware at the date of their common purchase of the existence of any such covenants seems to be almost conclusive evidence of an intention that the covenants were not entered into for the benefit of the purchasers inter se, but for the purchaser himself,"

appears to me to be well founded. To my mind, to bind people with covenants not called to their attention, and to draw the inference of an intention to enter into indiscriminate covenants, is too strong an inference for any court to draw.

F The result is that, in my opinion, there is no scheme here of any sort or description, but that it is a covenant by Osborne for his own benefit. Then, is there anything here which prevents his asserting his right to the equitable relief to which he is entitled by virtue of that covenant? So far as regards the defendant, he cannot, it appears to me, be heard to complain. The case made for him is one of constructive notice and that he did not know anything about it, and, therefore, that he ought not to be held liable. But he had actual notice. He bought and got a conveyance at a price fixed, no doubt, by reference to the existence of these covenants. There were two private houses, and those were allowed to remain as such. In 1900 he made some alterations in respect of a piece of land at the back of the two houses. He built a stable and warehouses over, and on the evidence I find that the plaintiff did not object to that being done, and certainly he was aware that the premises were so used. If the plaintiff were claiming to restrain the defendant from using the warehouse as a warehouse, in my opinion he would fail, and, in accordance with *Sayers v. Collyer* (2), I should probably have dismissed the action with costs. But that is not the case. It appears that that is situated in a side street, and is not in any way offensive. Again, as to the stable, it appears that it is cut entirely off from the two dwelling-houses in front, and the plaintiff seems to have acquiesced in its user as such. So that, again, if he were suing to I restrain that particular user he would probably not succeed in persuading me that he was entitled to any relief. The defendant now threatens and intends to alter structurally the fronts of these two houses which still remain and turn them into shops, instead of having, as now, two neat-looking residential villas. The plaintiff says that that is a very different thing, and that he is not bound to submit to it. But it is said that the plaintiff is guilty of conduct which disentitles him to relief because, being told of this on Jan. 28, he did not issue his writ until Mar. 7. But before Jan. 28 he protested and said he should bring an action, and, if the defendant chose to go on in the face of that, he cannot complain if the plaintiff

did not rush at once into litigation and set up acquiescence and laches so as to disentitle to relief. Further, it is argued that, inasmuch as Osborne undoubtedly allowed the use of one of the houses in a manner other than that of a private dwelling-house, as to a part of the premises, therefore he is disentitled to object to any alteration in any part of these two houses. That argument is, I think, unsound. I think that the case which has been referred to of *Richards v. Rerett* (11) is an authority, if one were needed, to show that it is not so, and, to my mind, it is contrary to common sense to say that the fact of allowing a warehouse to be placed on a back piece of land cut off from the front piece which is a villa residence, disentitles him to complain of anything done in front also. I think that would be compelling people to be extremely strict in enforcing their rights though they desired to be neighbourly, and not to insist on what might be deemed by the court to be a somewhat unreasonable attempt to enforce their contractual rights.

The result is that the plaintiff, in my opinion, is right, and is entitled to relief in this matter instead of considering the exact rights in the three different classes of property—namely, the warehouse, the stable, and the remaining houses. The house was used by a house agent as an office, and the warehouse was over a stable at the back. He is, therefore, entitled to an injunction. But as he is now willing to accept £125 in lieu of an injunction, there will be no order except that that sum is to be in satisfaction. The defendant will pay the costs of the action.

Solicitors : *A. R. & H. Steele ; Todd, Dennis & Lamb.*

[*Reported by A. W. CHASTER, Esq., Barrister-at-Law.*]

DUKE OF NEWCASTLE v. WORKSOP URBAN DISTRICT COUNCIL

[CHANCERY DIVISION (Farwell, J.), March 12, 13, 14, 15, 17, 24, 1902]

Reported 1902 2 Ch. 145; 71 L.J.Ch. 487; 86 L.T. 405; 18 T.L.R. 472

Fair—Market—Entailment of equal dignity—Impossibility of merger—Right to hold fair and market on same day—Forfeiture of charter—Unauthorised change in days on which fair or market to be held—Tolls—Surrender—Forfeiture—Omission to collect—Restoration to Crown—Right of owner to remit all or part—Distinction between fair tolls and stallage tolls.

It is possible for a market and a fair to co-exist on the same day in the same manor and for the benefit of the same lord. There can be no merger of the two; the two franchises are separate and distinct and of equal dignity, and so there is no question of a greater or less estate such as is essential to merger.

The lord having proclaimed his fair, all persons have a prima facie right to buy at the fair toll free, and if the lord sues for toll he must prove his title thereto. The franchise of fair is unaffected by an omission to collect the tolls, for tolls are not incidents of a fair—they owe their origin to a further grant and exist as a subordinate franchise appurtenant to the fair or market. The effect of a surrender or forfeiture of tolls would be, not to extinguish them, but to restore them to the Crown.

A change, unauthorised by the Crown, in the days on which a fair is to be held is a cause of forfeiture of which the Crown only can take advantage. Thereafter the owner of the fair cannot recover the tolls.

The owner of a market is not bound to charge the same tolls for all persons—persons who frequent the market can be charged less than those who come in on certain days only. So long as the lord does not exceed the maximum toll which he is entitled to demand (which is a reasonable sum where the charter specifies no amount) he may remit all or a part of the toll to whomsoever he pleases.

There is a distinction between fair tolls and stallage tolls. A fair toll is payable to the owner of the franchise in respect of goods sold in his fair or brought into the fair for sale and has nothing to do with the ownership of the soil. A stallage toll is paid in respect of some use of the soil—for the exclusive occupation of the land and the convenience of the stalls thereon—and can be exacted only by the owner of the soil.

Notes. Considered: *A.-G. v. Colchester Corp.*, [1952] 2 All E.R. 297. Referred to: *London Corp. v. Lyons, Son & Co., Ltd.*, [1935] All E.R. Rep. 540; *Brackenhorough v. Spalding U.D.C.*, [1942] 1 All E.R. 34; *Prescott v. Birmingham Corp.*, [1954] 3 All E.R. 698.

As to the holding of markets and fairs, see 25 HALSBURY'S LAWS (3rd Edn.) 389 et seq. and for cases see 33 DIGEST 528 et seq.

Cases referred to:

- (1) *A.-G. v. Simpson*, [1901] 2 Ch. 671; 85 L.T. 325; 16 T.L.R. 47; on appeal, [1901] 2 Ch. 700; 70 L.J.Ch. 828; 85 L.T. 333; 17 T.L.R. 768, C.A.; on appeal, sub nom. *Simpson v. A.-G.*, [1904] A.C. 476; 74 L.J.Ch. 1; 91 L.T. 610; 69 J.P. 85; 20 T.L.R. 761; 3 L.G.R. 190, H.L.; 19 Digest (Repl.) 66, 365.
- (2) *Hedley v. Welhouse* (1598), Moore, K.B. 474; sub nom. *Heddy v. Wheelhouse*, Cro. Eliz. 558, 591; 78 E.R. 803, 834; 33 Digest (Repl.) 540, 177.
- (3) *R. v. Maidenhead Corp.* (1620), Palm. 76; 81 E.R. 986; 33 Digest 541, 187.
- (4) *R. v. London Corp.* (1682), 2 Show. 263; 8 State Tr. 1039; E.B. & E. 122, n.; 89 E.R. 930; 13 Digest (Repl.) 355, 1627.

- (5) *Abbot of Strata Mercella Case* (1591), 9 Co. Rep. 24a; 77 E.R. 765; 13 Digest A (Repl.) 17, 158.
- (6) *Lord Middleton v. Power* (1886), 19 L.R.Ir. 1; 33 Digest 552, m.
- (7) *Earl of Egremont v. Saul* (1837), 6 Ad. & El. 924; 6 L.J.K.B. 205; 112 E.R. 353; 33 Digest 541, 191.
- (8) *Swindon Central Market Co., Ltd. v. Panting* (1872), 27 L.T. 578; 37 J.P. 118; 33 Digest 545, 262.
- (9) *Northampton Corp'n. v. Ward* (1745), 2 Stra. 1238; 1 Wils. 107; 93 E.R. 1155; 33 Digest 544, 246.
- (10) *Benjamin v. Andrews* (1858), 5 C.B.N.S. 299; 27 L.J.M.C. 310; 22 J.P. 464; 4 Jur.N.S. 976; 6 W.R. 692; 141 E.R. 119; 33 Digest 523, 7.
- (11) *Duke of Bedford v. St. Paul, Covent Garden, Overseers* (1881), 51 L.J.M.C. 41; 30 W.R. 411; Ryde, Rat. App. (1871-85) 313; sub nom. *R. v. Duke of Bedford*, *Duke of Bedford v. St. Paul's, Covent Garden, Overseers*, 45 L.T. 616; 46 J.P. 581; 33 Digest 539, 159.
- (12) *Stamford Corp'n. v. Pawlett* (1830), 1 Cr. & J. 57; affirmed sub nom. *Pawlett v. Stamford Corp'n.* (1831), 1 Cr. & J. 400; 148 E.R. 1478; sub nom. *Stamford Corp'n. v. Pawlett*, 1 Tyr. 291, Ex. Ch.; 11 Digest (Repl.) 654, 786.
- (13) *Hungerford Market Co. v. City Steamboat Co.* (1860), 3 F. & E. 365; 30 L.J.Q.B. 25; 3 L.T. 732; 25 J.P. 213; 7 Jur.N.S. 67; 121 E.R. 479; 44 Digest 99, 787.
- (14) *Duke of Bedford v. Emmett* (1820), 3 B. & Ald. 366; 106 E.R. 696; 33 Digest 542, 195.
- (15) *R. v. Casswell* (1872), L.R. 7 Q.B. 328; 26 L.T. 574; 20 W.R. 624; sub nom. *Caswell v. Wolverhampton Overseers*, 41 L.J.M.C. 108; 36 J.P. 645; 33 Digest 540, 169.

Also referred to in argument :

Mosley v. Walker (1827), 7 B. & C. 40; 9 Dow. & Ry.K.B. 863; 5 L.J.O.S.K.B. 358; 108 E.R. 640; 33 Digest 531, 91.

Yard v. Ford (1670), 2 Saund. 172; 1 Mod. Rep. 69; 1 Lev. 296; 2 Keb. 689, 706; 1 Vent. 98; T. Raym. 195; 85 E.R. 922; 33 Digest 550, 330.

R. v. Marsden (1765), 3 Burr. 1812; 1 Wm. Bl. 579; 97 E.R. 1113; 33 Digest 527, 49.

Yarmouth Corp'n. v. Groom (1862), 1 H. & C. 102; 32 L.J.Ex. 74; 7 L.T. 161; 8 Jur.N.S. 677; 158 E.R. 818; 33 Digest 545, 257.

Action for a declaration that the defendants were not entitled to certain market rights.

By a charter of 24 Edw. 1, one Thomas de Furnivall, the plaintiff's predecessor in title, became entitled to hold one market for merchandise, etc. (hereinafter called the goods market) in every week in his manor of Worksop, in the county of Nottingham. By another charter of 13 Car. 2 one Henry Howard of Norfolk, another predecessor in title of the plaintiff, became entitled to hold one market for buying and selling all manner of beasts or cattle, together with the market granted by the 24 Edw. 1, on each Wednesday in the manor of Worksop; also three new fairs to be held on Mar. 21, June 21 and 22, and Oct. 3 and 4 in each year with all customs, tolls, stallages, etc. By an indenture of lease, dated Nov. 11, 1851, the then lord of the manor of Worksop leased the right to hold the markets to the defendants' predecessors in title for the term of ninety-nine years. The first recital in the lease was to the effect that the lessor

"Is seised to him and his heirs for an estate of inheritance in fee simple of and in or is otherwise well entitled to the tolls and all other the market dues now receivable and payable at the market held in the town of Worksop" subject as therein mentioned. The second recital was to the following effect :

"And whereas it is intended to remove the said market from the open street in the said town of Worksop where the same is now held into or within the

A market house and ground now erected and inclosed for that purpose by a certain joint-stock company, which was . . . duly registered under the name or style of the Worksop, Nottinghamshire, Corn Exchange and Market Co., the site of which new market is adjacent to the present situation of the said market, and within the precincts within which the said market ought to be held, which removal is for the public benefit and convenience, and of which removal due and public notice is intended to be given as is hereinafter mentioned."

The words of demise in the lease were as follows :

"Doth by these presents, grant, demise, and confirm to [the lessees], etc., all those the tolls, customs, stallage, piccage, and all and singular other the market dues now receivable and payable at the market held in the town of Worksop belonging to the lessor . . . And also all that the right and power of appointing the clerk of the said market from time to time, and all profits, benefits, advantages, emoluments, appendances, and appurtenances whatsoever to the said premises belonging or in any wise appertaining (but excepted always out of the aforesaid grant or demise and reserved unto the said [lessor, etc.] all fairs, courts, perquisites of courts, royalties, jurisdictions, franchises, and other material rights whatsoever other than the said tolls and premises hereinbefore granted or demised to the said market belonging or in any wise appertaining or incident)."

The lease contained a covenant providing that the lessees

"Shall not nor will do any act or commit any default whereby or by reason or means whereof the said market shall or may during the continuance of the grant or demise hereby made cease to be held in or within the said market house and ground as aforesaid, or whereby or by reason or means whereof the said tolls, market dues, and premises hereby demised, or any of them or any part thereof, shall or may or can be or become forfeited or liable to be forfeited or surrendered, or whereby or by reason or means whereof the grant of the said market shall or may or can be repealed or revoked by the Crown, or the right of the said [lessor] to receive or enjoy the same tolls, market dues, and premises, subject to the grant or demise hereinbefore contained, shall or may or can be prejudiced or affected in any way."

At the date of the lease the goods market was held in the streets. It was subsequently removed to the market house. After the said date fairs continued to be (as they had before been) held under the charters, and in a place called Fair Green. Such fairs were formerly held on Mar. 31 and Oct. 14, but in 1845 the days were changed, as the plaintiff alleged for the public convenience, to the second Wednesdays in April and October. In 1878 the defendants' predecessors applied to the trustees of the then lord of the manor of Worksop, representing that they were entitled under the lease of 1851 to tolls and dues of a cattle market as well as of a goods market, and the trustees, upon such representation, demised the Fair Green to the defendants' predecessors by indenture dated May 29, 1878, for a term of twenty-one years, and the steward of the manor in the names of the trustees proclaimed a cattle market to be held there, and purported (by the proclamation) to authorise them to receive tolls and dues.

The plaintiff complained (inter alia) that no account of the fair tolls had ever been rendered to him. The defendants, by their defence, alleged that the express purpose of the lease and proclamation of 1878 was to enable their predecessors to hold a weekly Wednesday cattle market on the Fair Green, and to take tolls thereof for their own benefit. They also contended that the plaintiff, who in 1885 began to receive the rent, reserved by the lease of 1878, could not be heard to say that any obligation of the lease of 1851 was broken by reason of the Worksop cattle market being held elsewhere than in the places mentioned in the lease of 1851. They

denied that the fairs in question were ever held, and if the days on which they were held had been altered, such alteration made the fairs a nullity. They contended that if they had received any tolls of any fair, the same were received by them in the nature of stallage or piecage, due not to the owners of the fair, but to the defendant as occupiers of the soil. An alternative defence, that the defendants had established a statutory market, was abandoned at the trial of the action.

Haldane, K.C., Butcher, K.C., and Vaughan Hawkins for the plaintiff.
Upjohn, K.C., and Herbert Chitty for the defendants.

Cur. adv. vult.

Mar. 24, 1902. **FARWELL, J.**, read the following judgment.—The question in this case depends on the construction of a lease of certain tolls demised by the predecessor of the plaintiff to the predecessor of the defendants on Nov. 11, 1851; and for its determination it is necessary to understand the subject-matter with which the parties were dealing and to consider the condition thereof at the date of the demise, a consideration which has entailed a prolonged examination of facts and law out of all proportion to the value of the subject-matter of the action.

By a charter of 24 Edw. 1, the King granted to Thomas de Furnivall that he and his heirs for ever might have one market in every week on Wednesday at his manor of Worksop, and one fair there in every year to last for eight days—that is to say, on the eve, and on the day, and on the morrow of St. Cuthbert's day, and on the five days following. In the third year of Edward III. Thomas de Furnivall was summoned to answer *quo warranto* he claimed to hold a market, fair, gallows, timbrel, etc., in his manor of Worksop, and Thomas answered that he and his ancestors from time whereof memory does not exist have had in their manor of Worksop a market on Wednesday in every week and one fair there in every year on the eve and the day and morrow of St. Cuthbert in March, and he also set up the charter of Edward I. To this it was answered for the King that Thomas had abused certain of the liberties aforesaid (among other things) by taking from persons coming to his market and fair superfluous tolls and other than were accustomed. Thereupon twelve jurors found that Thomas and all his ancestors had in their manor, the market and other liberties, but that Thomas had abused the market and fair in that he had always taken two pence as toll *de quacunque re venali emptavenditâ ibidem in mereatu sive feriâ*, whereas before his time there were not wont to be taken but one penny. Thereupon Thomas de Furnivall's liberties were resumed by the Crown, but granted again to Thomas on payment of a fine. Both sides relied on this proceeding as evidence that tolls were properly payable and had been paid without duty in respect of the market and of the March fair; and for the reasons stated in *A.-G. v. Simpson* (1) ([1901] 2 Ch. at p. 688), I think that this is admissible in evidence and is sufficient to show that Thomas de Furnivall was entitled to take and work tolls in respect of his market and fair.

By charter 13 of Car. 2, the King granted to Henry Howard, his heirs, and assigns that he and they might have one market on every Wednesday in the year at Worksop for the buying and selling of all manner of beasts or cattle, together with an ancient market in and upon that day in times past then usually held, and also three new fairs to be held at Worksop (i) on Mar. 21; (ii) on June 21 and 22; and (iii) on Oct. 3 and 4 in every year, with court of piepowder and with all liberties, tolls, stallages, piecages, etc., with said markets or fairs and courts of piepowder pertaining or therewith usually had or enjoyed. The title of the plaintiff to the reversion of the markets and tolls demised by the lease of 1851 on the determination thereof, and to the fairs granted by the said two charters, is admitted by the defence.

The markets have been held regularly every week in former years in the streets, but since 1851 the provision market has been held in the Corn Exchange, Town Hall, and Market Square, all of which belonged to the defendants or their predecessors in title in fee, and the cattle market has been held in Shaw's field, a

A field belonging to the duke and leased by his predecessors in title to and before 1826 to Rhodes, then to Raulson Shaw, and then to W. Reuben Shaw and Son. Shaw's field was demised in 1878 by the duke's trustees to the Worksop Corn Exchange and Market Co., Ltd., for a term of years from Mar. 25, 1878, and on Aug. 17, 1882, this company assigned the residue of this term to the defendants' predecessor in title. On the expiration of this lease the plaintiff conveyed to the defendants a piece of land in Worksop for the purpose of erecting a market thereon, and they have since done so. In the year 1845 or thereabouts, the days for the fairs (which had been previously held on two of the days fixed by the charters) were changed to the second Wednesday in March and the second Wednesday in October, and were then held in the street and afterwards in the same place where the market was held. No new charter or licence for this change was produced, but the change was made by the duke's predecessors by a simple notice. These fairs have been duly proclaimed by the crier of the duke, but there is no evidence to show that any toll has ever been paid since the third year of Edward III. under the first charter, or at any time under the charter of Charles II. On the evidence before me I find that the lord has never appointed any collector of tolls, nor provided any buildings or ground for holding the fair, nor any stalls or pens, nor appointed anyone to settle disputes, nor, in short, done anything whatever except proclaim the fair in order to comply with the Statute of Northampton, 2 Edw. 3, c. 15.

This, then, being the state of circumstances, on Nov. 11, 1851, the plaintiffs' predecessor in title granted to the defendants' predecessor in title the lease under which the question arises. As the pleadings originally stood, the plaintiff disputed the right of the defendants to take cattle market tolls, and the defendants set up an alternative claim in case the plaintiff succeeded in this, to hold a statutory market under the Public Health Act; but on the opening of the case the plaintiff's counsel withdrew this claim at the Bar, and stated that he understood that it was not alleged by the amended pleadings, and the defendants' counsel thereupon at once withdrew his claim to a statutory market, which had only been put forward as an alternative. The only questions, therefore, left for my determination relate to the fairs, and with respect to these several points were taken. The plaintiff claims that all tolls taken on fair days are fair tolls, and contends that the defendants must account for them accordingly. A fair, they say (quoting GUNNING ON TOLLS, p. 44), is a great sort of market, and a market is less than a fair, and they cite COKE'S INST., bk. 2, at p. 406:

G "Note there be words in the grant of a market *ita quod non sit ad nocumentum alterius mercati*, and note that fairs are taken within this law, for every fair is a market, but every market is not a fair."

If it were impossible for a market and a fair to co-exist on the same day in the same manor and for the benefit of the same lord, there might be some force in this contention; but it was not and could not be contended that there was anything like merger of the two. The two franchises are separate and distinct, and of equal dignity. There is no question of a greater or a less estate such as is essential to merger. And the very charter of Edward I., under which the plaintiff claims, is inconsistent with any such contention, for the eight days' fair thereby granted on and around St. Cuthbert's day necessarily included a Wednesday; and yet the charter grants a market on every Wednesday. I cannot say that it is impossible for a fair to be held in one part of the manor of Worksop on the same day that the market is held in another part; and no authority has been cited showing the impossibility of the co-existence of the two franchises on the same day.

Then it is said that, even if this is so, a double set of tolls cannot be exacted, and that the tolls paid must be deemed to be fair tolls. It is not necessary for me to decide the first question, because if it were correct, the tolls taken by the defendants under this lease are, in my opinion, market tolls. The parties to the lease were contracting on the basis of the existing facts—viz., that no fair tolls had in

fact been paid since the reign of Edward III., and that no fair tolls could be recovered in respect of the fairs on the two new fair days, and on the face of the deed itself it is apparent that the non-existence of fair tolls was in the contemplation of the parties. The first point is the result of the evidence in the case. It is really inconceivable that where franchise has been for the last three or four centuries enjoyed by two great families such as the Howards and the Pelham-Clintons, no record of any payment in respect thereof could be found if any such had really ever been made. It is urged that the franchise remains, although the tolls have not been paid for centuries, and that there is nothing to prevent the plaintiff from now exacting them. I agree that the franchise of fair is unaffected by the omission to collect the tolls. Toll is not incident to a fair (*Heddy v. Wheelhouse* (2)), but as appears in *R. v. Maidenhead Corpn.* (3) (Palm. at p. 86):

"per op. del Court, Toll n'est incident al market, mes sont distinct choses,"

it owes its origin to a further grant, and exists as a subordinate franchise appurtenant to the fair or market, differing in this respect from the court of piepowder which is incident to a market: COKE'S INST., BR. 2, 220-221; COM. DIG. MARKET I. The statement in VINER'S ABBRIDGMENT, tit. MARKET, F. 7 and 8, rests merely on the statement of counsel in *R. v. London Corpn.*, and, as pointed out by PEASE and CHITTY in their excellent little treatise on MARKETS AND FAIRS, p. 60, n. (c.), this statement of counsel is founded upon the false assumption that tolls are incident to fairs and markets. There is great difficulty in presuming the extinction of the tolls which formed this subordinate franchise.

It has been urged that the effect of a surrender or forfeiture would not be to extinguish them, but to restore them to the Crown, and this appears to me to be correct. Thus in *Heddy v. Wheelhouse* (2), it was held by POPHAM, GAWDY, and FENNER (Cro. Eliz. at p. 592)

"that such liberties which a common person hath by prescription or grant, and which if the common person had not, the King himself should have throughout England, as wail, estray, wreck, etc., there, if the common person hath them by grant or prescription, and they come to the King by forfeiture or otherwise, they are extinguished in the crown, and the Queen shall have such liberties by her prerogative, and they cannot afterwards be granted but by a new creation. But such liberties which a common person hath by grant or prescription, which the King (if such prescription had not been) could not have by his prerogative, as warren, park, fair, market with toll, etc., if these come to the Crown, etc., they remain in esse and are not extinct: for if the King should not have them by this means they would be lost."

To the same effect is the decision in the case of the *Abbot of Strata Mercella* (9 Co. Rep. at p. 25 (b)):

"When the King grants any privileges, liberties, franchises, etc., which were privileges, liberties, franchises, in his own hands as parcel of the flowers of his Crown . . . there if they come again to the King, they are merged in the Crown and he has them again in jure corone . . . but when a privilege, liberty, franchise, or jurisdiction was at the beginning erected and created by the King, and was not any such flower before in the garland of the Crown, then by the accession of these again to the Crown they are not extinct . . ."

It is not easy to see how the franchises of a fair can be in the lord and the subordinate franchises of tolls, which exist only as appurtenant to the franchise can be in the Crown. It is not, however, necessary for me to determine this point, for, whether the tolls are extinguished or not, I find as a fact that they had not been paid for many years before 1851, and that the parties to the lease of 1851 were contracting with that knowledge and on that footing.

I have been dealing so far with the tolls payable under the charter in respect of fairs held on the days appointed by the charter. I have now to consider the effect

- A of the change of days made in 1845. The duke's predecessors altered these days more than once; there is no evidence of any licence or authority from the Crown, or any assent of the inhabitants, even if the latter could have any legal effect. At the date of the lease the alteration had been in force for five or six years only, a period far too short to give rise to any presumption of a lost grant or licence. An entire change of days such as this is doubtless a cause of forfeiture; but it has been held in *Lord Middleton v. Power* (6), that the Crown only can take advantage of such a forfeiture. I will assume that this is correct, that the charters that continued in existence in 1851 were the charters to hold fairs on the days therein specified, and could not support an action to recover tolls in respect of fairs held on other days. It is said that the decision in *Lord Middleton v. Power* (6) is opposed to this; but I do not so read it. That case was for disturbance of fair. The Land League had without any title set up a rival fair, and the Vice-Chancellor held that the plaintiff, who had changed the days on which his fairs were held some twenty years or so before, was entitled to a declaration of his tolls, and an injunction restraining the defendants from disturbing the plaintiff's fairs, and to damages, and he put it on the ground that the defendants were obviously wrongdoers. No question of tolls arose; the plaintiff had held a market on the days in question for some years, and was, therefore, *prima facie* in possession. This, however, is no authority for the proposition that the owner of a fair on a given day with tolls who changes the day without licence can recover tolls. The lord proclaims his fair, and thereupon everyone has *prima facie* the right to buy and sell at such fair toll free (*Earl of Egremont v. Saul* (7)), and if the lord sues for toll he must prove his title thereto; the persons buying and selling are not wrongdoers.

- E "Every person had of common right a liberty of coming into a public market for the purpose of buying and selling,"

- per COCKBURN, C.J., in *Swindon Central Market Co. v. Panting* (8) (27 L.T. at p. 579), citing *Northampton Corp'n. v. Ward* (9), and the lord has against them such rights only as he can prove. In the present case the fair was not held on the plaintiff's ground, but in the streets, or on some occasions possibly in Shaw's field with Shaw's permission. The plaintiff's predecessors must, therefore, have put in evidence his charter, and on its production must have failed. A market or fair cannot be a legal market or fair without a grant of the right to hold it on the day claimed: *Benjamin v. Andrews* (10). Tolls claimed in respect of it were not recoverable.

- G I find, therefore, that in 1851 the plaintiff's predecessor had no right to demand any tolls in respect of the fairs held on the altered days; and that the contract between the parties in 1851 must be read on this basis. I now turn to the lease itself, and I find that its contents are entirely consistent with the facts which I have stated. It recites the lessor's title to the tolls and market dues, but it is silent as to any fair tolls or dues; it demises all the market tolls or dues without any qualification, and then excepts and reserves to the lessor

- H "all fairs, courts, purquisites of courts, royalties, jurisdictions, franchises, and other manorial rights whatsoever, other than the said tolls and premises hereinbefore granted."

- I That is to say, although the market tolls on the subject-matters of the demise and the word "tolls" is mentioned both before and after the exception, there is an entire omission of any mention of tolls with reference to fairs. I do not, of course, say that, if there were in fact any tolls in respect of the fairs, they would not be duly excepted and reserved; but on the point of construction, the omission of all express reference to fair tolls is strongly corroborative of the view which I have expressed, that the parties were contracting with the knowledge and on the basis that there were in fact no fair tolls. But if this were not so, the plaintiff's contention is, in my opinion, quite untenable. It must extend to this—either that such market tolls as

are payable on fair days are not demised, or that, if they are, the lessee has in some way or other a duty cast on him of not collecting his own market dues until fair dues are paid, or of collecting the fair dues in preference to the market dues as and for the lessor. It is, in my opinion, impossible that a grantor can so derogate from his own grant or that such a meaning can be given to this demise on any of the ordinary rules of construction.

Further, during the six years prior to the writ, for which an account of tolls is claimed, it is true that the fair has been proclaimed, but the proclamation carries with it no right to hold the fair on the land of the defendants. No buying or selling has taken place during these six years, except on the land of the defendants; and it is certainly difficult to see how the plaintiff can claim that the lessees are not only bound to collect his tolls for him, but also to provide the land on which the fair is held. Assuming that the plaintiff's fairs still exist, and can be held on the proper days, they cannot be held on the defendants' land without their consent. Then it is said that the defendants have in fact received fair tolls as such, and some colour is lent to this contention by two items in the list of tolls to be taken in the provision market of June 16, 1892—viz. :

“Stalls in market yard, Wednesdays, Saturdays, per lineal foot, 2d. Do., fairs and stallages, 6d. Eggs, per lot, 3d. Do., fairs and stallages, 6d.”

The last-named toll (i.e., 6d. on eggs) has never been taken—the toll has been, in fact, the same on fair days as on market days. But with reference to stalls, the facts are as follows. The defendants provide stalls and seats, and for these they charge 1½d., not 2d., on market days. On fair days they charge the same toll to their old customers—i.e., the people who frequent the market—but they charge 3d. to new customers—i.e., to people who come in on fair days only.

I am of opinion that these tolls are not fair tolls, but stallage tolls. A fair toll is payable to the owner of the franchise in respect of goods sold in his fair or brought into the fair for sale, whether he be the owner of the soil or not, and has nothing to do with the ownership of the soil; stallage is paid in respect of some use of the soil, and can be exacted only by the owner of the soil. It is sufficient to refer to *Northampton Corpn. v. Ward* (9) and *Duke of Bedford v. St. Paul, Covent Garden, Overseers* (11). The land on which the stalls stand belongs to the defendants, and they make a charge for the exclusive occupation of the land and the convenience of stalls thereon.

It is said that the fact that the toll is increased on fair days is fatal to this conclusion, because it is intended that tolls must be the same for all persons, and that it follows that the extra 1½d. must be fair toll. In my opinion, that is not the law. So long as the lord does not exceed the maximum toll that he is entitled to demand (i.e., a reasonable amount when the charter specifies no sum, *Stamford Corpn. v. Pawlett* (12), and it is not suggested that 3d. is unreasonable), he may remit all or a part of the toll to whomsoever he pleases. The reasoning in *Hungerford Market Co. v. City Steamboat Co.* (13) applies, in my opinion, to the present case. In that case the company were authorised by statute to take tolls in return for services to the public, and Cockburn, C.J., in delivering the judgment of the court, consisting of himself, Hill and Blackburn, JJ., says (3 E. & E. at p. 380) :

“We were at first struck with the argument that as by the 76th section of the Hungerford Market Act (11 Geo. 4, c. lxx) the tolls authorised to be taken are required to be fixed and appointed by the company, a toll lower than that so fixed could not be properly considered as coming within the terms of the power. But we think a sufficient answer to this argument was given by the counsel for the plaintiffs, and that the true construction of the clause in question is that the tolls must be fixed and appointed in order to communicate to the public or persons interested the maximum toll they can be called upon to pay, leaving the right of the company to lower or remit the tolls, if it otherwise exist, wholly untouched.”

A The justification for the grant of tolls in a market or fair is the same as that in the *Hungerford Case* (13)—any services to the public. The principle that everyone may derive an advantage to himself applies as much to the owner of market tolls as to a railway or steamboat company. I see no ground on which the variation of tolls within the due limit can be said to be a wrong to anyone. This applies to all tolls, but, with regard to stallage, *Duke of Bedford v. Emmett* (14) is a direct authority for the variation when different prices are charged for different places in the market.

B It is said that these tolls cannot be stallage, because the defendants are not rated in respect of them; and it is no doubt true that franchise tolls, as distinguished from tolls in respect of the occupation of the land, are not rateable: *R. v. Casswell* (15); but I am not satisfied on the evidence that the defendants are not rated in respect of these tolls. The only evidence on the point is that Mr. Featherstone, the defendants' clerk, stated in cross-examination that the market and buildings were rated, but not the tolls; but in re-examination he explained that he meant the tolls were not separately rated. Their default or mistake cannot alter the character of the use and occupation of the ground, which is the fact on which the question depends. There can, I think, be no doubt that the 1½d. and 3d. are stallage, and the question as to the payment for baskets, which might give rise to more difficulty, does not arise, because there is no variation of the tolls in respect thereof on market and fair days.

D Finally, it was urged that the lease contained a covenant that the lessees would do nothing to prejudice the right of the lessors to receive the market tolls; and it was said that as these sums are unequal, some of them must be either too much or too little; if too much, there is danger to the charter; if too little, the lessor's right to receive the larger sums is prejudiced. It is sufficient for me to say that no such cause of action is pleaded in this case, and I cannot regard the breach of this covenant (if it is a breach, which I doubt) as any answer to the defendants' case. The action wholly fails, and must be dismissed with costs.

E Solicitors: *Richard Smith & Sons*, for *Marshalls & Bate*, East Retford; *Baker, Lees & Co.*

F [Reported by W. VALENTINE BALL, Esq., Barrister-at-Law.]

DAVIS v. TOWN PROPERTIES INVESTMENT CORPORATION, LTD.

[COURT OF APPEAL (Sir Richard Henn Collins, M.R., Romer and Cozens-Hardy, L.J.J.), March 12, 20, 1903]

[Reported [1903] 1 Ch. 797; 72 L.J.Ch. 389; 88 L.T. 665; 51 W.R. 417;
47 Sol. Jo. 383]

Landlord and Tenant—Lease—Covenant for quiet enjoyment—Assignment of reversion—Title to adjoining property acquired by assignee—Nuisance caused to lessee by user of adjoining property—Liability of assignee.

In 1897 the plaintiff became the lessee of premises, the lease containing a covenant for quiet enjoyment in the usual terms. In 1898 the defendant became the assignee of the reversion expectant upon the determination of plaintiffs' lease, and in 1900 he purchased a house adjoining the premises. He proceeded to pull this house down and erect new buildings on the site to a much greater height than the former house, which caused the plaintiff's chimneys to smoke so as materially to interfere with his enjoyment of his premises.

Held: the covenant did not apply, as it contained no special provisions enlarging the obligation of the lessor to respect or secure any other rights than those incident to the demised premises as they were at the time of the demise; the lessor had no interest in the adjoining premises at the time of the demise to the plaintiff and could not put any fetter on their enjoyment for the benefit of the plaintiff, and the rights which he undertook to respect were limited by the fact that the adjoining owner might build on the adjoining land and so interfere with the draught of the plaintiff's chimneys; even if the lessor's covenant extended to the acts complained of, the defendant had acquired the land under another title, and so far as the covenant was personal or collateral it would not run with the reversion and bind the assignee.

Tebb v. Cave (1) [1900] 1 Ch. 642; questioned.

Per COZENS-HARDY, L.J.: Section 11 of the Conveyancing Act, 1881, in no way alters the old law as to the class of covenants the burden of which will run with the reversion.

Notes. The Conveyancing Act, 1881, s. 11, has been repealed. See now The Law of Property Act, 1925, s. 142 (20 HALSBURY'S STATUTES (2nd Edn.), 734).

Referred: *Williams v. Gabriel*, [1906] 1 K.B. 155; *Jones v. Consolidated G Anthracite Collieries and Dynecor*, [1916] 1 K.B. 123; *Harmer v. Jumbil* (Nigerian Tin Areas, [1921] 1 Ch. 200.

As to covenant for quiet enjoyment, see 23 HALSBURY'S LAWS (3rd Edn.), 601-609; and for cases see 31 DIGEST (Repl.), 128 et seq.

Cases referred to:

- (1) *Tebb v. Cave*, [1900] 1 Ch. 642; 69 L.J.Ch. 282; 82 L.T. 115; 48 W.R. 318; 44 Sol. Jo. 262; 31 Digest (Repl.) 142, 2809.
- (2) *Leech v. Schweder* (1874), 9 Ch. App. 463; 43 L.J.Ch. 487; 30 L.T. 586; 38 J.P. 612; 22 W.R. 633, L.J.J.; 31 Digest (Repl.) 129, 2673.
- (3) *Booth v. Alcock* (1873), 8 Ch. App. 663; 42 L.J.Ch. 557; 29 L.T. 231; 37 J.P. 709; 21 W.R. 743, L.J.J.; 19 Digest (Repl.) 23, 95.
- (4) *Webb v. Bird* (1862), 13 C.B.N.S. 841; 31 L.J.C.P. 335; 8 Jur.N.S. 621; 143 E.R. 332, Ex. Ch.; 19 Digest (Repl.) 69, 384.
- (5) *Bygones v. Lefever* (1879), 4 C.P.D. 172; 48 L.J.Q.B. 380; 40 L.T. 579; 43 J.P. 478; 27 W.R. 612, C.A.; 19 Digest (Repl.) 67, 368.
- (6) *Chastey v. Ackland*, [1895] 2 Ch. 389; 64 L.J.Q.B. 523; 72 L.T. 845; 43 W.R. 627; 11 T.L.R. 460; 39 Sol. Jo. 582; 12 R. 420, C.A.; varied on appeal, [1897] A.C. 155; 66 L.J.Q.B. 518; 76 L.T. 430; 19 Digest (Repl.) 190, 1310.

- A (7) *Stewart & Doss* [1880], 5 C. Rep. 16a; 77 E.R. 72; 31 Digest (Repl.) 153, 2907.
- (8) *Harmon, Arnold & Co. v. Manchester*, [1891] 2 Q.B. 680; 61 L.J.Q.B. 102; 65 L.T. 481; 56 J.P. 69; 45 W.R. 102; 7 T.L.R. 688, C.A.; 31 Digest (Repl.) 137, 2754.

Also referred to in argument :

- B *Sanderson v. Barnold-upon-Tweed Corp.* (1884), 13 Q.B.D. 547; 53 L.J.Q.B. 459; 31 L.T. 495; 49 J.P. 6; 33 W.R. 67, C.A.; 31 Digest (Repl.) 141, 2801.
- Hobson v. Kildesal* (1889), 41 Ch.D. 88; 58 L.J.Ch. 392; 61 L.T. 60; 37 W.R. 545, C.A.; 31 Digest (Repl.) 130, 2676.
- Dennett v. Atherton* (1872), L.R. 7 Q.B. 316; 41 L.J.Q.B. 165; 20 W.R. 442, Ex.Ch.; 31 Digest (Repl.) 130, 2679.
- C *Manchester, Sheffield and Lincolnshire Rail. Co. v. Anderson*, [1898] 2 Ch. 394; 67 L.J.Ch. 568; 42 Sol. Jo. 609; *sum nom. Anderson v. Manchester, Sheffield and Lincolnshire Rail. Co.*, *Manchester, Sheffield and Lincolnshire Rail. Co. v. Anderson*, 78 L.T. 821; 14 T.L.R. 489, C.A.; 31 Digest (Repl.) 143, 2813.

Appeal from a decision of BYRNE, J.

- D On June 3, 1897, a lease was granted by R. G. W. Lee to the plaintiff, of offices on the ground floor of 119, Colmore Row, Birmingham, for a term of fourteen years from Sept. 29, 1897, at a yearly rent of £100. The lease contained a covenant for quiet enjoyment. On Sept. 28, 1898, the reversion in 119, Colmore Row, expectant upon the determination of the lease to the plaintiff, was assigned by Lee to the Town Properties Investment Corp., Ltd. In 1900 the company purchased from a Mr. Barber, who had no connection with Lee, a house next door to 119, Colmore Row, and proceeded to pull it down and erect new buildings on the site thereof to a much greater height than the old house. This caused the chimneys in the plaintiff's offices to smoke so as to materially interfere with the enjoyment of one of his rooms. The plaintiff brought an action for a declaration that the acts of the company constituted a breach of the covenant for quiet enjoyment, and for an injunction.
- F The form of the covenant was as follows :

"And the lessor doth hereby covenant with the lessee that the lessee paying the rent hereby reserved and observing the covenants and conditions herein contained and on the part of the lessee to be observed and performed, shall and may peaceably and quietly possess and enjoy the said offices during the said term without any eviction or disturbance by the lessor or any person lawfully or equitably claiming under him."

G By another clause in the lease it was provided that the expression "the lessor" should include Lee's executors, administrators, and assigns, where the context allowed.

H The action was heard by BYRNE, J., who gave judgment for the defendants, and the plaintiff appealed.

Norton, K.C., and *Clayton* for the plaintiff.

Levett, K.C., and *Austen-Cartmell* for the defendant.

Cur. adv. vult.

March 20, 1903. The following judgments were read.

I SIR RICHARD HENN COLLINS, M.R.—This is an appeal from BYRNE, J., who has decided in favour of the defendant, and, in my opinion, he was clearly right. It is only necessary to scrutinise the covenant on which the plaintiff sues to see that this must be so. It is the ordinary covenant against eviction or disturbance by the lessor or any person lawfully claiming under him. In other words, it contains no special provisions enlarging the obligation of the lessor to preserve or secure any other rights than those incident to the demised premises, such as they were at the time of the demise. Unless there are special words the

covenant for quiet enjoyment does not enlarge the grant. In dealing with a similar covenant in *Leech v. Schweder* (2) MELLISH, L.J., said (9 Ch. App. at p. 474):

"It is simply a covenant for quiet enjoyment; and I am clearly of opinion that it does not enlarge the right in any way. It is perfectly true that the lessee is 'to hold and enjoy without any suit, let, or hindrance.' But what is he to hold and enjoy? 'The premises.' What are the premises? The things previously demised and granted. The covenant does not enlarge what is previously granted, but an additional remedy is given, namely, an action for damages if the lessee cannot get, or is deprived of that which has been previously professed to be granted."

Here, then, the lessor had no interest in the adjoining premises at the time of the demise to the plaintiff. He could not and did not put any fetter on their enjoyment for the benefit of the plaintiff; and the rights of the plaintiff which the lessor undertook to respect were rights limited by the fact that the adjoining owner might, if so minded, build on the adjoining land, so as to interfere with the draught of the plaintiff's chimneys. Such an interference therefore, by raising the wall of the adjoining house is not, by whomsoever done, an interference with any right granted by the original demise.

It was on these principles that *Booth v. Alcock* (3) was decided by the same judges. There a lessor granted a lease of a house with its appurtenances, including lights. There was the usual covenant for quiet enjoyment. At the time of the demise the lessor was tenant for a term of the adjoining house. He afterwards bought the reversion upon his term, and after the expiration of the term began to build on the site of the adjoining house so as to interfere with the plaintiff's lights. It was held that the plaintiff could not complain. He had acquired no right to light passing over the adjoining house other than that which it was in the lessor's power to bestow, which was necessarily only during the duration of his interests therein, and consequently interference by the lessor himself with the lights passing over the site of the adjoining house after the term was ended involved no breach of the covenant for quiet enjoyment. He had not interfered with any right granted by the demise.

MELLISH, L.J., said (8 Ch. App. at p. 667): "General words in a grant must be restricted to that which the grantor had then power to grant, and will not extend to anything which he might subsequently acquire."

The case before us is a much stronger one for the defendants. They are not the original lessors, but assignees of the reversion on the lease and are liable only in that capacity, and the right said to be interfered with is not the well-known easement of light but something that is not the subject of grant or prescription: see *Webb v. Bird* (4); *Bryant v. Leferer* (5); *Chastey v. Acland* (6). Even if the lessor's covenant could be extended to cover user by him of land subsequently acquired, such an obligation could not pass with the assignment of the reversion to the defendants who acquired the adjoining land under another title, and have done what they have done under that other title and not as claiming under the lessor. So far as the covenant was personal or collateral it would not run with the reversion and bind the assignee. This was decided on the Grantees of Reversions Act, 1540, in *Spencer's Case* (7). The facts in this case take it outside *Tebb v. Cave* (1), which we are, therefore, relieved from considering. Neither is it necessary in this case to speculate on what must be taken to have been the intention of the parties in making the covenant, since here the grant speaks for itself, and the covenant is unambiguous. But if it were necessary to resort to such reasoning, the particular mischief and the sequence of events here was quite as unforeseen as in *Harrison, Ainslie & Co. v. Muncaster* (8). The appeal must be dismissed.

A ROMER, L.J.—I agree, and only wish to add that in the case of an alleged breach of the ordinary covenant for quiet enjoyment, where by the alleged breach neither the title to the land nor the possession of the land is affected, and what the lessee complains of is only an interruption of his enjoyment of the land by some act of the lessor, I doubt whether the act complained of is a breach of the covenant, unless it amounts to a direct interference with the enjoyment.

B I doubt, therefore, whether *Tebb v. Cure* (1) was rightly decided on the ground of breach of covenant, seeing that in that case the defendant was not directly interfering with the plaintiff's house. The plaintiff in that case had no right to any easement in respect of the current of air coming over the defendant's land, and the plaintiff's chimney smoked simply because that current of air was interfered with, and not otherwise by any act of the defendant.

C

COZENS-HARDY, L.J.—I entirely agree with the judgment of the Master of the Rolls. I share the doubt expressed by ROMER, L.J., whether the decision of BUCKLEY, J., in *Tebb v. Cure* (1) can be supported. Should the question raised in that case hereafter come before the Court of Appeal it will be necessary to consider carefully the true limits and extent of the covenant for quiet enjoyment. There is only one point which I desire to mention. Counsel for the plaintiff relied mainly upon s. 11 of the Conveyancing Act, 1881, and contended that the obligation of every covenant entered into by a lessor, who is owner in fee "with reference to the subject-matter of the lease," is now annexed to and goes with the reversionary estate, so that it may be taken advantage of and enforced against any person entitled to such reversionary estate. This covenant, he argued, has reference to the subject-matter of the lease. It binds the lessor throughout the term, and it also binds the defendants so long as the immediate reversion is vested in them. I cannot adopt this view. It seems to me that s. 11 in no way alters the old law as to the class of covenants the burden of which will run with the reversion.

E

Solicitors: *C. P. Eaton Taylor*; *F. A. K. Doyle*, for *S. T. Talbot*, Birmingham.

[*Reported by W. C. Biss, Esq., Barrister-at-Law.*]

J. AND J. CASH, LTD. v. CASH

COURT OF APPEAL (Vaughan Williams, Stirling and Cozens-Hardy, L.J.J.),
February 7, 8, 1902]

[Reported 86 L.T. 211; 50 W.R. 289; 18 T.L.R. 299; 46 Sol. Jo. 265;
19 R.P.C. 181]

*Passing Off—Trade name—Right of trader to carry on trade in own name—
Distinction of goods from those of company with similar name.*

In 1895 J. and J.C., an old firm at Coventry dealing in textile goods, was converted into a limited company, the plaintiffs in this action. The defendant, J. C., was one of the directors. He retired in 1898 and set up in the same class of business at Coventry as "J. C. & Co."

Held: the defendant could not be restrained from carrying on trade in his own name, but he must take reasonable precautions clearly to distinguish his goods from those of the plaintiffs and to prevent the public being misled into the belief that the business carried on by him was that of the plaintiffs.

Notes. Followed: *Rodgers v. Rodgers Simpson* (1906), 23 R.P.C. 297; Considered: *Dorman v. Meadows*, [1922] 2 Ch. 332; *Jaeger v. Jaeger Co.* (1927), 44 R.P.C. 437. Referred to: *Adrema, Ltd. v. Adrema G.m.b.H.*, [1958] R.P.C. 323.

As to classification of names, etc., in relation to passing off, see 38 HALSBURY'S LAWS (3rd Edn.) 619-626, and for cases see 43 DIGEST 264 et seq.

Cases referred to in argument:

Burgess v. Burgess (1853), 3 De G. M. & G. 896; 22 L.J.Ch. 675; 21 L.T.O.S. 53; 17 Jur. 292; 43 E.R. 351, L.J.J.; 43 Digest 286, 1155.

Tarton v. Tarton (1889), 42 Ch.D. 128; 58 L.J.Ch. 677; 61 L.T. 571; 54 J.P. 151; 38 W.R. 22; 5 T.L.R. 545, C.A.; 43 Digest 286, 1150.

Cellular Clothing Co. v. Marton and Murray, [1899] A.C. 326; 68 L.J.P.C. 72; 80 L.T. 809; 16 R.P.C. 397, H.L.; 43 Digest 276, 1090.

Croft v. Day (1843), 7 Beav. 84; 49 E.R. 994; 43 Digest 285, 1148.

Reddaway v. Banham, [1896] A.C. 199; 65 L.J.Q.B. 381; 74 L.T. 289; 44 W.R. 638; 12 T.L.R. 295; 13 R.P.C. 218, H.L.; 43 Digest 277, 1098.

Wotherspoon v. Currie (1872), L.R. 5 H.L. 508; 42 L.J.Ch. 130; 27 L.T. 393; 37 J.P. 294, H.L.; 43 Digest 273, 1073.

Massam v. Thorley's Cattle Food Co. (1880), 14 Ch.D. 748; 42 L.T. 851; 28 W.R. 966, C.A.; 43 Digest 266, 1034.

Powell v. Birmingham Vinegar Brewery Co., [1896] 2 Ch. 54; 65 L.J.Ch. 563; 74 L.T. 509, C.A.; affirmed sub nom. *Birmingham Vinegar Brewery Co. v. Powell*, [1897] A.C. 710; 66 L.J.Ch. 763; 76 L.T. 792; sub nom. *Powell v. Birmingham Vinegar Brewery Co., Ltd.*, 14 R.P.C. 720, H.L.; 43 Digest 274, 1076.

Montgomery v. Thompson, [1891] A.C. 217; 60 L.J.Ch. 757; 64 L.T. 748; 55 J.P. 756; 8 R.P.C. 361, H.L.; 43 Digest 273, 1075.

Appeal from decision of KEKEWICH, J.

On April 4, 1895, the plaintiffs, J. and J. Cash, Ltd., were incorporated under the Companies Acts when they purchased the business and goodwill of the old-established firm of J. and J. Cash of Coventry, together with the trade names in connection therewith, and in particular the exclusive right to use the names of "J. and J. Cash" and "Cash's frillings." It was provided that the vendors should be the first directors of the company, and should not be allowed to resign for five years after the incorporation of the company, except by consent; and that none of the vendors should, while director, without consent of the other directors, either solely or jointly with any other person or company, directly or indirectly,

- A** party on or he concerned in the business of manufacturers of ribbons, frillings, tapes, or other textile goods, or permit his name to be used in connection therewith, except as a member or director of the plaintiff company. By a deed of Dec. 1, 1898, the plaintiff company released the defendant from his engagement not to resign his directorship, which he accordingly resigned. On May 11, 1899, the defendant formed a limited company called "Joseph Cash, Ltd.," for the purpose of carrying
- B** on at Coventry the business of manufacturer of ribbons, frillings, tapes, and other textile goods. The plaintiff company protested, and the defendant gave an undertaking not to proceed with his company. Subsequently the defendant commenced to carry on business at Coventry of the same kind as the plaintiff company's business, under the name of "Joseph Cash & Co." The plaintiff company thereupon brought this action alleging that the result of the defendant's trading in a business
- C** similar to theirs, "under the style of Joseph Cash & Co.," was to create confusion between the businesses, and to represent that his business and goods were, and cause them to be mistaken for, the business and goods of the plaintiff company and asked for damages and costs. The defendant denied that he was carrying on his business in the manner alleged by the plaintiff company, and asserted his right to carry on his business in his own name. On May 25, 1900, the trial of
- D** the action took place before KEKEWICH, J., who held that it was impossible for the defendant trading under his own name of Cash to sell "frillings" without their being known as "Cash's frillings"; that that term having been proved to mean goods of the plaintiffs, to sell "Cash's frillings" was to represent such frillings to be the goods of the plaintiffs, and that the defendant must therefore be restrained from selling frillings under the name of Cash. An interim injunction was granted.
- E** From this decision the defendant appealed.

Hugo Young, K.C., and O. L. Clare for the defendant.

Sargant (Warrington, K.C., with him) for the plaintiffs.

- THE COURT having intimated that they were of opinion that the injunction granted
- F** by KEKEWICH, J., went too far, the following order was settled after some discussion: "This court doth order that the defendant, Joseph Cash, be restrained from selling any frillings or woven names or initials not manufactured by the plaintiffs, as 'Cash's frillings' or 'Cash's woven names or initials,' and from carrying on the business of a manufacturer or seller of frillings or woven names or initials under the name of 'Joseph Cash & Co.' while not in partnership with any other person;
- G** and from carrying on any such business either in the name of 'Cash,' or under any style in which the name 'Cash' appears, without taking reasonable precautions to clearly distinguish the business carried on, and the frillings and woven names and initials manufactured or sold, by the defendant from the business carried on, and the frillings and woven names and initials manufactured, by the plaintiffs; and
- H** from carrying on any such business under any name or in any manner so as to mislead or deceive the public into the belief that the business of the defendant or the frillings or woven names or initials manufactured or sold by him is the business of, or goods manufactured by, the plaintiffs, or that the defendant is carrying on the business formerly carried on at Coventry by Messrs. J. and J. Cash, the vendors to and predecessors in business of the plaintiffs.

- I** **VAUGHAN WILLIAMS, L.J.**—Now that the form of injunction has been agreed upon, I wish to say a few words upon the case. It may be that a trade is of such a nature that the products of that trade, when used in connection with a particular trade name, have become almost indissolubly connected with the business carried on by a certain manufacturer who has created that particular business. But still, even though that may be so, and even though the nature of the trade must be taken into consideration in an action for an injunction, there never has been a case yet where an order has been made restraining a man altogether from carrying on a particular trade in his own name. Every decision up to the present

time has been limited to restraining him from carrying on a trade which has thus become so identified with the business of another person, without taking such steps as any honest man would wish to take to prevent his goods being confounded with the other person's goods which have become so identified with the name. In my judgment, under the circumstances, the order of *KEKEWICH, J.*, went too far, and the order which we now make goes as far as it is possible to go. The order of the learned judge will, therefore, be varied in the manner stated.

STIRLING and **COZENS-HARDY, L.JJ.**, concurred.

Solicitors: *Maddocks & Colson*, for *H. Maddocks*, Coventry; *Mackrell, Maton, Godlee & Quincey*, for *Wragge & Co.*, Birmingham.

[*Reported by W. C. Biss, Esq., Barrister-at-Law.*]

AERATORS, LTD. v. TOLLITT

[CHANCERY DIVISION (Farwell, J.), May 29, 1902]

[Reported [1902] 2 Ch. 319; 71 L.J.Ch. 727; 86 L.T. 651; 53 W.R. 584; 18 T.L.R. 637; 46 Sol. Jo. 451; 10 Mans. 95; 19 R.P.C. 418]

Passing Off—Trade name—Company—New company proposed to be registered under similar name.

The plaintiffs, Aerators, Ltd., were a company established for the purpose of working a patent for the instantaneous automatic aeration of liquids. The defendants were the signatories to the memorandum and articles of association of a proposed new company to be known as Automatic Aerator Patents, Ltd. The plaintiff company sought to restrain the defendants from registering that title, and rested their case on the fact that the word "Aerator" or "Aerators" was generally known in connection with the plaintiff company, which possessed the principle of instantaneous automatic aeration, and that the adoption of the word "Aerator" by the defendants was calculated to deceive. The defendants contended that the system they proposed to adopt was entirely different from that of the plaintiffs, and could not be confused with their patent.

Held: there was no evidence of probability of deception, and the action was, therefore, an attempt to monopolise a word in ordinary use, and must be dismissed with costs.

Notes. Section 20 of the Companies Act, 1862, has been repealed. See now the Companies Act, 1948, s. 18 (2), 3 HALSBURY'S STATUTES (2nd Edn.) 474.

Approved: *Randall v. Bradley* (1907), 24 R.P.C. 773. Explained: *Facsimile Letter Printing Co. v. Facsimile Typewriting Co.* (1912), 29 R.P.C. 557. Referred to: *British Vacuum Cleaner Co. v. New Vacuum Cleaner Co.*, [1907] 2 Ch. 312; *Kingston, Miller & Co. v. Kingston*, [1912] 1 Ch. 575; *Harrods v. Harrod* (1924), 40 T.L.R. 195; *Office Cleaning Services, Ltd. v. Westminster Window and General Cleaners, Ltd.* (1946), 174 L.T. 229.

As to classification of names, etc., in relation to passing off, see 38 HALSBURY'S LAWS (3rd Edn.) 619-626, and as to name and change of name of companies, see 6 HALSBURY'S LAWS (3rd Edn.) 132-135. For cases see 9 DIGEST (Repl.) 58-69.

A Cases referred to :

(1) *North Cheshire and Manchester Brewery Co. v. Manchester Brewery Co.*, [1890] A.C. 83; 68 L.J.Ch. 74; 79 L.T. 645; 15 T.L.R. 110, H.L.; 9 Digest (Repl.) 60, 206.

(2) *Kidlington v. Brakom*, [1896] A.C. 119; 65 L.J.Q.B. 381; 74 L.T. 289; 44 W.R. 638; 12 T.L.R. 295; 13 R.P.C. 218, H.L.; 43 Digest 277, 1098.

B

(3) *Cellular Clothing Co. v. Marton and Murray*, [1899] A.C. 326; 68 L.J.P.C. 72; 80 L.T. 809; 16 R.P.C. 397, H.L.; 43 Digest 276, 1090.

(4) *S. Chivers & Sons v. S. Chivers & Co., Ltd.* (1900), 17 R.P.C. 420; 43 Digest 266, 1037.

C Injunction to restrain registration of a company with a similar name.

The plaintiffs in this case were a company established for the purpose of working a certain patent for the instantaneous automatic aeration of liquids, and the defendants were the signatories to the memorandum and articles of association of a proposed new company to be known as "Automatic Aerator Patents, Ltd." About May 1, 1902, it came to the knowledge of the directors of the plaintiff company that a new company was being formed under that title, and they accordingly prepared a memorandum and articles of association of a new company under the title of Automatic Aerators, Ltd., which was tendered to the Registrar of Joint Stock Companies but he refused to register the name as the defendants' papers had then been lodged with him. The plaintiff company commenced this action, in which they claimed an injunction to restrain the defendants from registering a company under the title of "Automatic Aerator Patents, Ltd." or in any other name so nearly resembling the name of the plaintiff company as to be calculated to deceive.

E

Notice of motion having been given for an injunction in the action, the motion was ordered to be heard as an action with witnesses and without pleadings. The plaintiffs' case was that they had been carrying on business since February, 1900, and the word "Aerator" or "Aerators" was thoroughly well known over the greater part of the world as a company possessing the principle of instantaneous, automatic

F

aeration by the name of "sparklets." For the defendants it was urged that the system of aeration they proposed to adopt was entirely different from that of the plaintiffs. The plaintiff company's system was essentially a portable one, whilst that of the defendants was more adapted to public houses and places of business where a large amount of aeration was required. The objection to the defendants' title was practically confined to the word "Aerator" on the ground that that word had been identified over the greater part of the world with the business carried on by the plaintiffs.

G

Jenkins, K.C., and *J. G. Wood* for the motion.

Upjohn, K.C., and *George Lawrence* for the defendants.

H

FARWELL, J.—The plaintiffs "Aerators Ltd." claim an injunction to restrain the defendants from registering a company under the name of "Automatic Aerator Patents, Ltd." on the ground that such name so nearly resembles the plaintiffs' name as to be calculated to deceive within the meaning of s. 20 of the Companies Act, 1862.

I

The plaintiffs were incorporated in the year 1900, and took over the business of a similar company of the same name incorporated in 1896. Their business consists in the sale of "sparklets"; this word is their trade mark, they have largely advertised "sparklets". I understand them to be a small apparatus containing carbonic acid gas by means of which contents of bottles are aerated. One of the merits claimed for them is their portability and their applicability to a small quantity of liquid. The defendants propose that the new company to be formed by them shall acquire patents for the aeration of liquids contained in tanks or cylinders of large size, and shall either work such patents themselves, or shall

form subsidiary companies for the development of such patents. Section 20 of the Companies Act enacts that no company shall be registered under a name identical with that by which a subsisting company is already registered or so nearly resembling the same to be calculated to deceive, except in certain cases which are not material to the present case. A company has, therefore, a greater right than an individual in respect of names that are identical. For John Smith cannot prevent other persons of the same name from using their own name; but John Smith, Ltd. can prevent the registration of any other company as John Smith, Ltd. It does not follow that the legislature has intended to give companies any greater rights than individuals possess in respect of names which are not identical, but only similar, and it has been held that "calculated to deceive" does not point to intentional fraud, but it is a question of fact in each case whether the name of the new company is so similar to that of the old company as to induce the belief that the two companies are identical.

In considering this question it is material to ascertain (i) what business has been or is intended to be carried on by the old company, and what is intended to be carried on by the new one; (ii) what sort of name has been adopted by the old company. As to the first point, it is not sufficient for an existing company to point to clauses in its memorandum which will enable it to extend its operations to numerous classes of trade unless it can satisfy the court that it either has carried on or really proposes within a limited time to carry on such particular business. It cannot be enough in these days when the objects of a company are usually limited only by the number of letters in the alphabet and extend to every form of business whether connected or not with the principal object to show that the intended new company includes some similar objects. It is necessary to see whether the real objects of the second company are similar. As to the second point, I think that it is necessary to consider the nature of the title registered by the old company. The plaintiffs have argued that the House of Lords in *North Cheshire and Manchester Brewery Co. v. Manchester Brewery Co.* (1) decided that in no case can a new company take the whole title of an existing company whatever additional words they may add to it, and they accordingly claim a monopoly in the word "Aerators."

In my opinion, this is not correct. The House found as a fact in the case before them that the adoption by the defendant company of the whole of the plaintiff's title, although added to other words, was "calculated to deceive," but it appears impossible to say as a general proposition that a company can by registering a single word, whatever its nature, remove that word from the English language so far as regards its use in the title of subsequent companies. In the present case the plaintiffs have taken a word which aptly and rightly describes a machine for producing a particular result. The word has been in common use in the English language for at least thirty years; it is to be found in dictionaries such as the *CENTURY* (1889), *MURRAY'S DICTIONARY* (1891), and in the *DICTIONARY OF MECHANICS* (1876), to which one of the witnesses referred. It would obviously lead to the greatest inconvenience if any company could prevent all other companies from using as part of their title the one word in the English language which aptly describes the articles they manufacture and deal in, or the name of the individual associated for years with a particular firm; for example, suppose a company had registered the name of "Motors, Ltd.," and another the name of "Automobiles, Ltd.," it appears impossible to say that they thereby prevent all other companies from using as part of their title these two words, which, so far as I know, are the only words which represent the fashionable locomotives of the day, although their sole trade was the manufacture and sale of motors and automobiles. Or again to take an instance of names, it would be absurd to suppose that *Barelay & Co., Ltd.*, the well-known bankers, could restrain *Barelay, Perkins & Co., Ltd.*, the well-known brewers, from registering as such on the ground that they take the whole of the title of the banking firm.

A In considering whether a name is calculated to deceive it is material to see what that name is, and, if the name is simply a word in ordinary use representing a machine or an article of commerce, the probability of deception is out of all proportion less than it would be in the case of an invented or fancy word, or even the name of a place; the latter may well point to a particular company, the former certainly points *prima facie* to the machine or article, and can only under very exceptional circumstances, and by a long course of usage point to the company, and rather than the thing itself. English-speaking people know "aerators," "motors," and the like as machines, not as companies, and the presence of such a word in the title of a company suggests that. A company deals in these machines, not that it has anything to do with a company of that name; if the plaintiffs assert the contrary it is for them to prove it, and the principles applied by the House of Lords in *Reddaway v. Banham* (2), explained as they were in *Cellular Clothing Co. v. Maston and Murray* (3), to which I had occasion to refer in *S. Chivers & Sons v. S. Chivers & Co., Ltd.* (4), apply as much to the name of a company under s. 20 as to the "camel's hair belting," the "cellular clothing," and the name of "Chivers" in these cases. I will read the passage from LORD SHAND's speech ([1899] A.C. at p. 340) that I read in *Chivers' Case* (4):

D "I shall only say that it no doubt shows it is possible where a descriptive name has been used to prove that so general, I should rather say so universal, has been the use of it as to give it a secondary meaning, and so to confer on the person who has so used it a right to its exclusive use, or, at all events, to such a use that others employing it must qualify their use by some distinguishing characteristic. But I have always thought that it should be made almost impossible for anyone to obtain the exclusive right to the use of a word or term which is in ordinary use in our language, and which is descriptive only, and, indeed, were it not for the decision in *Reddaway's Case* (2), I should say this should be made altogether impossible."

F The plaintiffs further argued that the Act of Parliament was intended for the protection of the public, and that there must necessarily be some confusion in the minds of the public if the whole of their title is taken, but I would point out that the plaintiffs cannot assert in their own names the right of the public—that is for the Attorney-General; they can only assert their own right as members of the public if and so far as they can show special damage to themselves; but the choice of their own name rests with themselves; the registrar has no discretion to refuse to register any name put forward on behalf of a company; and if by reason of their adoption of one single word in common use they run the risk of suffering injury, they have only themselves to thank, and they can no more acquire a monopoly in the use of the word "aerators," by adopting that as their title than an individual can acquire a monopoly in his own name or the name of the article he manufactures.

G As in the latter case it is necessary for the individual to show not merely that the defendant is trading under his name or making the article the name of which he has adopted, but must also show that the name or article is exclusively identified with his own manufacture so as to have acquired a secondary meaning. So a company must also show that the name which *prima facie* refers to a number of persons or articles is in fact identified solely with the plaintiff before they can satisfy the court that its use as part of another company's name is calculated to deceive. A name is not necessarily calculated to deceive because it is similar; it must depend in great measure upon what the nature of the name is, and if it merely represents the name of the article supplied by the company it would require very strong evidence to show that such name had lost its primary meaning, and had become identified with the plaintiff company. In the case before me, as indeed in all cases under s. 20, the action is a *quia timet* action, and evidence of actual mistake is, therefore, impossible, but there is in fact no evidence to my mind of any probability of deception. The plaintiffs' trade mark is sparklets,

and the name is put prominently forward on their shop fronts, invoices, bill-heads, and letter paper. The articles in which they deal are very different from those to be manufactured under the defendants' patents. When the plaintiffs ascertained that the defendants intended to register the Automatic Aerator Patents, Ltd. they themselves applied to register another company under the same or all but the same title, and were only prevented from so doing because the defendants' application was first lodged. The plaintiffs' managing director stated, that although their chief object was to be beforehand with the defendants, and prevent the registration of the name, yet that they had intended that the new company should carry on business under this title, and that if proper care was taken they did not anticipate that any confusion would arise. Yet this new company of the plaintiffs was intended to deal in articles similar to those sold by the plaintiffs, and if due care can prevent confusion in such a case, *a fortiori* can it do so when the articles dealt in are so different as those of the plaintiffs and defendants. In my opinion, the plaintiffs' action is an attempt to monopolise for the purposes of nomenclature one word in ordinary use in the English language, and fails, and must be dismissed with costs.

Solicitors: *Wainwright & Co.; Hind & Robinson.*

[*Reported by A. W. CHASTER, Esq., Barrister-at-Law.*]

MILES v. HUTCHINGS

[KING'S BENCH DIVISION (Lord Alverstone, C.J., Wills and Channell, JJ.), July 8, 1903]

[Reported [1903] 2 K.B. 714; 72 L.J.K.B. 775; 89 L.T. 420; 52 W.R. 284; 20 Cox, C.C. 555]

Animal—Malicious killing or wounding—Bonâ fide belief that necessary to shoot dog to protect property—Malicious Damage Act, 1861 (24 & 25 Vict., c. 97) s. 41.

A person who has a bonâ fide belief that it is necessary to shoot a dog in order to protect his master's property is not guilty of an offence under s. 41 of the Malicious Damage Act, 1861.

Notes. Considered: *Barnard v. Evans*, [1925] All E.R. Rep. 231; *Cotterill v. Penn*, [1935] All E.R. Rep. 204; *Gott v. Measures*, [1947] 2 All E.R. 609; *Cresswell v. Sirl*, [1947] 2 All E.R. 730. Referred to: *Nye v. Niblett*, [1916-17] All E.R. Rep. 520.

As to malicious damage and injury to animals, see 10 HALSBURY'S LAWS (3rd Edn.) 887; and for cases, see 15 DIGEST (Repl.) 1223-1224. For the Malicious Damage Act, 1861, see 5 HALSBURY'S STATUTES (2nd Edn.) 750.

Cases referred to:

(1) *Daniel v. Jones* (1877), 2 C.P.D. 351; 41 J.P. 712; 15 Digest (Repl.) 1223, 12,492.

A Also referred to in argument :

Smith v. Williams (1892), 56 J.P. 840; 9 T.L.R. 9; 37 Sol. J. 11, D.C.; 15 Digest (Repl.) 1223, 12,493.

Amstrang v. Mitchell (1903), 88 L.T. 870; 67 J.P. 329; 19 T.L.R. 525; 20 Cox, C.C. 497, D.C.; 15 Digest (Repl.) 1223, 12,494.

B Case Stated by justices for the county of Southampton.

An information preferred by the respondent, Frederick Hutchings, against the appellant, John Miles, alleged that the appellant did unlawfully and maliciously kill a dog the property of Robert Peel Sheldon. At the petty sessions held at Winchester on April 25, 1903, the appellant was found guilty of the offence and was ordered to pay £2 damages and 9s. costs. It was proved, and the justices found

C as facts, that the appellant, who was a gamekeeper, seeing a white fox terrier near an aviary in which some pheasants were confined for breeding purposes, fired two shots at the dog; that the dog died from the effects of such shots; and that such dog was then wearing a collar having the name and address of the owner of the dog legibly engraved thereon. It was stated on behalf of the appellant that the pheasants had been very much troubled by stray dogs, and that some pheasants
D in consequence had died or escaped; that notice boards had been put up warning people against letting their dogs stray near the aviary; that various people owning dogs near thereto had been personally asked to keep them away; that Mr. Sheldon, the owner of the dog shot, had not been so warned, as the appellant was not aware that he kept a dog; that the appellant shot at this dog with the intention of driving it away and not with the intention of killing it, and that he thought it was necessary
E to shoot in order to protect his master's property. It was further contended on the part of the appellant that it was lawful to kill any animal so found straying, and that the shooting of the dog was in law neither unlawful nor malicious so as to bring the act complained of within the provisions of the statute. The justices, however, were of opinion that the evidence given before them brought the case within the operation of the statute; that the appellant had no right to shoot the
F dog; and that, if any damage had been done by the dog, there were other ways of proceeding without shooting the dog. They therefore convicted the appellant.

The questions of law arising for the opinion of the court were: (i) Whether the case came within the provisions of s. 41 of the Malicious Damage Act, 1861; (ii) whether the appellant was legally convicted of the offence charged against him.

G By the Malicious Damage Act, 1861, s. 41 :

"Whosoever shall unlawfully and maliciously kill, maim, or wound any dog, bird, beast, or other animal not being cattle, but being either the subject of larceny at common law or being ordinarily kept in a state of confinement or for any domestic purpose, shall on conviction thereof before a justice of the peace, at the discretion of the justice, be liable to imprisonment or a fine
H not exceeding £20."

Cancellor for the appellant.

No counsel appeared for the respondent.

LORD ALVERSTONE, C.J.—This case is one of considerable importance, **I** more especially as there has been lately more than one case of the kind before the court, and it is therefore desirable that it should be more fully stated. It must go back to the magistrates as they have not found sufficient to enable the court to deal with the case. They say that it was stated on behalf of the appellant that he shot at the dog with the intention, not of killing it, but of merely driving it away; but then, when they come to deal with the case, they simply say that the appellant had no right to shoot the dog. They do not seem to have dealt at all with the point that there was a bona fide belief on the part of the appellant that in order to protect his master's property it was necessary to shoot the dog.

In one of the cases cited by counsel for the appellant—*Daniel v. Jones* (1)—LORD COLERIDGE, C.J., said (2 C.P.D. at p. 353) that s. 41 pointed to

“a wicked crime, the unlawfully and maliciously killing or maiming the animals referred to simply for the purpose of indulging a cruel disposition, and not an act done under an impression, right or wrong, that the party is justified in protecting his premises from a trespass by such means.”

Here the act was said to be done by the appellant for the protection of the property of his master; and, while feeling all respect for LORD COLERIDGE, I cannot help expressing by opinion that the real test is whether the appellant was bona fide doing an act which he thought was necessary for the protection of his master's property. If that was so, the allegation that he was acting unlawfully and with malice would be negatived. If, however, the act was unnecessary and not for the protection of his master's property, the conclusion to be drawn might be different. It is therefore important that the facts should be clearly stated on this point.

WILLS, J.—I am of the same opinion. I also agree with the judgment of LORD COLERIDGE in the case before him, but as a general proposition I think the statement in his judgment as to the right of a person to do anything of this kind without bringing himself within the section is too broad. I do not think it is enough to do it under the impression, right or wrong, that he is justified in protecting his premises for a trespass by such means, if the man knew that something else could be done which would be effectual for the protecting of his property without doing injury to the animal.

CHANNELL, J. I agree that the case must go back to the justices. I think the malicious intention is negatived if the man wrongly but honestly thought it was necessary to shoot the dog in order to drive it away.

Case remitted.

Solicitors: *Prior, Church & Adams*, for *Percy W. Snelling*, Winchester.

[*Reported by J. A. STRAHAN, Esq., Barrister-at-Law.*]

A

HARDWICK v. LANE

KING'S BENCH DIVISION (Lord Alverstone, C.J., Lawrance and Kennedy, JJ.),
December 8, 1903]

B [Reported 1904] 1 K.B. 204; 73 L.J.K.B. 96; 89 L.T. 630; 68 J.P. 94; 52 W.R. 591;
20 T.L.R. 87; 48 Sol. Jo. 133; 20 Cox, C.C. 575]

*Gaming—Lottery—Sweepstakes—Profit to organiser—Gaming Act, 1802 (42 Geo. 3,
c. 119), s. 2.*

C

A publican arranged at his beerhouse a sweepstakes on a coming horse race. There were sixty-one entries, each person paying 6d. to the publican. Three prizes of 15s., 10s., and 5s. respectively, were offered by the publican on the result of the race, and one of the conditions of the sweepstakes was that the person who won the first prize should pay the publican at the beerhouse for two gallons of beer to be consumed in his house, the person who won the second prize should pay for one gallon, and the person who won the third prize should pay for two quarts of beer. The winners of the prizes were ascertained by a drawing at the beerhouse, and the prizes were given by the publican to the winners, less the price of the beer which was deducted by him from the prizes.

D

Held: the sweepstakes was an illegal lottery under s. 2 of the Gaming Act, 1802, and the publican ought to be convicted under that section.

E

Notes. The Gaming Act, 1802, has been repealed. Section 21 of the Betting and Lotteries Act, 1934 (10 HALSBURY'S STATUTES (2nd Edn.) 801) establishes as a general rule that all lotteries are unlawful. As to exceptions to this general rule, see the Gaming Act, 1934, ss. 23, 24; the Small Lotteries and Gaming Act, 1956, s. 1; and the Betting and Gaming Act, 1960, s. 21.

As to lotteries in general, see 18 HALSBURY'S LAWS (3rd Edn.) 238 et seq.; and
F for cases see 25 DIGEST 452 et seq.

Cases referred to:

(1) *Taylor v. Smetten* (1883), 11 Q.B.D. 207; 52 L.J.M.C. 101; 48 J.P. 36, D.C.;
25 Digest 455, 443.

G

(2) *R. v. Hobbs*, [1898] 2 Q.B. 647; 67 L.J.Q.B. 928; 79 L.T. 160; 62 J.P. 551;
47 W.R. 79; 14 T.L.R. 573; 42 Sol. Jo. 717; 19 Cox, C.C. 154, C.C.R.; 25
Digest 447, 401.

Also referred to in argument:

Allport v. Nutt (1845), 1 C.B. 974; 3 Dow. & L. 233; 14 L.J.C.P. 272; 5 L.T.O.S.
308; 9 Jur. 900; 135 E.R. 826; 25 Digest 454, 435.

H

Gatty v. Field (1846), 9 Q.B. 431; 15 L.J.Q.B. 408; 10 Jur. 980; 115 E.R. 1337;
25 Digest 406, 100.

Case Stated by justices of the peace for the Upton-on-Severn petty sessional division of the county of Worcester.

I

An information preferred by the appellant, an inspector in the police force, alleged that the respondent on Mar. 27, 1903, unlawfully and knowingly did suffer to be exercised, kept open, and exposed to be played and drawn by numbers and figures and by other contrivances a certain lottery usually called a sweepstakes not then authorised by Parliament—to wit, a lottery for money prizes in respect of horses who would win or run second or third to the winner in a certain steeplechase—in his house, contrary to the form of the statute in such case made and provided. The facts as proved on behalf of the appellant, or admitted by the respondent, were as follows. The respondent arranged at his beerhouse, on Mar. 24, 1903, and three following days, for a sweepstakes to be held in connection with the Grand National Steeplechase, which took place on Mar. 27, 1903. There were

sixty-one entries for the sweepstakes, and each person who entered for the same paid sixpence to the respondent at his beerhouse. There were three prizes offered by the respondent dependent on the result of the steeplechase—namely, a first prize of 15s., a second prize of 10s., and a third prize of 5s. One of the conditions of the sweepstakes was that the person who won the first prize was to pay the respondent for two gallons of beer to be consumed in his house; that the winner of the second prize was to pay for one gallon, and the winner of the third prize was to pay for two quarts. The names of the various persons who entered for the sweepstakes were put down in a list, with numbers opposite to their names, and, after the winners had been ascertained by a drawing which took place at the respondent's beerhouse, the prizes of 15s., 10s., and 5s. were paid respectively to the winners thereof by the respondent, less the price of two gallons, one gallon, and two quarts of beer respectively as before mentioned, the price of the beer being deducted by the respondent from the prizes.

It was contended on behalf of the respondent that the respondent had not committed any criminal offence, as it had never been held that a sweepstakes was an illegal lottery. It was submitted on behalf of the appellant that a sweepstakes was a lottery within the meaning of s. 2 of the Gaming Act, 1802, whereby every person offending against that section was to be deemed a rogue and vagabond and punishable accordingly, and that the respondent could be convicted summarily because by the Vagrancy Act, 1824, s. 21, it was enacted that wherever by any Act of Parliament then in force any person was directed to be punished as a rogue and vagabond for any offence specified in such Act and not provided for by the Vagrancy Act, 1824, such person should be punished under the provisions of the Vagrancy Act, 1824, and the appellant relied on *Taylor v. Smetten* (1) as showing that a person holding a lottery could be convicted summarily as a rogue and vagabond. He also relied on the dictum of LORD RUSSELL, C.J., in *R. v. Hobbs* (2) in support of his contention that a sweepstakes was an illegal lottery. On the part of the respondent it was contended: (i) That *R. v. Hobbs* (2) had decided that a sweepstakes was not an offence under the Betting Act, 1853; (ii) that the holding of a sweepstakes did not come within the provisions of the Gaming Act, 1802; (iii) that, it being admitted by the prosecution that the information and summons were laid under the Gaming Act, 1802, no conviction could ensue on this summons; (iv) that the Court for the Consideration of Crown Cases Reserved, in *R. v. Hobbs*, did not hold that a sweepstakes was an illegal lottery, but expressed an opinion, by way of obiter dictum, that it was a lottery, without expressing any opinion as to the question under which or any Act such lottery could be considered a criminal offence.

On May 7, 1903, after hearing the evidence and the arguments on behalf of the appellant and the respondent, the justices were in doubt whether a sweepstakes was an illegal lottery punishable on summary conviction, and they thought it safer to dismiss the summons, and to state a Case for the opinion of the court. The question of law for the opinion of the court was whether a sweepstakes was an illegal lottery, punishable on summary conviction, and whether the respondent ought to have been convicted.

By the Gaming Act, 1802, s. 2:

"No person or persons whatsoever shall publicly or privately keep any office or place to exercise, keep open, show, or expose to be played, drawn, or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever, any game or lottery called a little goe, or any other lottery whatsoever not authorised by Parliament, or shall knowingly suffer to be exercised, kept open, shown, or exposed to be played, drawn, or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever, any such game or lottery, in his or her house, room, or place, upon pain of

- A *inferring, for every such offence, the sum of five hundred pounds, to be recovered in the Court of Exchequer, at the suit of His Majesty's Attorney-General, and to be to the use of His Majesty, his heirs and successors; and every person so offending shall be deemed a rogue and vagabond within the true intent and meaning of an Act passed in the seventeenth year of the reign of His late Majesty King George the Second, intituled 'An Act to amend and make more effectual the laws relating to rogues, vagabonds, and other idle and disorderly persons, and to houses of correction,' and shall be punishable as such rogue and vagabond accordingly."*
- B

Arory, K.C. (Stutfield with him) for the appellant.

J. B. Matthews for the respondent.

- C **LORD ALVERSTONE, C.J.** We are clearly of opinion that upon the authorities this sweepstakes was a lottery pure and simple within the meaning of the section and nothing else. If it did not so appear upon the authorities, we should so lay it down. If we should have to deal with this question again, I should have no doubt that the inducement to get the people to come to the publichouse was quite sufficient, apart from the payment of the 6d. and the buying of the beer, to make this a lottery. Here the publican had a benefit. It was only because the magistrates had a doubt that they did not convict; but I think that they should have had no doubt. The appeal must, therefore, be allowed, and the Case must go back to the magistrates to convict.
- D

- E **LAWRANCE, J.**—I agree.

KENNEDY, J.—I agree.

Case remitted to the justices to convict.

Solicitors: *Blundell, Gordon & Co., for S. Thornely, Worcester; Ernest W. Moore, Tewkesbury.*

[*Reported by W. W. ORR, Esq., Barrister-at-Law.*]

HOUGHTON v. HOUGHTON

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Francis Jeune, P.), May 4, 18, 1903]

[Reported [1903] P. 150; 72 L.J.P. 31; 89 L.T. 76; 52 W.R. 272; 19 T.L.R. 505; 47 Sol. Jo. 548]

Divorce—Condonation—Revival of condoned adultery by subsequent desertion.

Desertion operates to revive condoned adultery notwithstanding the fact that the Matrimonial Causes Act, 1857 [now the Matrimonial Causes Act, 1950], which makes desertion a matrimonial offence for certain specific purposes, does not specifically provide so.

The court may order that a decree nisi shall date from the first day of the hearing if an adjournment has taken place for the purpose of further argument.

Per SIR FRANCIS JEUNE, P.: "When the law speaks of condonation and revival, it is meant that the offence is condoned on the condition that there shall be in future a proper compliance with matrimonial decencies and duties, and when a person goes back to live with his or her guilty spouse, he or she goes back on that condition alone."

Notes. The Matrimonial Causes Act, 1857, has been repealed. See now the Matrimonial Causes Act, 1950 (29 HALSBURY'S STATUTES (2nd Edn.) 388).

Followed: *Copsey v. Copsey and Erney*, [1904-7] All E.R. Rep. 106. Applied: *Price v. Price and Brown*, [1911] P. 201. Considered: *Richardson v. Richardson*, [1949] 2 All E.R. 330. Referred to: *Cramp v. Cramp and Freeman*, [1920] All E.R. Rep. 164; *Ainley v. Ainley*, [1945] 1 All E.R. 265; *Beard v. Beard*, [1945] 2 All E.R. 306; *Roe v. Roe*, [1956] 3 All E.R. 478.

As to condonation in general, see 12 HALSBURY'S LAWS (3rd Edn.) 302 et seq.; and for cases see 27 DIGEST (Repl.) 395 et seq.

Cases referred to:

- (1) *Cargill v. Cargill* (1858), 1 Sw. & Tr. 235; 27 L.J.P. & M. 69; 31 L.T.O.S. 332; 4 Jur.N.S. 764; 6 W.R. 870; 164 E.R. 708; 27 Digest (Repl.) 349, 3293.
- (2) *Binney v. Binney* (1893), 69 L.T. 498; 27 Digest (Repl.) 420, 3500.
- (3) *Dent v. Dent* (1865), 4 Sw. & Tr. 105; 34 L.J.P.M. & A. 118; 13 L.T. 252; 164 E.R. 1455; 27 Digest (Repl.) 399, 3283.
- (4) *Cooke v. Cooke* (1863), 3 Sw. & Tr. 126, 246; 32 L.J.P.M. & A. 81, 154; 8 L.T. 26, 644; 9 Jur.N.S. 309, 754; 11 W.R. 957; 164 E.R. 1221; 27 Digest (Repl.) 396, 3267.

Also referred to in argument:

- Palmer v. Palmer* (1860), 2 Sw. & Tr. 61; 29 L.J.P.M. & A. 124; 2 L.T. 363; 8 W.R. 504; 164 E.R. 914; 27 Digest (Repl.) 396, 3266.
- Newsome v. Newsome* (1871), L.R. 2 P. & D. 306; 40 L.J. P. & M. 71; 25 L.T. 204; 19 W.R. 1039; 27 Digest (Repl.) 410, 3387.
- Moore v. Moore*, [1892] P. 382; 62 L.J.P. 10; 67; L.T. 520; 8 T.L.R. 704; 1 R. 488; 27 Digest (Repl.) 437, 3667.
- Rogers v. Rogers*, [1894] P. 161; 63 L.J.P. 97; 70 L.T. 699; 6 R. 650; 27 Digest (Repl.) 590, 5508.

Petition of Mrs. Mary Jane Houghton for the dissolution of her marriage with David John Houghton on the ground of respondent's incestuous adultery and desertion.

The parties were married in 1887, and lived together at Dalston and several other places. There was one child living, the issue of the marriage, a boy of the age of fourteen. The wife alleged in her petition that the respondent had committed incestuous adultery with the petitioner's sister on certain dates in 1888 and 1889

A and had deserted her on May 3, 1894. The wife had condoned the incestuous adultery after 1889. The husband had left this country in May, 1894, ostensibly for the sake of his health, and had promised to return in eighteen months. He corresponded with his wife, but did not return to England until 1902. He remained here for a short time only, but did not see either his wife or his child, although he wrote to the wife's mother, expressing a desire to see the child. On July 9, 1901, the husband had obtained, in a circuit court in the city of Detroit, Michigan, a decree dissolving his marriage with his wife, and declaring the parties free from the obligation thereof, on the ground that the wife had been guilty of several acts of desertion charged by him in his bill of complaint.

B The wife for the wife, asked the court to pronounce a decree nisi. It was true that the adultery had been condoned, but the subsequent desertion of the husband revived the adultery. C Condonation was only conditional forgiveness.

SIR FRANCIS JEUNE, P.—*Cargill v. Cargill* (1) does not seem to be an authority for your proposition and *Binney v. Binney* (2) is not a precedent for the present one, for the condoned and the revived adultery was with the same woman. My difficulty is with regard to the Matrimonial Causes Act, 1857, which makes D desertion a matrimonial offence for certain specific purposes only, and the revival of an antecedent matrimonial offence which has since been condoned is not one of them. I think the case ought to be looked into more fully, and afterwards restored to the list for further argument.

May 18, 1903. *Newson* renewed his application for a decree nisi.

E SIR FRANCIS JEUNE, P.—I think I can accede to the arguments which have been brought before the court, and I am anxious to do so if I possibly can. The principle is quite clear. When the law speaks of condonation and revival, it is meant that the offence is condoned on the condition that there shall be in future a proper compliance with matrimonial decencies and duties, and when a person goes back to live with his or her guilty spouse, he or she goes back on that condition alone. F Desertion is as serious a matrimonial offence as can be imagined, since it may possibly result in the breaking up of the matrimonial home. The difficulty I have had to contend with has been the statute. The Act of 1857 [repealed] made desertion a matrimonial offence for the first time, and for certain specified causes only. The revival of previous misconduct was not one of them. In holding as I am doing G in this present case, I feel that I am doing something which is not mentioned in the Act itself, but I wish to take as broad a view as I can of the matter. Condonation, not only in previous cases under the old Ecclesiastical law, which would apply in suits for judicial separation as well as in suits for dissolution of marriage, is to be, in the terms of the Act, an answer to the suit, and in the old sense of the term—namely, conditional on future good conduct.

H So far, then, the Act of 1857 [repealed] proceeded by bringing in the term condonation in the old technical meaning of the law, with the condition that is attached to it—namely, that there shall be good conduct in the future. Consequently, one is entitled to look not only at acts of matrimonial misconduct as they were recognised before the Act, but also to look at the law as it exists. Desertion is a matrimonial offence of a most serious kind, and one would ignore the effect of condonation—that is, its conditional forgiveness—if one held that cruelty and adultery would revive a previous matrimonial offence, and that desertion would not. There is no decision I precisely in point, but the language used by the Judge Ordinary in *Dent v. Dent* (3) appears to me to be wide enough, on the whole, to allow me to come to that conclusion. There it is said :

"Now the rule of law is that all condonation is conditional, and the condition is in future you shall treat me as a husband ought to treat his wife; and if you hereafter break your matrimonial obligation, and are guilty of adultery, or of cruelty, the condoned offence is revived."

That language would seem to bring in the case of desertion equally with cruelty and adultery. *Dent v. Dent* (3) was decided in 1865, some years after the passing of the Matrimonial Causes Act, 1857. I look upon the decision in *Cooke v. Cooke* (4) in very much the same light. That case was decided in 1863, and the judgment of the full court contains this passage (3 Sw. & Tr. at p. 247) :

“The wife appears to have been willing to condone, provided she was treated by her husband in the manner she had a right to expect if she returned to live and cohabit with him. She was not, upon her return to him, treated by him in the manner she ought to have been . . . and upon non-compliance with that which was a condition of condonation the offences said to have been condoned were revived.”

I cannot see why the same principle should not be made to apply to desertion equally with adultery and cruelty. It rests upon the meaning which is to be attached to condonation, and, if condonation is taken as meaning conditional forgiveness, I think that I am perfectly justified in holding that the Act of 1857 [repealed] is quite as efficacious in reviving condoned adultery by subsequent desertion as by subsequent cruelty and adultery. I come to this conclusion on principle, for I do not find it contradicted by any judicial authority, and to some extent supported by it. There will be a decree nisi with costs, and the petitioner will have the custody of the child of the marriage. Although the decree is not pronounced until today, I will order that the petitioner may apply to have the decree made absolute in six months from May 4, on the day on which the petition was first heard.

Solicitors : *Spencer, Chapman & Co.*

[*Reported by J. A. SLATER, Esq., Barrister-at-Law.*]

WATNEY, COMBE, REID & CO. v. EWART AND OTHERS

House of Lords (The Earl of Halsbury, L.C., Lord Macnaghten, Lord Davey, Lord Brampton, Lord Robertson and Lord Lindley), December 17, 1901, March 13, 1902]

[Reported [1902] A.C. 187; 71 L.J.K.B. 433; 86 L.T. 242; 18 T.L.R. 426; 9 Mans. 281]

Landlord and Tenant—Lease—Right of re-entry—Liquidation of lessee company—Liquidation for purposes of amalgamation—Lessor's right to re-enter—Forfeiture of lease—"Bankruptcy"—"Liquidation by company"—Conveyancing Act, 1881 (44 & 45 Vict., c. 41), s. 14.

A lease reserved to the lessors a right of re-entry if the lessees or their assigns, being a company, should go into liquidation whether compulsory or voluntary. The lessees, a company which was then solvent, went into liquidation solely for the purpose of amalgamating with two other companies.

Held: (i) the liquidation entitled the lessors to exercise their right of re-entry; (ii) the liquidation was a "bankruptcy" under the Conveyancing Act, 1881, s. 14 (6), and so no relief against forfeiture could be granted to the lessees.

Decision of the Court of Appeal, sub nom. *Ewart v. Fryer*, [1901] 1 Ch. 499, affirmed.

Horsey Estate, Ltd. v. Steiger (1), [1899] 2 Q.B. 79, applied.

Notes. The Conveyancing Act, 1881, s. 14, has been replaced by the Law of Property Act, 1925, s. 146. Section 146 (10) allows in certain cases relief against forfeiture on the bankruptcy of a lessee, and by s. 205 (1) (i) "bankruptcy" includes liquidation by arrangement and also in relation to a corporation means the winding up thereof.

Referred to: *Hurd v. Whaley*, [1918-19] All E.R. Rep. 812; *Civil Service Co-operative Society, Ltd. v. McGrigor's Trustee*, [1923] All E.R. Rep. 595; *Factors (Sundries), Ltd. v. Miller*, [1952] 2 All E.R. 630; *Chelsea Investment Co. v. Marche*, [1955] 1 All E.R. 195.

As to forfeiture, see generally 23 HALSBURY'S LAWS (3rd Edn.) 665-683, and for cases see 31 DIGEST (Repl.) 549-550. For the Law of Property Act, 1925, ss. 146 and 205 (1) (i), see 20 HALSBURY'S STATUTES (2nd Edn.) 739-750 and 832 respectively.

Cases referred to:

(1) *Horsey Estate, Ltd. v. Steiger*, [1898] 2 Q.B. 259; 67 L.J.Q.B. 747; 79 L.T. 116; 14 T.L.R. 407; reversed [1899] 2 Q.B. 79; 68 L.J.Q.B. 743; 80 L.T. 857; 47 W.R. 644; 15 T.L.R. 367, C.A.; 31 Digest (Repl.) 541, 6639.

(2) *Re Milan Tramways Co., Ex parte Theys* (1884), 25 Ch.D. 587; 53 L.J.Ch. 1008; 50 L.T. 545; 32 W.R. 601, C.A.; 10 Digest (Repl.) 989, 6807.

(3) *Re London, Hamburg and Continental Exchange Bank, Emmerson's Case* (1866), L.R. 2 Eq. 231; 35 L.J.Ch. 652; 14 L.T. 457; 12 Jur.N.S. 494; 14 W.R. 785; on appeal, 1 Ch. App. 433; 36 L.J.Ch. 177; 14 L.T. 746; 12 Jur.N.S. 592; 14 W.R. 905, L.J.J.; 9 Digest (Repl.) 410, 2648.

Also referred to in argument:

Lock v. Pearce, [1893] 2 Ch. 271; 62 L.J.Ch. 582; 68 L.T. 569; 41 W.R. 369; 9 T.L.R. 363; 37 Sol. 372; 2 R. 403, C.A.; 31 Digest (Repl.) 539, 6626.

Skinners' Co. v. Knight, [1891] 2 Q.B. 542; 60 L.J.Q.B. 629; 65 L.T. 240; 56 J.P. 36; 40 W.R. 57; 7 T.L.R. 712, C.A.; 31 Digest (Repl.) 547, 6635.

Appeal from a decision of the Court of Appeal (RIGBY, VAUGHAN WILLIAMS, and ROMER, L.J.J.), reported sub nom. *Ewart v. Fryer*, [1901] 1 Ch. 499, affirming a decision of KEKEWICH, J., reported 82 L.T. 415.

By a lease dated Oct. 26, 1896, the respondents demised to Combe & Co., Ltd., brewers, a public-house for the term of thirty years from Dec. 25, 1895. The lease contained the following proviso :

"Provided that if and whenever the lessees or their assigns, being a company, shall enter into liquidation, whether compulsory or voluntary, then and in any such case it shall be lawful for, but not obligatory upon, the lessor, or any person or persons duly authorised by him in that behalf, into or upon the said demised premises, or any part thereof in the name of the whole, to re-enter, and the said premises peaceably to hold and enjoy thenceforth as if these presents had not been made, without prejudice to any right of action or remedy of the lessor in respect of any antecedent breach of any of the covenants by the lessees hereinbefore contained."

The lessees were not to assign without the lessor's consent, such consent not to be arbitrarily withheld. Combe & Co., Ltd., granted an under-lease of the premises to Frederick James Fryer for 29½ years from June 24, 1896, at a premium of £8,000 and at an annual rent of £800 reducible to £300 so long as he bought his beer from them.

In June, 1898, the appellants company was formed for the purpose of amalgamating Combe & Co., Ltd., and two other brewery companies, and in Dec. 1898, Combe & Co., Ltd., and these other companies passed resolutions for their voluntary winding-up, it being conceded that at the time all the amalgamating companies were solvent and that their assets greatly exceeded their liabilities and the amounts of their capitals.

Although the resolutions were advertised in the LONDON GAZETTE, the respondents did not in fact know of the liquidation until June, 1899, when the liquidator of Combe & Co., Ltd., assigned the lease to the appellants without the consent of the respondents.

The respondents commenced this action against the appellants and against Fryer for possession for breach of the condition relating to liquidation.

It was contended before KEKEWICH, J., that any right of forfeiture had been waived by the acceptance of rent after the advertisements had appeared in the LONDON GAZETTE, but he rejected this argument on the facts and held that the respondents were entitled to forfeit the lease, and that as the liquidation was a "bankruptcy" under the Conveyancing Act, 1881, s. 14 (6), no relief against forfeiture could be granted to the appellants; he granted Fryer relief against forfeiture of the sub-lease, but as the public-house ceased to be tied to the appellants because of the forfeiture of the head-lease, the rent payable by Fryer was increased above £300 per annum.

The appellants and Fryer both appealed to the Court of Appeal who dismissed their appeal. The appellants and Fryer then appealed to the House of Lords but Fryer afterwards withdrew from the appeal, which was argued only between the appellants, as assigns of the lease, and the respondents as lessors.

Warmington, K.C., and J. D. Davenport for the appellants.

Neville, K.C., T. R. Warrington, K.C., and Methold for the respondents.

Their Lordships took time for consideration.

Mar. 13, 1902. The following opinions were read :

THE EARL OF HALSBURY, L.C.—It is not denied that the lessees, being a company, went into voluntary liquidation, and the first point raised is that if the liquidation was for the purpose of reconstruction, and not by reason of insolvency, the words above quoted do not apply. It is asserted, and admitted by the respondents, that here the liquidation was simply to reconstruct, and was not in any degree due to insolvency. I am, however, unable to see that this makes any difference. I am not entitled to introduce words into the instrument which the

A parties have not put there. This was a voluntary liquidation, and, whatever the motives might be for entering into it, the lessees did the very thing which by plain and unambiguous language was agreed to give a right of re-entry. But for the able and persistent argument of the learned counsel, I should have thought the language of the instrument too plain to be susceptible of argument.

B The other point, to my mind, is equally plain. It is, speaking broadly, whether the rule concerning forfeiture contained in s. 14 of the Conveyancing Act, 1881, has any application at all to the forfeiture, which, as I have said, was very plainly incurred by the liquidation. That depends on the interpretation which is to be given to the words of sub-s. (6) of the code in question, which sub-section expressly enacts that the section, which, as I have said, embraces a code for relief against forfeiture, is not to extend to a condition of forfeiture upon the bankruptcy of the lessee.

C But for the artificial and extended meaning given to the word "bankruptcy," this would not be such a condition; but it seems to me that when one reads that extended meaning given to the word "bankruptcy," one cannot doubt that liquidation by a company comes within it. The words are these: "Bankruptcy includes liquidation by arrangement," which, I think, does not refer to liquidation by a company in this sense. But then come the words "and any other act or proceeding in law having under any Act for the time being in force effects or results similar to those in bankruptcy." What could be more apt to describe the *cessio bonorum* which in effect takes place, and the payment by some constituted authority of the creditors of the trading concern, and the distribution of its surplus property to its members, so that, except for the purposes of winding-up, it ceases to be a trading concern at all? This was decided in 1899 by the Court of Appeal (*Horsey Estate, Ltd. v. Steiger* (1)), and, I think, rightly decided; and, if so, we are remitted to the first point, whether a forfeiture has been incurred.

E Other questions have been raised with which I do not propose to deal, inasmuch as what I have said disposes of this appeal, subject to one question of fact, which I only notice to say that, so far as that question of fact—namely, "waiver"—is concerned, I am entirely satisfied with the judgment upon it by KEKEWICH, J., and the Court of Appeal, and under these circumstances I move your Lordships to dismiss this appeal with costs.

F **LORD MACNAGHTEN.**—In *Horsey Estate, Ltd. v. Steiger* (1) it was held by RUSSELL, C.J., and A. L. SMITH and HENN COLLINS, L.JJ., that a similar proviso in the lease then under consideration was "a condition for forfeiture on the bankruptcy of the lessee" within the meaning of s. 14 (6), of the Conveyancing Act, 1881, a condition to which, as sub-s. (6) itself declares, s. 14 "does not extend." Then comes the question, Was the Court of Appeal right in *Steiger's Case* (1)? Is the liquidation of a limited company "bankruptcy" within the meaning of that expression as used in the Act of 1881? I think it is. In the Act of 1881, if I am not mistaken, the expression "bankruptcy" occurs only in the interpretation clause, s. 2, and in sub-s. (6) of s. 14. Section 2 (xv.), is in these words:

"Bankruptcy includes liquidation by arrangement, and any other act or proceeding in law having under any Act for the time being in force effects or results similar to those of bankruptcy, and bankrupt has a meaning corresponding with that of bankruptcy."

I The expression "liquidation by arrangement" refers, of course, to liquidation by arrangement under the Bankruptcy Act, 1869, which was then in force. But it seems to me that the words which follow plainly include the liquidation of a limited company under the Companies Act, 1862. Having regard to the Companies Act, 1862, and s. 10 of the Supreme Court of Judicature Act, 1875, it is impossible to deny that the liquidation of a limited company has "effects or results similar to those of bankruptcy," and it is to be borne in mind that it has been held that the provisions of the Judicature Act, s. 10, must be treated as applicable to every

company in liquidation unless and until it is shown that its assets are in fact sufficient for the payment of its liabilities and the costs of winding-up: (*Re Milan Tramways Co., Ex parte Theys* (2)). And, therefore, where the condition of forfeiture is the entering into liquidation, the result of the liquidation is immaterial. This conclusion is sufficient to dispose of the present case. Section 2 of the Conveyancing Act, 1892, which qualifies sub-s. (6) of s. 14 of the Act of 1881, and applied in *Steiger's Case* (1), does not apply to any lease of a public-house.

There were two other points suggested on behalf of the appellants—(i) that without proof of actual notice publication in the GAZETTE is notice to all the world, as LORD ROMILLY, M.R., seems to have held, and that therefore receipt of rent after the winding-up resolution appeared in the GAZETTE was a waiver of the forfeiture (*Emmerson's Case* (3)); and (ii) that liquidation is only voluntary liquidation, within the meaning of that expression as used in the lease to Combe & Co., when it is entered into unwillingly owing to the pressure of pecuniary embarrassment. These points were only faintly argued, and hardly require serious consideration. I agree that the appeal must be dismissed with costs.

LORD DAVEY. I have had an opportunity of reading and considering the opinions which have already been delivered, and that which has been prepared by LORD LINDLEY, and, as they express my own view, I do not trouble your Lordships by delivering an opinion of my own. I only desire to add that no distinction is made in the Companies Acts between one voluntary liquidation and another. In my opinion it is not legitimate, for the purpose of construing either a lease or the Conveyancing Act, to inquire into the motives or objects which actuated the members of the company in entering into a voluntary liquidation.

LORD BRAMPTON and **LORD ROBERTSON** concurred.

LORD LINDLEY.—Counsel, in his argument for the appellants, endeavoured to establish—(i) that there was no forfeiture; (ii) that, if there was, it had been waived; (iii) that s. 14, cl. 1, of the Conveyancing Act, 1881, applied to the case if there was a forfeiture which had not been waived; (iv) that cl. 6 of s. 14 of the same Act did not apply. Counsel for the appellants did not ask the House to vary the terms on which relief had been granted by KEKEWICH, J., and the Court of Appeal under s. 4 of the Conveyancing Act, 1892; he based his case on the broad ground that the lessors were not entitled to eject their tenant.

The first question turns entirely on the construction of the proviso for re-entry, and this is too plain to present any difficulty. The lessees were a company, and they did enter into voluntary liquidation by passing a resolution to wind-up voluntarily. What their object was is quite immaterial; it was in this case with a view to reconstruction; it might have been for some other purpose. Whatever the object of entering into liquidation was, it is impossible to deny that one of the events on which the lessors stipulated for a right to re-enter indisputably happened. Similar language had to be construed in *Horsey Estate, Ltd. v. Steiger* (1), and both HAWKINS, J. (who tried the case) and the Court of Appeal held that the language was too plain to be got over.

The second question turns on the acceptance of rent after the forfeiture and on the correspondence which took place between the solicitors of the parties. This part of the case was very carefully gone into by KEKEWICH, J., and he came to the conclusion that the plaintiffs had no such knowledge of what had taken place as to establish a waiver of their rights. The Court of Appeal took the same view, and on this point did not think it necessary to hear the other side. It is unnecessary to do more than say that, having attentively followed counsel's observations on this question of waiver, I see no reason to think that the conclusion thus arrived at is erroneous; I think that it was right.

A The third question does not appear to have been raised in the courts below. At all events it is not noticed in the judgments as printed; it is a very important one, but it is unnecessary to decide it. I, therefore, refrain from saying more about it. But I do not wish to be understood as assenting to the argument addressed to us upon it.

B This brings me to the fourth question argued by counsel for the appellants—viz., whether a voluntary winding-up of a solvent company with a view to a reconstruction is equivalent to a bankruptcy as defined by s. 2 (xv.) of the Conveyancing Act, 1881. Unquestionably there are some very marked distinctions between bankruptcy (even as defined in s. 2, cl. xv., of the Conveyancing Act, 1881) and a winding-up, whether compulsory or voluntary. The main distinctions are as follows: (i) In bankruptcy (and also in liquidations by arrangement under the Bankruptcy Act, 1869) the property of the debtor is divested from him and vested in a trustee for his creditors, whilst in a winding-up the property of the company is not divested from it; (ii) the doctrine of the relation of the title of a trustee in bankruptcy back to the act of bankruptcy does not apply to a winding-up; (iii) the doctrine of reputed ownership does not apply to a winding-up; (iv) a trustee in bankruptcy can disclaim onerous property, including a disadvantageous lease, but in a winding-up there is no similar power to disclaim. This is a very important practical difference when considering the position of lessors and lessees.

C But, notwithstanding these differences, the Court of Appeal held, in *Horsey Estate, Ltd. v. Steiger* (1) that a voluntary winding-up was included in the word bankruptcy as used in the Conveyancing Act, 1881. There is much to be said in favour of this view; s. 2, cl. xv., of that Act gives a very wide meaning to the word bankruptcy; it includes "any proceeding in law having under any Act for the time being in force effects or results similar to those in bankruptcy." Winding-up has many effects or results similar to those in bankruptcy. The following are the most important and striking: (i) The cessation of the business of the company, except with a view to wind-up its affairs, and the appointment of persons whose duty it is to take the control of all the company's assets and realise them so far as may be necessary to pay the debts and liabilities of the company; (ii) the debts provable, those entitled to preference, the rules as to set-off, as to secured debts, as to fraudulent preference; (iii) the fundamental doctrine that all creditors (with a few exceptions) are to be paid *pari passu* out of the assets. Further, it must not be forgotten that formerly trading companies could be made bankrupt (7 & 8 Vict., c. 111), and that by degrees the administration of the estates of companies being wound up has been made more and more similar to the administration of estates in bankruptcy. Still, I am impressed by the argument of counsel for the appellants that a voluntary winding-up of a solvent company with a view to reconstruction was not a bankruptcy within the meaning of the Conveyancing Act, 1881. I am not, however, prepared to say that the Court of Appeal was wrong in deciding that it was, and I accept their solution of what I think a very doubtful question.

H Even if, therefore, counsel was right in contending that this case came within s. 14, cl. 1, he was wrong in contending that it did not fall within cl. 6 of that section. As the property leased is a public-house, it is unnecessary to consider the effect of s. 2, cl. 2, of the Conveyancing Act, 1892, for its application to this case is excluded by s. 3 of the same Act. The appeal ought to be dismissed with costs.

I

Appeal dismissed.

Solicitors: *Bischoff, Bompas, Dodgson, Cox & Bompas; Bolton & Co.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

RHYMNEY RAIL. CO. v. BRECON AND MERTHYR TYDFIL RAIL. CO.

[COURT OF APPEAL (Lord Alverstone, M.R., Rigby and Henn Collins, L.J.J.), July 3, 4, 20, 1900]

[Reported 69 L.J.Ch. 813; 83 L.T. 111; 49 W.R. 116; 16 T.L.R. 517;
44 Sol. Jo. 643]

Contract—Repudiation—Right of other party to treat contract as at an end—Inference to be drawn from conduct of party in breach—Breach of part of contract—Breach going to root of contract—Discharge of contract.

If there is a distinct refusal by one party to a contract to be bound by its terms in the future, the other party may treat the contract as at an end. Short of such a refusal, the true principle to be deduced from all the cases is that the court must ascertain whether the conduct of the party who is breaking the contract is such that the other party is entitled to conclude that the former no longer intends to be bound by its provisions. When one party fails to perform part of a contract, the other can only treat it as discharged if the breach goes to the root of the contract.

Withers v. Reynolds (1) (1831), 2 B. & Ad. 882, *Hochster v. De La Tour* (2) (1853), 2 E. & B. 678, and *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (3) (1884), 9 App. Cas. 434, at pp. 442-4, applied.

Notes. Referred to: *Re Rubel Bronze and Metal Co. and Vos*, 1918] 1 K.B. 315.

As to anticipatory breach of contract, see 8 HALSBURY'S LAWS (3rd Edn.) 202-205, and for cases see 12 DIGEST (Repl.) 377-379.

Cases referred to:

- (1) *Withers v. Reynolds* (1831), 2 B. & Ad. 882; 1 L.J.K.B. 30; 109 E.R. 1370; 39 Digest 423, 554.
- (2) *Hochster v. De La Tour* (1853), 2 E. & B. 678; 22 L.J.Q.B. 455; 22 L.T.O.S. 171; 17 Jur. 972; 1 W.R. 469; 1 C.L.R. 846; 118 E.R. 922; 12 Digest (Repl.) 377, 2960.
- (3) *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884), 9 App. Cas. 434; 53 L.J.Q.B. 497; 51 L.T. 637; 32 W.R. 989, H.L.; 12 Digest (Repl.) 378, 2966.
- (4) *Johnstone v. Milling* (1886), 16 Q.B.D. 460; 55 L.J.Q.B. 162; 54 L.T. 629; 50 J.P. 694; 34 W.R. 238; 2 T.L.R. 249, C.A.; 12 Digest (Repl.) 377, 2961.

Also referred to in argument:

- Clough v. London and North Western Rail. Co.* (1871), L.R. 7 Exch. 26; 41 L.J.Ex. 17; 25 L.T. 708; 20 W.R. 189, Ex. Ch.; 39 Digest 533, 1449.
- Freeth v. Burr* (1874), L.R. 9 C.P. 208; 43 L.J.C.P. 91; 29 L.T. 773; 22 W.R. 370; 12 Digest (Repl.) 378, 2970.
- Surplice v. Farnsworth* (1844), 7 Man. & G. 576; 8 Scott. N.R. 307; 13 L.J.C.P. 215; 3 L.T.O.S. 181; 8 Jur. 760; 135 E.R. 232; 31 Digest (Repl.) 347, 4785.
- Bradford v. Williams* (1872), L.R. 7 Exch. 259; 41 L.J.Ex. 164; 26 L.T. 641; 20 W.R. 782; 1 Asp.M.L.C. 313; 12 Digest (Repl.) 383, 2995.
- Panama and South Pacific Telegraph Co. v. India Rubber, Gutta Percha and Telegraph Works Co.* (1875), 10 Ch. App. 515; 45 L.J.Ch. 121; 32 L.T. 517; 23 W.R. 583, L.J.J.; 7 Digest (Repl.) 358, 87.

Appeal from a decision of NORTH, J., in an action brought by the plaintiffs, Rhymney Rail. Co., against the defendants, Brecon and Merthyr Tydfil Rail. Co., in which the plaintiffs claimed a declaration that they were entitled to treat an agree-

A ment made in 1864 between them and the defendants as determined and the defendants counterclaimed for an account under one of the terms of the contract on the footing that the agreement was still binding.

The following statement of facts is extracted from the judgment of the Court of Appeal.—Prior to the year 1864 the plaintiffs were in possession of a line of railway running from the neighbourhood of Rhymney, on the west side of the Rhymney Valley, to Caerphilly, with a branch to the west to join the Taff Vale at the Walnut Tree junction. The defendants were in possession of a line of railway running also from the neighbourhood of Rhymney down the east side of the Rhymney Valley to Newport by way of Maehen, with a branch from Maehen to Caerphilly, and also of a line running northwards from a point called Deri through Dowlais to Brecon and Merthyr. The plaintiffs had a branch from Bargoed to join the defendants' line at Deri. This was substantially the position of the two companies in the year 1864. In the session of that year both companies were in Parliament desiring to construct certain railways, and particularly a railway from Caerphilly to Cardiff; the Brecon Company also proposing to construct a line from a point on their then existing line due north of Caerphilly to Caerphilly. Under these circumstances the heads of the agreement of 1864 were made out and confirmed by s. 23 of the Rhymney Railway Act, 1864. The main provisions of that agreement may be summarised as follows.—Clauses 1, 2, 3, and 4 contemplated the construction of various lines by the Brecon and Rhymney Railway Companies respectively to the north of Rhymney, and a line from a point on the Brecon Company's line to Caerphilly. None of these lines have been constructed. Clauses 5 and 6 provided that the defendants should withdraw their scheme for constructing a line from Caerphilly to Cardiff, and that the plaintiffs should give the defendants running powers for through traffic from the terminus of the defendants' Caerphilly branch to the plaintiff company's station at Adam Street, Cardiff. Certain restrictions were imposed upon the user of these running powers. By cl. 7 an alteration was made in the position of a junction which had been authorised between the defendants' line and the line of the plaintiffs, and the defendants were given running powers over the substituted junction and portion of the line of the Rhymney Company to Bargoed to a point to which they had already running powers communicating by way of Deri with their own line. Clauses 8 and 9 are not material to be stated; but by cl. 10 the plaintiffs gave the defendants running powers over their line between the end of the defendants' Caerphilly branch and Walnut Tree junction subject to certain restrictions as to the traffic for which these running powers should be used. Clause 11 was in the following terms:

"After the opening of the Caerphilly and Cardiff line, the receipts arising from the traffic carried on between the New Tredegar works and Cardiff shall as between New Tredegar and Caerphilly be divided in equal proportions between the two companies after the deduction of 30 per cent. for working expenses, the mileage proportion between Caerphilly and Cardiff to belong exclusively to the Rhymney Company, the Brecon Company being allowed working expenses on the portion carried by them."

Clause 17, on which the plaintiffs founded their claim, was as follows:

"Except as herein mentioned neither company shall either directly or indirectly seek any new line from one side of the valley to the other to take away the traffic of either company."

In pursuance of the agreement embodied in the heads of agreement the defendants withdrew their Bill for making an independent line from Caerphilly to Cardiff, the line of the plaintiffs was constructed, and the new junction near Bargoed station referred to in cl. 7 was also carried out. The works referred to in cls. 1, 2, and 4 were never constructed. At the time of the making of this agreement the connection across the valley between the plaintiffs' railway and the New Tredegar works already

existed. Both parties acted upon the agreement down to the year 1898, when the circumstances giving rise to this action arose. Some further communications were made from the Rhymney line on the western side of the valley to some new collieries opened up on the eastern, but it was agreed that these lines crossing the valley were constructed independently by landowners, and the case was conducted throughout on the basis that from 1864 down to 1898 both parties had abstained from any breach of the agreement. In 1896 the Barry Rail. Co., which had about the year 1885 established docks and connecting railways running north from Barry, a port a few miles to the westward of Cardiff, obtained powers to construct a railway to join the line of the plaintiffs at Penrhos, and in the session of 1898 the Barry Company were again in Parliament proposing to join the line of the defendants on the eastern side of the valley near Bedwas with another junction from the new projected line to the line of the Rhymney Company at Aber. The Bill was introduced in the House of Commons, but prior to its consideration before a private Bill committee in that House the heads of agreement were made between the defendants and the Barry Company which formed the foundation of the alleged breach by the defendants in respect of which the plaintiffs founded their right to treat the agreement of 1864 as at an end. These heads of agreement were dated April 26, 1898. Under them the defendants agreed to withdraw two railways which they were seeking power to construct for the purpose of making connection between their own line and that of the plaintiffs in the neighbourhood of Caerphilly, and the Barry Company granted to the defendant company running powers over the Barry Company's proposed new line from its junction with the defendants' railway near Bedwas to its junction with the plaintiffs' railway near Aber. The agreement contained certain terms as to how the traffic to Barry was to be carried on which are not material for the purpose of the present question.

The Barry Company's Bill, which was introduced in the House of Commons, was opposed in committee on preamble by the plaintiffs, their opposition being founded upon, among other grounds, the rights which they had obtained under the agreement of 1864. Upon the preamble being declared proved the plaintiffs did not appear upon clauses in the House of Commons. The chairman of the committee, in their absence, inserted cl. 9 of the Barry Railway Act, 1898, apparently for the protection of the plaintiffs. The terms of the heads of agreement between the Brecon and the Barry Companies, dated April 26, were made known to the plaintiffs in the course of the passage of the Barry Company's Bill through the committee of the House of Commons. Upon the Barry Company's Bill being, in the ordinary course, referred to a committee of the House of Lords, the plaintiffs again opposed the preamble, and, upon the preamble being passed, proposed an amendment to cl. 9 of the Bill which would have enlarged its scope so as to have brought within it protective provisions traffic from other places besides the New Tredegar works.

NORTH, J., on Dec. 19, 1899, made a declaration that the notice given by the plaintiffs on July 7, 1898, validly determined the agreement of 1864, and dismissed the counter-claim. The defendants appealed.

Baggallay, Q.C., and E. C. Macnaghten, Q.C. (with them C. H. Sargant) for the defendants.

Cripps, Q.C., and Harold Bompas (with them Ernest Moon and E. S. Robertson) for the plaintiffs.

Cur. adv. vult. I

July 20, 1900. **LORD ALVERSTONE, M.R.**, read the judgment of the court in which he stated the facts and continued: We have referred to these proceedings in Parliament because they were made the ground of a contention raised by the defendants that the plaintiffs had so acted as to preclude them from now saying that they could treat the agreement as determined. In July, 1898, the plaintiff company informed the defendant company that they considered that the agreement of 1864 had been broken, and would be treated by them as determined, and in November

A If the same year they gave formal notice in writing to the defendant company determining the said agreement. Upon the case coming before NORTH, J., he held that the action of the defendants in connection with the proposed new line of the Barry Company in the session of 1898 was not only a breach of art. 17, but was such a breach as entitled the plaintiffs to treat the agreement thenceforward as at an end.

B Before considering the main questions which arise in the action it would be well to dispose of the preliminary point which was raised by the defendants—viz., that the action of the plaintiffs during the passage of the Barry Company's Bill through Parliament was such as to preclude them from treating the agreement as determined. We are clearly of opinion that nothing was done by the plaintiff company to prevent them from raising the case which they brought before NORTH, J. The action which C they took in Parliament was action against the Barry Company in order to protect their rights, and, on failing to obtain such protection as they considered sufficient, they were, in our opinion, clearly entitled to resort to any further remedies which were open to them as between themselves and the defendants.

The main questions, however, which arise for decision are the following: It is D contended on behalf of the defendants that their action in the year 1898 did not constitute a breach of cl. 17 of the agreement of 1864; and, secondly, that, even if it was a breach, it was not such a breach as entitled the plaintiff company wholly to determine and put an end to their obligations under the agreement. NORTH, J., has found that the action of the defendant company did amount to a breach of cl. 17 of the agreement, and in this judgment he was, in our opinion, right. It was contended E on behalf of the defendants, in support of their argument on this point, that the agreement of 1864 was intended to be an agreement whereby the traffic upon the east side of the valley was to be treated as traffic of the defendants, and the traffic on the west side as traffic of the plaintiffs. To a certain extent this may be the result of cl. 17 of the agreement, but we are clearly of opinion that among the traffic which was intended to be protected in the interests of the plaintiffs was the already existing traffic from the New Tredegar pits to Cardiff by way of the plain- F tiffs' line, and that a scheme which proposed to take that traffic and divert it from Cardiff to another competing port by means of a line from one side of the valley to the other would be a new line to take away the traffic of the plaintiff company.

There remains the question whether the breach of the agreement by the Brecon Company is such as entitled the Rhymney Company to treat the agreement as at an end, or whether their remedy is one for damages only. After the best consideration G we can give to the matter, we are of opinion that the breach was not one entitling the plaintiffs to determine the agreement, but that they must seek their remedy in damages.

It will be well to consider in the first instance what conduct on the part of one party to a contract justifies the other party in treating it as at an end. If there is a distinct refusal by one party to be bound by the terms of a contract in the future, the H other party may, in our opinion, treat the contract as at an end. See *Withers v. Reynolds* (1); *Hochster v. De La Tour* (2). See the judgment of LORD BLACKBURN in *Mersey Steel and Iron Co. v. Naylor, Benson & Co.* (3) (9 App. Cas. at p. 442). Short of such refusal, we think the true principle to be deduced from all the cases is that you must ascertain whether the action of the party who is breaking the I contract is such that the other party is entitled to conclude that the party breaking the contract no longer intends to be bound by its provisions. This part of the rule was laid down by LORD BLACKBURN in the same judgment (9 App. Cas. at p. 443), where he says the rule of law is that where there is a contract between two parties, each side having to do something, if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, "I am not going to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct."

It was contended by counsel on behalf of the plaintiffs, that, however little remained to be performed by the defendants, if it was to be gathered from the facts that they did not intend to fulfil their obligations to perform that part the plaintiff company were justified in treating the agreement as wholly determined. We think this goes too far. The result would be that, although all the main provisions of an agreement might have been performed, however trivial the breach was, the person complaining of the breach could treat it as going to the root of the contract. That this is not the true view of the law is, we think, to be deduced from another passage in the same judgment of LORD BLACKBURN in which he says (9 App. Cas. at p. 444):

"I repeatedly asked Mr. Cohen whether or not he could find any authority which justified him in saying that every breach of a contract, or even a breach which involved in it the nonpayment of money which there was an obligation to pay, must be considered to go to the root of the contract, and he produced no such authority. There are many cases in which the breach may do so; it depends upon the construction of the contract."

The same view of the law was expressed by this court in *Johnstone v. Milling* (4). That was a case of the breach of one of the covenants of a lease, and in dealing with the principle to which we have referred COTTON, L.J., said (16 Q.B.D. at p. 471):

"It must be taken, therefore, that the law is that when one party has done an act which amounts to a wrongful renunciation of the contract, and the other has acted upon it as such, there is a cause of action in respect thereof, but, when the other has not done so, then both the parties, as well he who has attempted to renounce the contract as he who asserts its existence, are entitled to the benefit of its provisions. The Divisional Court in the present case treated the statements made by the plaintiff as a renunciation of the contract within the doctrine I have mentioned. I cannot say I think they were right in so doing. But, assuming that they were, I can find no case which shows that the doctrine in question applies to the renunciation of one particular covenant or stipulation in a contract such as a lease, which contains many. And as at present advised I am not favourably impressed with the view that the doctrine would apply to the case of a lease where the tenant cannot, in consequence of the refusal by the landlord to perform a particular covenant, put an end to the entire contract. But, however that may be, we have first to arrive at the conclusion that there was a renunciation of the contract."

It remains to apply these rules of law to the facts in the present case. It is not contended that there was an express refusal by the defendants to be bound by the provisions of the agreement. What is said is that their conduct amounts to a breach of cl. 17 entitling the plaintiffs to determine the contract. Now to apply the test laid down by LORD BLACKBURN, it cannot be said that any breach of cl. 17 goes to the root of the whole agreement and defeats the substantial consideration for it. In our opinion, the main object of the agreement of 1864, so far as the plaintiffs were concerned, was to get rid of the defendants' proposed competing line from Caerphilly to Cardiff, which by cl. 5 the defendants undertook to withdraw, and in consideration of which withdrawal the defendants obtained running powers both to Cardiff and to Walnut Tree junction. A further provision, not in our opinion unimportant, was the grant of running powers to the Brecon Company under cl. 7. We think this view is further supported by the provisions of art. 11. If the defendants had obtained their own route from Caerphilly to Cardiff traffic might have been carried from the New Tredegar works to Cardiff wholly on the line of the defendants, in which event they would have secured the whole of the rate for themselves. The agreement provides that although such traffic will be carried to Cardiff entirely by the plaintiffs and never touch the defendant company's line at all, the defendants are to share in the receipts (after deducting working expenses) due to the portion of the transit from the New Tredegar pits to Caerphilly.

- A In our opinion, the provisions of the agreement show clearly that cl. 11 was part of the consideration paid by the plaintiffs for the abandonment by the defendants of their independent route from Caerphilly to Cardiff. If we could have rested on the construction of the agreement that cl. 11 and 17 depended the one upon the other—that is to say, that the consideration for cl. 17 was the granting of the share of the receipts under cl. 11—we should have been prepared to hold that a breach by the defendants of their obligation under cl. 17 justified the plaintiffs in refusing to fulfil their obligation under cl. 11. But looking at the whole agreement and its main provisions we think it would be wrong to hold that cl. 11 and 17 are so mutually dependent, and, therefore, that the plaintiffs are justified in withholding payment under cl. 11 simply on the ground that there has been a breach of cl. 17. We may point out that the consequences of holding the agreement at an end might be very serious. The defendants' running powers from Caerphilly to Cardiff and Walnut Tree junction would be gone, and although it is said that they have not hitherto been largely used, still they may be of great value; but, in addition, the running powers over the portion of the plaintiffs' substituted line south of Bargoed station would also be gone, and this forms part of the route of the Brecon Company to their own line north of Deri.
- D For the above reasons we are of opinion that the decision of NORTH, J., holding that the plaintiffs were right in putting an end to the agreement, cannot be supported, and that the defendants are entitled to have a declaration that cl. 11 is binding on the plaintiffs, and to have an account taken thereunder. A subordinate question was raised as to interest, which has not been argued before us, and if any difference arises it should, we think, be raised on the taking of the account.
- E The plaintiffs are entitled to a declaration that the action of the defendant company did constitute a breach of the agreement, but until the line of the Brecon Company is opened they would not be entitled to recover any damages in respect of that breach. Each party to pay their own costs in the court below, but the defendants are entitled to the costs of this appeal.

Appeal allowed.

- F Solicitors : *Beale & Co. ; Bompas, Bischoff & Co.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

MILLER v. LAW ACCIDENT INSURANCE CO.

[COURT OF APPEAL (Vaughan Williams, Stirling and Mathew, L.J.J.), March 16, 17, 18, 1903]

[Reported [1903] 1 K.B. 712; 72 L.J.K.B. 428; 88 L.T. 370; 51 W.R. 420; 19 T.L.R. 331; 47 Sol. Jo. 382; 9 Asp.M.L.C. 386; 8 Com. Cas. 161]

Insurance—Marine insurance—Insurance against “arrests, restraints and detentions of all princes and people”—Warranty against “capture, seizure or detention”—Decree of foreign government forbidding importation of cargo—Cargo sold elsewhere at a loss—Right to recover on policy.

A policy of insurance was effected on a cargo of cattle on a voyage from Liverpool to Buenos Aires. The risks insured against included “arrests, restraints, and detentions of all princes and people,” but the policy contained a warranty against “capture, seizure, or detention.” On arrival at Buenos Aires the cattle were found to be suffering from foot-and-mouth disease, and, in pursuance of a general decree of the government forbidding the importation of cattle suffering from contagious disease, the Argentine officials forbade the landing of the cattle in question. The assured gave notice of abandonment, and brought an action on the policy as for a total or partial loss.

Held: the action by the Argentine government amounted to an exercise of force so as to bring the case within the perils insured against by the policy, but the underwriters were relieved from their liability by the terms of the warranty which cancelled their liability under the earlier part of the policy.

Notes. By the Marine Insurance Act, 1906, Sched. I, r. 10 (13 HALSBURY'S STATUTES (2nd Edn.) 62): “The term ‘arrests, etc., of kings, princes and people’ refers to political or executive acts, and does not include a loss caused by riot or by ordinary judicial process.”

Followed: *Mansell v. Hoade* (1903), 20 T.L.R. 150. Applied: *British and Foreign Marine Insurance v. Sanday & Co.*, [1916-17] All E.R. Rep. 134. Considered: *Becker, Gray & Co. v. London Assurance Corpn.*, [1916-17] All E.R. Rep. 146; *Rickards v. Forestal Land Timber and Railways Co.*, *Robertson v. Middows, Ltd.*, *Kann v. Howard Bros., Ltd.*, [1941] 3 All E.R. 62. Referred to: *St. Paul Fire and Marine Insurance v. Morice* (1906), 22 T.L.R. 449; *Yuill v. Robson*, [1908] 1 K.B. 270; *Adelaide Steamship Co. v. R.* (1924), 93 L.J.K.B. 871.

As to perils insured against in marine insurance, see 22 HALSBURY'S LAWS (3rd Edn.) 73 et seq.; and for cases see 29 DIGEST 215 et seq.

Cases referred to:

- (1) *Cory v. Burr* (1883), 8 App. Cas. 393; 52 L.J.Q.B. 657; 49 L.T. 78; 31 W.R. 894; 5 Asp.M.L.C. 109, H.L.; 29 Digest 217, 1736.
- (2) *Robinson Gold Mining Co. v. Alliance Insurance Co.*, [1902] 2 K.B. 489; 71 L.J.K.B. 942; 86 L.T. 858; 18 T.L.R. 732; 7 Com. Cas. 219; affirmed, [1904] A.C. 359; 73 L.J.K.B. 898; 91 L.T. 202; 53 W.R. 160; 20 T.L.R. 645; 9 Com. Cas. 301, H.L.; 29 Digest 217, 1734.
- (3) *Hadkinson v. Robinson* (1803), 3 Bos. & P. 388; 127 E.R. 212; 29 Digest 208, 1671.
- (4) *Rodocanachi v. Elliott* (1873), L.R. 8 C.P. 650; 42 L.J.C.P. 247; 28 L.T. 840; 2 Asp.M.L.C. 21; affirmed (1874), L.R. 9 C.P. 518; 43 L.J.C.P. 255; 31 L.T. 239; 2 Asp.M.L.C. 399, Ex. Ch.; 29 Digest 218, 1747.
- (5) *Finlay v. Liverpool and Great Western Steamship Co., Ltd.* (1870), 23 L.T. 251; 3 Mar. L.C. 487; 41 Digest 410, 2553.

A Also referred to in argument :

Barker v. Blakes (1808), 9 East, 283; 103 E.R. 581; 29 Digest 284, 2315.

Calayan v. London Assurance Co. (1816), 5 M. & S. 447; 105 E.R. 1114; 29 Digest 254, 2058.

Rotch v. Edie (1795), 6 Term Rep. 413; 101 E.R. 623; 29 Digest 277, 2241.

B *Gajjal v. Smith* (1872), L.R. 7 Q.B. 404; 41 L.J.Q.B. 153; 26 L.T. 361; 20 W.R. 332; 1 Asp.M.L.C. 268; 41 Digest 411, 2558.

Nobel's Explosives Co. v. Jenkins & Co., [1896] 2 Q.B. 326; 65 L.J.Q.B. 638; 75 L.T. 163; 12 T.L.R. 522; 8 Asp.M.L.C. 181; 1 Com. Cas. 436; 41 Digest 521, 3501.

Crew, Widgey & Co. v. Great Western Steamship Co. (1887), 4 T.L.R. 148, C.A.; 41 Digest 481, 3137.

C *Nobels & Co. v. London and Provincial Marine and General Insurance Co.* (1900), 70 L.J.Q.B. 29; 17 T.L.R. 54; 6 Com. Cas. 15; 29 Digest 208, 1676.

Appeal by the plaintiff from the decision of BIGHAM, J., reported [1902] 2 K.B. 694, at the trial of the action without a jury.

D The action was brought to recover the amount of a total or partial loss of cattle under a Lloyd's policy of marine insurance for a voyage from Liverpool to Montevideo and or Buenos Aires granted by the defendants to the plaintiff. The risks insured against were described in the usual way, and included

E "arrests, restraints, and detentions of all kings, princes, and people of what nation, condition, or quality whatsoever . . . and all perils, losses, and misfortunes that shall come to the hurt, detriment, or damage of the said goods and merchandises or any part thereof."

The policy also contained the following clause :

F "Warranted free of capture, seizure, or detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities, warlike operations, and all risks of riots and civil commotions, whether before or after declaration of war."

G The plaintiff shipped a number of bulls by the steamer *Bellerue* to be carried from Liverpool to Buenos Aires; and, having made the shipment, effected the policy sued on. Some time before the shipment was made the Argentine government had passed a decree forbidding the entry of animals suffering from contagious diseases or coming from countries where such diseases prevailed. The decree contained articles describing the diseases, and providing how animals suspected of being affected were to be dealt with. On Sept. 10, 1900, the *Bellerue* arrived at Buenos Aires. The cattle were duly inspected on board the vessel by the Argentine officials, with the result that the Ministry of Agriculture came to the conclusion that they were suffering from disease within the meaning of the decree, and the same day the vessel was ordered to leave the port. The order contained a provision that the captain, if he so wished, might tranship the cattle to another vessel outside the limits of the port for carriage to some other destination. On Sept. 11 the Ministry issued a general order forbidding the discharge of any cattle arriving from the United Kingdom until further notice. In obedience to the order, the *Bellerue* left the dock **H** in Buenos Aires, and on Sept. 14 the cattle were transhipped into lighters at Santiago, a place outside the limits of the port. On the same day notice of abandonment was given. The cattle remained in the lighters for some days, when a ship called the *Sallast* was found to take them on to Montevideo, at which place, after being forty days in quarantine, they were landed and sold at considerable loss.

I At the trial of the action BIGHAM, J., found as a fact that the animals were suffering from disease within the meaning of the decree, and that the order forbidding their landing was lawfully made by the Argentine authorities. He also held that the mere operation of an ordinary municipal law affecting or preventing the delivery of

the insured goods at their destination was no "restraint of people" within the meaning of the policy. Some violence or something out of the ordinary course of things would be necessary before the peril could be brought within the meaning of the policy. He was, however, of the opinion that the clause "warranted free of capture, seizure, and detention" had as its object the exemption of the underwriters from liability under the words "arrests, restraints, and detainments" in the body of the policy. He therefore gave judgment for the defendants. The plaintiff appealed.

J. A. Hamilton, K.C., and Maurice Hill for the plaintiff.

Scrutton, K.C., and Loehnis for the defendants.

VAUGHAN WILLIAMS, L.J.—In my judgment, there can be no doubt that, so far as the words in the body of the policy are concerned, the events which occurred in this case would bring the case within the word "restraint," and, therefore, that but for the warranty, which I will deal with presently, the underwriters would be insurers liable for the risk. I have no doubt myself, this being an insurance of cattle shipped to Buenos Aires, which happened to be the only place where commercially it was worth while to sell them, that the result of what happened at Buenos Aires was that the adventure was altogether defeated, so far as the cattle were concerned, and that the underwriters are liable in respect of the value of the cattle. The only other thing that I have to say about this part of the case is that, in my judgment, that which was done here by the issuing of the decree and the other documents which were issued by the government was an act of State, and comes within the words in the body of the policy, and has no analogy whatever to a case where there has been an arrest or detention of a ship for the purpose of instituting a suit to enforce the rights of a private individual.

But then I come to the warranty. If one were dealing with a document other than a policy of marine insurance, I should have been disposed to say, according to the natural meaning of the words, that a restraint of this sort was after all only a restraint in the nature of an injunction forbidding the landing of the cattle and the other cargo on board, but allowing the cargo other than the cattle to be landed upon certain conditions if the master of the ship thought fit to do so. I should not have said myself, according to the ordinary meaning of the English language, that such a proceeding was either capture, seizure, or detention. It is manifest that it is not capture, and I should have thought that it was not either seizure or detention, according to the ordinary meaning of the words. But I accept that which was put in argument, that really one must not construe a policy of insurance in the way one would construe any other document. **BIGHAM, J.**, in delivering judgment, said:

"It was said that this exception ought not to be interpreted to include 'restraint.' I think, however, that the very object of this exception is to free the underwriters from liability under the words 'arrests, restraints, and detainments' in the body of the policy. It is true that the same words are not used, but the exception must be taken to refer to something which has gone before—and to what, if not to the words I have mentioned?"

I see **MR. PARSONS** in his book on the **LAW OF MARINE INSURANCE** (1868) does not speak with any great certainty about it, but he suggests that the word "detention," which is the word that he seems to prefer, includes, perhaps, being lawfully restrained from entering a port of destination by a blockade in force. For this purpose I do not see that it makes any difference whether it is a blockade in force or a sanitary law, and under those circumstances I have not sufficient confidence in a conclusion founded merely upon the natural meaning of the words to say that the meaning which the authorities seem to say has been put upon the words of the exception in the warranty is wrong, and therefore I concur in the judgments which are going to be delivered.

The result is that the judgment of **BIGHAM, J.**, will be affirmed, not for the reason

A that he gives in the first part of his judgment—that, I think, is wrong—but for the reason that he gives in the latter part of his judgment, that is, the reason based upon the warranty.

B STIRLING, L.J.—I am of the same opinion. As we are differing in part from
C BIRHAM, J., I desire to state as shortly as possible the grounds upon which I have arrived at the conclusion which has been expressed by the lord justice. In the first place, I think with him that the proceedings which took place in Buenos Aires in September, 1900, amounted to an exercise of force by the government of the Argentine Republic so as to bring the case within the perils insured against by the policy. What took place was substantially this, that the ship, having arrived, was visited by a veterinary surgeon, and it was discovered that certain of the cattle on board were or might be suffering from an infectious disease. Thereupon the Minister of Agriculture of the government intervened and served the captain with a formal resolution, dated Sept. 10, 1900, by which the consignees were informed that, the animals brought by the ship being attacked by apthose fever,

D “It has been resolved, in accordance with art. 5 of the regulations, that the said steamship go out immediately from the port, you being able, if it suits you, to effect the transshipment of the animals to another vessel outside the port, but the *Bellerue* must be previously and completely disinfected before the rest of her cargo can be landed, or she moored on the Argentine coast.”

E And on the following day an order was made by the President of the Republic and the Minister of Agriculture that, in consequence of the arrival of this steamer having this live stock on board, a decree was made stopping until further notice the discharge of all cattle, sheep, and pigs which might arrive from the United Kingdom of Great Britain and Ireland. I understand that what happened was this, that the captain of the steamship, being served with this resolution, took his ship outside the port, and, with the view of minimising the loss, transhipped the cattle to another
F vessel, by which they were carried to Montevideo and there sold at a great loss.

I have already stated the conclusion at which I arrive upon these facts. It seems to me that this was an act of intervention of the government, and it is none the less an exercise of superior force that neither the army nor the police force nor any other force of the government, actually intervened; but it is absolutely certain to my
G mind, as a matter of inference, that if the captain had not seen fit to do as he did the ship would have been taken possession of or entered and the cattle destroyed in accordance with what is described as art. 5 of the regulations. I think that the captain was well justified with a view of minimising the loss, in taking the steps which he did, and I think that, in fact, he yielded only to superior power in doing what he did.

H I think, also, that this is not the less an act on the part of the government of the Argentine Republic that it is done in accordance with the laws in force in the country. It has been decided that the peril insured against in the same terms was within the policy in a case when the intervention of the government took place in enforcing the revenue laws of the country; and I do not see that any effectual distinction can be drawn between the intervention of the government for the purpose of enforcing the revenue laws and the intervention of the government for the purpose of enforcing the sanitary laws for the benefit of the public. This seems to me
I to be recognised both in *Cory v. Barr* (1) where the seizure which took place was of a vessel which was engaged in smuggling, and also in the case of which was mentioned in the course of the argument of the *Robinson Gold Mining Co. v. The Alliance Insurance Co.* (2) in the Court of Appeal.

On behalf of the defendants, it was very much urged before us that a long line of authorities, of which *Hadkinson v. Robinson* (3) is a leading example, applied to the case, but these were cases the effect of which is summed up by BARR, J., in *Rodocanachi v. Elliott* (4), where he puts it thus (L.R. 8 L.P. at p. 620):

"If the master of the ship, of his own accord, or in obedience to the orders of the officers of the Queen abstains from entering a blockaded port, the *causa proxima* is not the blockade, but the voluntary act of the master."

It seems to me that the present case goes far beyond what was laid down there. In the view of the facts which I take, the master did not act voluntarily in any sense. If when he entered the harbour he had been informed by some person that there was a law forbidding the landing of such cattle as he had on board, and that the government were likely to put it in force, and he had, nevertheless, gone on, the case, I think, would have been very analogous to *Hadkinson v. Robinson* (3) and that class of authorities; but here he went as far as he could, and he only desisted from landing when the government actually interfered and served upon him the notice which I have spoken of. I have already explained the view which I take of what he did and, in my judgment, those cases do not apply. That being so, I regret that I find myself differing as I do from BIGHAM, J., but having arrived at that conclusion, it is my duty to express it.

On the second question, which was also decided by BIGHAM, J., I find myself unable to differ from him. I admit that the words are difficult to construe, but having regard to the opinion which was expressed by him, and the opinion about to be expressed by my brother, MATHEW, I do not feel myself at liberty to differ from the learned judge's conclusion in that respect.

MATHEW, L.J.—The material facts may be stated in a few words. By the order of the administration, the executive authority of Buenos Aires, the vessel, the *Belleue*, was stopped before she reached her berth. The discharge of the cattle was prohibited, and the animals were detained on board the vessel. The master was directed to leave Buenos Aires and land the cattle at some other port. He obeyed. The animals were transhipped outside the port and sent to Montevideo. It was not disputed that the object of the assured in shipping the cattle to Buenos Aires in consequence was altogether defeated.

It was argued for the defendants that the loss thus occasioned was not due to "arrest, restraint, or detainment" within the meaning of the policy. The words, it was contended, implied the use of direct force, and none had in fact been employed. *Finlay v. Liverpool and Great Western Steamship Co.* (5), upon which reliance was placed by the defendants' counsel, afforded no grounds for this position, and no other satisfactory authority was referred to. If actual force was not used it was because there was no opposition. The master submitted to the orders of the administration. The result to the assured was the same as if force had been used, and even if the defendants were right in their interpretation of the words in question, the loss was ejusdem generis with the peril described in the policy, and was covered by the general words, "other losses and misfortunes," which end the enumeration of the perils insured against.

It was further argued for the defendants that the loss was not within the policy because the acts of the administration were illegal—that is to say, were out of the ordinary course of the law. There was no reason for saying that what was done by the administration was out of the ordinary course of the law of the port of destination. Even if it were, I do not see how it would help the underwriters. I am of opinion that but for the warranty the underwriters would be responsible for the loss in question. This conclusion is in accordance with the decisions referred to in the argument with respect to the meaning of similar words in charterparties when shipowners and charterers have been exonerated from the performance of their obligations by a blockade which renders access to a port commercially impracticable. No reason was given with respect to this insurance why the words "arrest of princes" in this policy and in an ordinary charterparty should have different meanings.

But the policy contains the warranty against "capture, seizure, and detention," commonly called at Lloyd's the f.e.s. clause; and it was argued for the defendants

A that their liability under the earlier part of the policy was cancelled. The warranty goes beyond the words "arrest" and "restraint." "Capture" and "seizure" are stronger expressions. It was suggested that what was meant were acts of warfare, but it is clearly settled that the words have no such restricted meaning: see *Cory v. Burr* (1). It is not, in my opinion, intended by the alteration of terms to describe a different class of perils from those previously mentioned. Counsel for the plaintiff B failed to suggest any practical difference for the present purpose between the two sets of phrases. It seems to me sufficient to point out that the word "detention" in the warranty cannot be distinguished from the word "detainment" in the earlier part of the policy. The loss, in my judgment, is within the warranty, and the underwriters are not liable in this action. For these reasons I agree that the appeal must be dismissed.

C

Appeal dismissed.

Solicitors: Rowcliffes, Rawle & Co., for Hill, Dickinson & Co., Liverpool; Waltons, Johnson, Bubbs & Whetton.

[Reported by E. MANLEY SMITH, ESQ., Barrister-at-Law.]

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E

MCDOWALL v. GREAT WESTERN RAIL. CO.

[COURT OF APPEAL (Vaughan Williams, Romer and Stirling, L.JJ.), June 16, 1903]

F

[Reported [1903] 2 K.B. 331; 72 L.J.K.B. 652; 88 L.T. 825; 19 T.L.R. 552; 47 Sol. Jo. 603]

Negligence—Effective cause—Railway line crossing highway—Trucks placed on incline above crossing—Trucks released by trespassers—Liability of railway company.

G

The servants of a railway company shunted five trucks and a brake van along a siding which was on an incline descending to a point where the railway crossed a highway on the level. In the course of the incline there was a catch-point which would prevent any vehicles running down the incline. For shunting purposes, however, the servants drew the trucks and the van to a position between the catch-point and the highway and there left them, having applied the brake in the van and secured the wheels of the trucks. The van was attached to the trucks by a screw-coupling, which was screwed up sufficiently tight to hold the van in connection with the trucks if not interfered with. The following day some boys unfastened the screw-coupling of the van and partly released the brake, and, as a result, the van, loosed from the trucks, ran down the incline and injured the plaintiff while she was passing over the level-crossing. The railway company was aware of the fact that boys were accustomed to trespass on the siding and interfere with trucks.

H

I

Held: negligence on the part of the railway company was not the effective cause of the accident as (i) there was nothing in the circumstances of the case to require the company to do any more than they did with regard to the placing of the trucks, and (ii) the railway company could not reasonably have anticipated the act done by the boys or the result which came from it.

Notes. The duty owed by an occupier of premises to all his visitors is now regulated by the Occupiers' Liability Act, 1957 (37 HALSBERY'S STATUTES (2nd

Edn.) 832 et seq.). The rules of the common law continue to regulate the duty owed to trespassers. A

Considered: *Clinton v. J. Lyons & Co., Ltd.*, [1911-13] All E.R. Rep. 577. Applied: *Wheeler v. Morris*, [1914-15] All E.R. Rep. 1196. Referred to: *Cooke v. Midland Great Western Railway of Ireland*, [1908-10] All E.R. Rep. 16; *Latham v. Richard Johnson and Nephew, Ltd.*, [1911-13] All E.R. Rep. 117; *Ruoff v. Long*, [1916] 1 K.B. 148; *Everett v. Griffiths*, [1920] All E.R. Rep. 32. B

As to the standard of care to be exercised, see 28 HALSBURY'S LAWS (3rd Edn.) 10 et seq.; and for cases see 36 DIGEST (Repl.) 22 et seq. As to the duty of occupiers of premises adjoining the highway, see 28 HALSBURY'S LAWS (3rd Edn.) 72, 73; and for cases see 36 DIGEST (Repl.) 72 et seq. As to intervening acts of third parties, see 28 HALSBURY'S LAWS (3rd Edn.) 32; and for cases see 36 DIGEST (Repl.) 40. C

Case referred to:

- (1) *Engelhardt v. Farrant & Co.*, [1897] 1 Q.B. 240; 66 L.J.Q.B. 122; 75 L.T. 617; 45 W.R. 179; 13 T.L.R. 81, C.A.; 36 Digest (Repl.) 33, 153.

Also referred to in argument:

- Clark v. Chambers* (1878), 3 Q.B.D. 327; 47 L.J.Q.B. 427; 38 L.T. 454; 42 J.P. 438; 26 W.R. 613; 36 Digest (Repl.) 31, 135. D
Hot v. Wilkes (1820), 3 B. & Ad. 304; 106 E.R. 674; 36 Digest (Repl.) 153, 507.
Jordin v. Crump (1841), 8 M. & W. 782; 11 L.J.Ex. 74; 5 Jur. 1113; 151 E.R. 1256; 2 Digest (Repl.) 375, 518.
Lynch v. Nurdin (1841), 1 Q.B. 28; Arn. & H. 158; 4 Per. & Dav. 672; 10 L.J.Q.B. 73; 5 J.P. 319; 5 Jur. 797; 113 E.R. 1041; 36 Digest (Repl.) 33, 150.
Mann v. Ward (1892), 8 T.L.R. 699, C.A.; 36 Digest (Repl.) 43, 229. E
Daniels v. Potter and Wing, etc. (1830), 4 C. & P. 262; Mood. & M. 501, N.P.; 36 Digest (Repl.) 41, 206.
Bird v. Holbrook (1828), 4 Bing. 628; 1 Moo. & P. 607; 2 Man. & Ry. M.C. 198; 6 L.J.O.S.C.P. 146; 130 E.R. 911; 36 Digest (Repl.) 153, 508.
Hill v. New River Co. (1868), 9 B. & S. 303; 18 L.T. 355; 36 Digest (Repl.) 39, 190. F
Parker v. City of Cohoes (1878), 10 Hun. (N.Y.) 531; 74 N.Y. 610.
Murphy v. Smith (1886), 13 R. (Ct. of Sess.) 985; 36 Digest (Repl.) 41, *227.
Vaughan v. Menlove (1837), 3 Bing. N.C. 468; 3 Hodg. 51; 4 Scott, 244; 6 L.J.C.P. 92; 1 Jur. 215; 132 E.R. 490; 36 Digest (Repl.) 29, 126.
Smith v. London and South Western Rail. Co. (1870), L.R. 6 C.P. 14; 40 L.J.C.P. 21; 23 L.T. 678; 19 W.R. 230, Ex. Ch.; 36 Digest (Repl.) 37, 184. G
Blyth v. Birmingham Waterworks Co. (1856), 11 Exch. 781; 25 L.J.Ex. 212; 26 L.T.O.S. 261; 20 J.P. 247; 2 Jur.N.S. 333; 4 W.R. 294; 156 E.R. 1047; 36 Digest (Repl.) 5, 1.
Harrold v. Watney, [1898] 2 Q.B. 320; 67 L.J.Q.B. 771; 78 L.T. 788; 46 W.R. 642; 14 T.L.R. 486; 42 Sol. Jo. 609, C.A.; 36 Digest (Repl.) 115, 577.

Appeal from a decision of KENNEDY, J., reported [1902] 1 K.B. 618, in an action tried before a jury. H

B. Francis-Williams, K.C., and *Denman Benson* for the defendants.

Arthur Lewis and *E. M. Samson* for the plaintiff.

VAUGHAN WILLIAMS, L.J.—In my judgment this appeal must be allowed. I think that the case might be shortly put as being one in which at the conclusion of the plaintiff's case there was no case to go to the jury at all, no evidence of the neglect by the defendant railway company of any duty, which neglect led to this accident. But I will deal with the case on the findings of the jury. I do not propose to consider at all as to which way the balance of evidence is, or as to whether the verdict was against the weight of evidence. I propose to deal with the case upon this question: Was there really any reasonable evidence to go to the jury in respect of those matters which were left for the findings of the jury, the findings being mainly against the defendants. I

A The first question put to the jury was :

"Was the van, in regard to persons using the highway, where the plaintiff was, in a safe position where it was left by the defendants' servants on July 20 unless interfered with afterwards."

B The answer was "Yes." There is no negligence thus far. The railway company put their van in a perfectly safe position. The next question was :

"Would the accident to the plaintiff have happened if the van had not been interfered with?"

The jury answered "No." Then came this question :

C "Was the interference the act of trespassers, and, if so, was the interference with the wilful intent of causing the van to descend the incline, or merely negligent?"

D The jury answered : "Yes; it was the act of trespassers with negligence." Thus far in the findings there is nothing to show any negligence whatsoever by the defendants. Before I go to the next two questions I want to point out that this van was not only placed in a position where it was safe, but it was placed there under conditions in which it was safe. It was locked up, it was braked, and it was coupled by a screw coupling to the train of trucks. Under those circumstances, in order that this interference by these boys, who were so neglectful of the safety of other people, could cause that to happen which did happen, the boys had to go through a very considerable operation. They had to break into the van or get into it with the aid of a key, which it is suggested that they did, and when they got there they had a great deal to do before this van could be loosed and run down this incline. That being so, the fourth question was :

E "Was the danger of such interference causing injury to persons using the highway known to the defendants at the time when the van was left and kept where it was; and might it have been sufficiently guarded against by the exercise of reasonable care and skill on the part of the defendants?"

F The answer was :

"Yes; it was known and could have been guarded against by the exercise of reasonable care on the part of the defendants."

G Let me take that question in two halves. Was the danger of such interference causing injury to persons using the highway known to the defendants at the time when the van was left and kept where it was?

H Let us see what the facts are. It is quite true that the boys had been in the habit of breaking into the defendants' van and stealing apples and doing one thing and another. But, although it is said that the boys had been doing this for years, there is no evidence that they ever loosed a van or carriage before in all this time; and, under those circumstances, it seems to me there is nothing in the past history of the conduct of those boys towards carriages or vans or anything else left on the rails at this point to lead one to anticipate that they would go and uncouple a carriage and let it down the incline the way in which they did here. Under those circumstances

I it seems to me that there was no evidence to go to the jury upon which they could properly find that the danger of such interference causing injury to persons using the highway was known to the defendants at the time when the van was left and kept where it was,

"and might it have been sufficiently guarded against by the exercise of reasonable care and skill on the part of the defendants."

There, again, I do not understand what the suggestion is. The suggestion made by the learned counsel for the plaintiff seems to be that the van might have been put on

the other side of the catch-point, and that then it could not have gone down the incline. That is not true. It is not true to say absolutely it could not, and it is not true to say that upon the other side of the catch-point it would have been safe. The truth of the matter is that if the van had been placed there all that these boys would have had to do was to open or close, as the case may be, I do not know which is the technical term, the catch-point, and let the van go by, which would have been a very much simpler operation than those that they actually went through, when they got into the van, and, having got in there, uncoupled and unbraked it.

The fifth question was :

"Was the occurrence of the injury to the plaintiff materially and effectively caused by want of reasonable care and skill on the part of the defendants' servants in placing and keeping the van where it was placed by them, either (i) in regard to its danger of position apart from the interference of trespassers; or (ii) in regard to its danger if so interfered with; or (iii) in any other way by want of reasonable care, and in what way or ways?"

The answer was :

"Yes; the defendants were negligent in not placing the van and trucks to the east of the catch-point."

In my judgment, there, again, there was nothing which would justify the finding of the jury that the not placing the van to the east of the catch-point was an effective cause of the accident which occurred.

Having said that as to the findings, I will try to state in a few words what I consider to be the law on the question here. I do not think that counsel for the defendants in his argument was wrong when he said that in those cases in which part of the cause of the accident was the interference of a stranger or a third person, you do not find the defendants responsible unless that which they do or omit to do is itself the effective cause of the accident. Bearing that in mind, it seems to me that in every case in which the circumstances are such that anyone of common sense would recognise the danger of that happening which would be likely to injure others, it is the duty of the person having such custody or control to take reasonable care to avoid such injury. Of that proposition I do not think the counsel for the plaintiff can complain. It is, at all events, sufficiently liberal in their favour. Assuming that to be the law, I am of opinion, for the reasons I have already given, that there was nothing in the circumstances of this case which would induce an ordinary person of common sense and care to do anything more than the defendants did in respect of this van and the keeping of it in the place where it was kept in the condition in which it was kept.

If that is so, there is an end of the case altogether. But let me for a moment assume that there was evidence to go to the jury of neglect by the defendants of that care which a reasonable man would have taken to avoid what I will call for short "obvious dangers." Even in that case it seems to me that the rule which has been laid down by LORD ESHER, M.R., in *Engelhardt v. Farrant & Co.* (1) is the rule which we must apply. If a stranger interferes it does not follow that the defendant is liable. But it equally does not follow that because a stranger interferes the defendant is not liable if the negligence of a servant of his is the effective cause of the accident. Even assuming any neglect of duty here by the defendants, what one has to ask oneself is this: Was such neglect by the defendants of precautions the effective cause of this accident? I confess I think, on the evidence, that it was not the effective cause of this accident. And as LORD ESHER, M.R., says, if it were not, that means that the defendants are not liable. Under those circumstances, what we ought to do here, in my judgment, is to allow this appeal, and to order judgment to be entered in this case for the defendants. The appeal will be allowed with costs, the sum of £175 paid by the defendants to the plaintiff without conditions to be returned.

A ROMER, L.J.—I am of the same opinion. Clearly, as found by the jury, when this train was left by the defendants with the precautions taken by them, it was perfectly safe. It was not left in any condition in which it could be said that there was any negligence on the part of the defendants under the circumstances, unless you can find some evidence of negligence by reason of the evidence relating to the mischievous boys. In other words, there was no negligence on the part of the defendants unless the evidence relating to the mischievous boys turned that act, which was otherwise a proper act on the part of the defendants, into a negligent one. Upon that, all I can say is this: Speaking for myself, and having considered that evidence, it does not appear to me that upon it the jury could reasonably have found that the defendants ought, under the circumstances in which they left this van, reasonably to have anticipated that the boys would or might have done what they in fact did do; or that there was any such risk at the time known to the defendants of the particular acts of the boys which caused the accident as called upon the defendants to take further precautions against those particular acts. That being so it appears to me that the findings upon which the learned judge acted in the court below cannot be relied upon on behalf of the plaintiff; and that therefore the appeal ought to succeed.

D STIRLING, L.J.—I am of the same opinion. The real question in this case is whether the findings of the jury in answer to the fourth and fifth questions which were put to them by the learned judge in the court below can be supported. In answer to the first three questions the jury have found that the van was in a safe position as and where it was left by the defendants' servants, unless interfered with afterwards; that the accident would not have happened if the van had not been interfered with; and that the interference was the act of trespassers, who acted negligently. What really happened was this: Some boys, at least that is the account of the matter which is given, got into the van, and they undid the brake and undid the couplings, and that led to the accident. Was there any evidence to show that the defendants ought reasonably to have anticipated such an occurrence? The learned judge in the court below twice in the course of his judgment states what the facts are. In his statement of facts he says that for years the defendants had been troubled by boys trespassing on this part of the line and playing in and about vehicles standing upon it; and later on he says that to the knowledge of the defendants the boys used to get into trucks and vans, and unlock the doors of the vans on the siding. That is the whole length the evidence went; nothing further has been called to our attention. That misconduct had gone on for years; but it does seem to me that it is a very strong inference to draw, that the defendants ought to have reasonably anticipated any such act as was actually done by the boys in this case, or the result which came from it. Upon that ground I think that the appeal ought to be allowed.

Appeal allowed.

H Solicitors: *R. R. Nelson; A. R. & H. Steele, for W. J. Jones, Haverfordwest.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

LYON & CO. v. LONDON, CITY AND MIDLAND BANK

[KING'S BENCH DIVISION (Joyce, J.), March 17, 18, 1903]

[Reported [1903] 2 K.B. 135; 72 L.J.K.B. 465; 88 L.T. 392; 51 W.R. 400;
19 T.L.R. 334; 47 Sol. Jo. 386]

Mortgage—Premises including fixtures—Seats hired by mortgagor of theatre for fixed period with option to purchase—Seats affixed to floor of mortgaged premises—Right of owner of seats as against mortgagee.

The presumption that an article affixed to the soil is a fixture may be rebutted by showing that the annexation was incomplete inasmuch as the article may be removed without injuring anything, or was annexed, not for the permanent improvement of the land, but for a temporary purpose and for the better enjoyment of the chattel itself.

The plaintiffs, a firm of theatrical furnishers, hired out a number of theatre seats to the owner and occupier of a hippodrome for a fixed payment during a specified period, with a provision that he should be entitled to purchase them at a certain sum, the firm to be at liberty to remove the seats if any default in payment were made. The regulations of the local authority required that seats in places of entertainment should be fixed, and the seats were affixed with screws of 1 in. to 1½ in. in length to a wooden floor, which was itself attached by long nails to a floor of concrete. The hirer afterwards mortgaged the hippodrome to the defendants, a bank, with all fixtures whatsoever then or at any time thereafter affixed or attached to the premises or any part thereof, except trade machinery. The bank having entered into possession claimed the seats as fixtures and sold them. In an action by the theatrical furnishers to recover their value,

Held: the seats were affixed for a temporary purpose only and did not become attached to the freehold, and, therefore, the legal ownership in them remained in the plaintiffs who were entitled to succeed.

Notes. Approved: *Reynolds v. Ashby & Son*, [1904-7] All E.R. Rep. 401. Distinguished: *Vaudeville Electric Cinema v. Muriset*, [1923] 2 Ch. 74. Referred to: *Hulme v. Brigham*, [1943] 1 All E.R. 204.

As to fixtures, see 23 HALSBURY'S LAWS (3rd Edn.) 489 et seq., and for cases see 31 DIGEST (Repl.) 201 et seq.

Cases referred to:

- (1) *Cumberland Union Banking Co. v. Maryport Hematite Iron and Steel Co., Re Maryport Hematite Iron and Steel Co.*, [1892] 1 Ch. 415; 61 L.J.Ch. 227; 66 L.T. 108; 40 W.R. 280; 31 Digest (Repl.) 223, 3599.
- (2) *Hobson v. Gorringe*, [1897] 1 Ch. 182; 66 L.J.Ch. 114; 75 L.T. 610; 45 W.R. 356; 13 T.L.R. 139; 41 Sol. Jo. 154, C.A.; 31 Digest (Repl.) 206, 3375.

Also referred to in argument:

Re De Falbe, Ward v. Taylor, [1901] 1 Ch. 523; 70 L.J.Ch. 286; 84 L.T. 273; 49 W.R. 455; 17 T.L.R. 246; 45 Sol. Jo. 294, C.A.; affirmed sub nom. *Leigh v. Taylor*, ante p. 520; [1902] A.C. 157; 71 L.J.Ch. 272; 86 L.T. 239; 50 W.R. 623; 18 T.L.R. 293; 46 Sol. Jo. 264, H.L.; 31 Digest (Repl.) 216, 3500.

Reynolds v. Ashby & Son, [1903] 1 K.B. 87; 72 L.J.K.B. 51; 87 L.T. 640; 51 W.R. 405; 19 T.L.R. 70, C.A.; affirmed, [1904-7] All E.R. Rep. 401; [1904] A.C. 466; 73 L.J.K.B. 946; 91 L.T. 607; 53 W.R. 129; 20 T.L.R. 766, H.L.; 35 Digest 309, 565.

Viscount Hill v. Bullock, [1897] 2 Ch. 482; 66 L.J.Ch. 705; 77 L.T. 240; 46 W.R. 84; 13 T.L.R. 554; 41 Sol. Jo. 696, C.A.; 40 Digest (Repl.) 707, 2027.

Monti v. Barnes, [1901] 1 K.B. 205; 70 L.J.Q.B. 225; 83 L.T. 619; 49 W.R. 147; 17 T.L.R. 88, C.A.; 35 Digest 302, 523.

- A** *Holland v. Hodgson* (1872), L.R. 7 C.P. 328; 41 L.J.C.P. 146; 26 L.T. 709; 20 W.R. 990, Ex.Ch.; 31 Digest (Repl.) 206, 3376.
Fisher v. Dixon (1845), 12 Cl. & Fin. 312; 9 Jur. 883; 8 E.R. 1426, H.L.; 38 Digest (Repl.) 789, 70.
Cress v. Barnes (1877), 46 L.J.Q.B. 479; 36 L.T. 693; 35 Digest 305, 539.

B Action tried by JOYCE, J., without a jury.

Messrs. Lyon & Co., were a firm of theatrical upholsterers and furnishers who, among other things, supplied seats to places of entertainment for varying periods of hire. On Aug. 7, 1901, Messrs. Lyon & Co., agreed with Mr. Ellis, the owner and occupier of a hippodrome, for the supply to him of a number of seats for use in the auditorium of the hippodrome, he agreeing to pay for them £20 a week for a period of not less than twelve weeks, such payments to be deducted if he bought the seats for £976 within a period of three months, afterwards extended to six months, which option was not exercised. Messrs. Lyon & Co. were to be at liberty to remove the seats on default of payment. The seats, which were armchairs upholstered in velvet, were affixed by screws of about 1in. to 1½in. in length to a floor of boards, which was in its turn fastened by long nails to a bed of concrete. Each seat had four screws, and there was no carpet under the seats. The regulations of the local authority required all seats in places of entertainment to be affixed to the floor, to avoid accidents in cases of crowding or confusion. The seats were also capable of being joined together, and they were used in rows.

On Oct. 18, 1901, Mr. Ellis, the hirer of the seats, mortgaged the Hippodrome to the London, City and Midland Bank,

E "together with (in addition to any fixtures passing by reason of the conveyance hereinbefore contained) all fixtures whatsoever now or at any time hereafter affixed or attached to the said premises or any part thereof, except trade machinery as defined by s. 5 of the Bills of Sale Act, 1878."

The bank subsequently entered in possession and sold the seats, claiming that they passed to them as fixtures under the mortgage. Lyon & Co. thereupon brought this action against them to recover the value of the seats, which it was agreed should be taken for the purposes of the action to be £450 after allowing for the payments made by Mr. Ellis.

Herbert Reed, K.C., and Kerly for the plaintiffs.

Muir Mackenzie and H. Cassie Holden for the defendants.

G **JOYCE, J.**—Whatever my own opinion on the subject might have been, I should of course have been bound by decisions of the Court of Appeal, or of a court of co-ordinate jurisdiction, in any case which was on all fours with the present case, though I feel that there was a good deal to be said for the view expressed by NORTH, J. in *Cumberland Union Banking Co. v. Maryport Hematite Iron and Steel Co.* (1), that a mortgagee cannot confer on his mortgagee a better title than he has himself. In the present case no one but a lawyer would think of saying that these chairs belonged to the mortgagee, and I am a little surprised that such a claim should have been made; but I must decide the case according to my view of the law, and I think that there are rather important distinctions between this case and the cases that have been cited.

I The chattels here are chairs, not engines or boilers or machines; they are complete in themselves and could well have been used unscrewed, though it was better to screw them to the floor of the theatre. The agreement under which the mortgagee required the use of them was not a time and purchase agreement, on which cases like *Hobson v. Goringe* (2) have sometimes been supposed to turn; it was an agreement for hiring though with an option to purchase. At the date of the mortgage the legal ownership in the chairs was in the plaintiffs, and it never has been in the mortgagee, though he may have had a special property in the chairs when hired; and I cannot see how the legal ownership has passed to the mortgagees any more than

would have been the case if the chairs had been introduced by other parties. When an article is affixed to the soil no doubt the *prima facie* inference is that it is a fixture; but the presumption is capable of being rebutted by showing that the annexation was incomplete, inasmuch as the article is removable without injuring anything, or was annexed not for the permanent improvement of the land but for a temporary purpose and for the better enjoyment of the chattel itself. I think these chairs were annexed only for a temporary purpose; and the case seems to me more like the affixing of a carpet to a floor than the affixing of boilers or engines to the freehold. In my opinion, therefore, these chattels did not become attached to the freehold, and the plaintiffs are entitled to recover their value with costs.

Judgment for plaintiffs.

Solicitors: *Reed and Reed; Nye, Morreton & Clowes*, for *Nye & Treacher*, Brighton.

[*Reported by H. W. LAW, Esq., Barrister-at-Law.*]

BWLLFA AND MERTHYR DARE STEAM COLLIERIES (1891) LTD. v. PONTYPRIDD WATERWORKS CO.

[HOUSE OF LORDS (The Earl of Halsbury, L.C., Lord Macnaghten, Lord Shand, Lord Robertson and Lord Lindley), July 6, August 6, 1903]

[Reported [1903] A.C. 426; 72 L.J.K.B. 805; 89 L.T. 280; 52 W.R. 193; 19 T.L.R. 673]

Compulsory Purchase—Compensation—Arbitrator—Duty to avail himself of all information at hand at time of making his award—Waterworks Clauses Act, 1847 (10 & 11 Vict., c. 17), s. 22.

An arbitrator's duty when determining the amount of compensation to be paid is to avail himself of all information at hand at the time of making his award.

Thus, where a notice had been given under the Waterworks Clauses Act, 1847 [now the Water Act, 1945], by a waterworks company to the owners of a coal mine not to work the coal under or near their reservoir, **held** that the arbitrator, when assessing the compensation to be paid to the mine owners, should take into account the fact that the value of coal had increased since the date of the original notice.

Notes. Section 22 of the Waterworks Clauses Act, 1847, has been replaced by ss. 13 and 14 of Sched. 3 to the Water Act, 1945.

Applied: *Re Richard and Great Western Rail. Co.*, [1904-07] All E.R. Rep. 521. Considered: *Eden v. North Eastern Rail. Co.*, [1904-07] All E.R. Rep. 513; *Godstone R.D.C. v. Croydon Corpn.* (1932), 48 T.L.R. 447; *Re Bradberry, National Provincial Bank v. Bradberry, Re Fry, Tasker v. Gulliford*, [1942] 2 All E.R. 629; *Racecourse Betting Control Board v. Secretary for Air*, [1943] 1 All E.R. 672; *B.A. Collieries, Ltd. v. London and North Eastern Rail. Co.*, [1943] 2 All E.R. 637; *Huckle v. Lowestoft Corpn.*, [1943] 1 K.B. 59; *London and North Eastern Rail. Co. v. B.A. Collieries, Ltd.*, [1945] 1 All E.R. 51. Referred to: *Manchester Corpn. v.*

- A** *New Moss Colliery*, [1906] 1 Ch. 278; *Coltong Union Firing Co. v. I.R. Comrs.* (1922), 12 Tax Cas. 427; *L.C.C. v. Tobin*, [1959] 1 All E.R. 649.

As to the measure of compensation in general, see 10 HALSBURY'S LAWS (3rd Edn.) 21 et seq.; and for cases see 11 DIGEST (Repl.) 126 et seq. For the Water Act, 1945, see 26 HALSBURY'S STATUTES (2nd Edn.) 786.

- B** Case referred to :

(1) *Smith v. Great Western Rail. Co.* (1877), 3 App. Cas. 165; 47 L.J.Ch. 97; 37 L.T. 645; 42 J.P. 404; sub nom. *Great Western Rail. Co. v. Smith*, 26 W.R. 180, H.L.; 11 Digest (Repl.) 168, 397.

Also referred to in argument :

- C** *Great Northern Rail. Co. v. I.R. Comrs.*, [1901] 1 K.B. 416; 70 L.J.K.B. 336; 84 L.T. 183; 65 J.P. 275; 49 W.R. 261; 17 T.L.R. 218; 45 Sol. Jo. 237, C.A.; 11 Digest (Repl.) 167, 391.

Appeal from a decision of the Court of Appeal (VAUGHAN WILLIAMS, ROMER, and MATHEW, L.JJ.), reported [1902] 2 K.B. 135, reversing a decision of the Divisional Court (RIDLEY and PHILLIMORE, L.JJ.), reported [1901] 2 K.B. 798, upon a Special Case Stated by an arbitrator.

- D** The question was whether under the Lands Clauses Consolidation Act, 1845, and the Waterworks Clauses Act, 1847, in an arbitration to determine the amount of compensation to be paid by the undertakers to the owners of mines and minerals underlying or adjacent to their waterworks in respect of minerals required by the undertakers to be left unworked, evidence of value subsequent to the notice to treat was admissible; or whether the amount should be estimated exclusively on the basis of the knowledge possessed at the date of the notice. The Divisional Court decided in favour of the former; the Court of Appeal of the latter alternative. The facts are fully set out in the opinion of LORD MACNAGHTEN.

Upjohn, K.C., and *W. D. Benson* for the appellants.

Balfour Browne, K.C., and *Trevor Lewis (B. Francis Williams, K.C., with them)*

- F** for the respondents.

Their Lordships took time for consideration.

Aug. 6, 1903. The following opinions were read.

- THE EARL OF HALSBURY, L.C.** I think in this case that PHILLIMORE, J., stated the question for debate with perfect accuracy when he said that

- G** "the true inquiry here is not of the value of the coalfield or what the value of the coal is, but what would the colliery company, if they had not been prohibited, have made out of the coal during the time it would have taken them to have got it."

- H** It was not a purchase of the coal, nor is it analogous to a purchase of the coal. It is what it is, and it appears to me that, considering what it is, the question propounded is solved by the statement of what it is. If it were a purchase, the rights and liabilities, and profits, if there were any, would pass to the purchaser, and its value, with all its possibilities, would pass at the time that the notice to treat was given; but if the question is that which I think it is, then the person who had to make the calculation of what was the compensation, ought to have arrived at the sum which experience has now shown to be the correct amount. It is true that he probably would not have been able to arrive at that sum accurately, but he ought to have calculated upon such material as he had what would be the true sum. He ought to have considered the possible rise or fall of prices; but, as I have said, he probably would have made a mistake. We now know what would have been the true sum; and the proposition baldly stated appears to be that, because you could not arrive at the true sum when the notice was given, you should shut your eyes to the true sum now you do know it; because you could not have guessed it then. It is, of course, only an accident that the true sum can now be ascertained with

precision; but what does that matter? It seems to me that the whole fallacy of the contention that you may not look at the facts which have occurred rests upon the false analogy of a sale. I am of opinion that the analogy is a false one, and I move your Lordships that the decision of the Court of Appeal be reversed and the original judgment restored, and that the respondents do pay to the appellants the costs both here and below.

LORD MACNAGHTEN. This is a question of compensation under the Waterworks Clauses Act, 1847. The appellants are mine-owners. They are, in fact, lessees, but the term granted was long enough for working out all the minerals comprised in the lease. In reply to a notice under s. 22 of the Act of 1847, the respondents, by notice in writing dated Oct. 15, 1898, required the appellants to leave unworked a seam of coal lying under a parcel of land about 5½ acres in extent. On this notice the parties went to arbitration, but, owing to delays, for which neither party was to blame, proceedings under the reference did not commence until June, 1900. The arbitration was finished on Feb. 1, 1901, and on April 26 following the arbitrator stated his award in the form of a special case. The material paragraphs in the Case are as follows :

“(ix) Coal rose in value subsequently to the date of the said notice of Oct. 15, 1898. (x) . . . the coal company claimed that, in consequence of such rise, the compensation to be paid by the waterworks company should be assessed not on the basis of the knowledge . . . possessed at the date of the said notice of Oct. 15, 1898, which basis is hereinafter called the ‘first alternative,’ but on the basis of the knowledge which was subsequently acquired, which last-mentioned basis is called ‘the second alternative.’ ”

The arbitrator found that, according to the first alternative, the compensation payable was £2,950, according to the second, £5,650. The Divisional Court held the appellants entitled to the larger sum. The Court of Appeal reversed this decision. They held that the appellants were only entitled to the lesser sum, that is, a sum assessed according to the first alternative.

The statement in the Special Case as to the rise in the value of coal seems to require a little further explanation. There is no dispute as to the facts. It was stated by the appellants, and not disputed by the respondents, that but for the notice given by the respondents the coal in the protected area would have been reached about June, 1900, and would have been worked out in about two years from that date. The appellants gave evidence before the arbitrator to prove (i) the tonnage of coal in the protected area that would have been brought to bank within each consecutive period of three months; (ii) the cost and expense of getting that coal; and (iii) the market prices current during each period in respect of such coal. The appellants also gave evidence to prove that at the time when the rise in price came they would have been in a position to make forward contracts for the delivery of the whole of the coal within the protected area, and would thus have been enabled to secure the full benefit of the rise. It was contended by the respondents that the arbitrator ought to have rejected this evidence altogether, and to have been guided in making his award solely by facts and circumstances known at the date of the notice of Oct. 15, 1898, and such inferences (if any) as to the probable course of future events as experts (if experts there be in such matters) could properly have drawn at the date of the notice, supposing them to be unbiased and unprejudiced in their forecast by knowledge of what actually did occur. That view was adopted by the Court of Appeal.

The question turns on three sections in the Act of 1847—ss. 6, 22, and 25 [now s. 92, ss. 13, 14, and s. 16 of Sched. 3 to the Water Act, 1945]. These sections cover much the same ground. They are to be read together, and if any defect or obscurity be found in any one, recourse is to be had to the whole series of enactments: see *Smith v. Great Western Rail. Co.* (1). Section 6 requires the undertakers to make “full compensation” for the value of lands used for the purpose of

A their special Act, and for all damage sustained by reason of the exercise of the powers vested in them by the special or any general Act. It also provides by reference to the Lands Clauses Consolidation Act, for the adjustment of compensation and the enforcement of payment. Section 22 enacts that, if a mineowner desires to get the minerals lying under the property of the undertakers, or within the prescribed distance from their works, he is to give thirty days' notice before commencing work, and then, where danger is apprehended, the undertakers may by counter-notice prevent working within a specified area on the terms of making compensation. In the absence of agreement, compensation is to be made "as in other cases of disputed compensation." Section 25 provides for payment by the undertakers of all "expenses and losses" occasioned by the exercise of their powers as well as payment for any mines or minerals not purchased by the undertakers which cannot be obtained by reason of making and maintaining the works or by reason of apprehended injury from the working of such mines or minerals; and, again, in regard to the question of compensation, reference is made to the Lands Clauses Consolidation Act.

D I cannot find in this group of sections any provision or even any suggestion to the effect that a line is to be drawn at the date of the counter-notice, and that all that occurs after that date is to be as if it had never happened. It appears to me that the case put forward on behalf of the respondents is based on a false analogy. The counter-notice by the undertakers following a notice of the mineowners under s. 22 does not operate to make a contract or to transfer property. It is not even a step towards a contract or a step towards expropriation. The undertakers acquire no property in the minerals. The property remains where it was. The mineowner is prohibited from working, and the undertakers are bound to make full compensation. That is all. If the question goes to arbitration, the arbitrator's duty is to determine the amount of compensation payable. In order to enable him to come to a just and true conclusion it is his duty, I think, to avail himself of all information at hand at the time of making his award, which may be laid before him. Why should he listen to conjecture on a matter which has become an accomplished fact? Why should he guess when he can calculate? With the light before him, why should he shut his eyes and grope in the dark? The mineowner prevented from working his minerals is to be fully compensated—the Act says so. That means that as far as money can compensate him he is to be placed in the position in which he would have been if he had been free to go on working. Here it has been proved to demonstration that, if he had not been interfered with, he would have made between £5,000 and £6,000. I cannot understand upon what principle it is maintained that he should be content with half, and that that half is "full compensation." I think that the appeal ought to be allowed, and the judgment of the Divisional Court restored, with costs here and below. My noble and learned friend **LORD SHAND** has asked me to add that he concurs in this opinion.

H

LORD ROBERTSON.—The following propositions in law seem to be perfectly clear; the coal in question was not taken and acquired, and could not be taken and acquired, by the respondents; but, on the contrary, remained the property of the appellants. After the notice of Oct. 15, 1898, the appellants were disabled from working the coal. The resulting pecuniary obligation on the respondents was to pay pecuniary compensation to the appellants for being thus prevented from working the coal. It follows that what is due to the appellants is not the price on a transaction of sale, but compensation for a continuing embargo on working. The sum to be paid would, therefore, be whatever sum could best be made out to be the profit that would have been made by the appellants if they had been free to work. Any estimate of this profit necessarily involves the question, How long would the coal in question take to work out? if for no other reason than in order to compute the cost of working.

If the question thus presented has to be solved *ab ante*, the arbitrator, or who ever has to deal with it, must form the best conjecture that he can of probable prices and probable wages during the period required to work out the area in question. But these calculations are resorted to merely in the absence of facts, and not because the time to be considered is that moment of time when the notice of Oct. 15, 1898, was presented. And if, owing to the course of the procedure the period required for the working out of the coal in question has come to be matter of history, then estimate and conjecture are superseded by facts as the proper *media concludendi*. I do not mean to say that the proper course in awarding compensation is to wait for the expiration of the period required for working out the coal. On the contrary, it is natural that the compensation should be assessed once for all, and by estimate. But the point is that as in this instance facts are available they are not to be shut out. I have only to add that my view exactly coincides with that of PHILLIMORE, J., when he says :

"The true inquiry here is not of the value of the coalfield, or what the value of the coal is, but what would the colliery company, if they had not been prohibited, have made out of the coal during the time which it would have taken them to have got it."

The opposite view seems to me to rest upon the erroneous analogy between the notice given on Oct. 15, 1898, and a notice where land is taken. The notice of Oct. 15 is merely, and purports to be merely, a notice of the willingness of the respondents to make compensation for what they require to be left unworked, and it is so described in s. 23 [now s. 4 of Sched. 3 to the Act of 1945] of the Act in question.

LORD LINDLEY concurred.

Solicitors: *Bell, Brodrick & Gray*, for C. & W. *Kenshole*, Aberdare; *Wrenthmore & Son*, for *Frank James & Sons*, Cardiff.

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

AUSTRIAN LLOYD STEAMSHIP CO. v. GRESHAM LIFE ASSURANCE SOCIETY, LTD.

[COURT OF APPEAL (Romer and Mathew, L.JJ.), January 19, 1903]

[Reported [1903] 1 K.B. 249; 72 L.J.K.B. 211; 88 L.T. 6; 51 W.R. 402;
19 T.L.R. 155; 47 Sol. Jo. 222]

Insurance—Life assurance—Policy—Agreement to submit disputes to jurisdiction of courts having jurisdiction in foreign country.

A policy of assurance granted by an English company upon the life of an Austrian subject contained the following clause: "Residence for purposes of jurisdiction. For all disputes which may arise out of the contract of insurance, all the parties interested expressly agree to submit to the jurisdiction of courts having jurisdiction in such matters in Budapest."

Held: the meaning of the clause was not that if one party should sue the other in the courts in Budapest the defendant to such action would not object to the jurisdiction of such courts, but that the clause was a submission by both parties of all disputes arising out of the contract to the decision of the courts in Budapest; and, therefore, an action on the contract brought in England should be stayed under the Arbitration Act, 1889 [now the Arbitration Act, 1950].

A **Notes.** The Arbitration Act, 1889, has been repealed and replaced by the Arbitration Act, 1950. Section 4 of the latter Act corresponds to s. 4 of the Act of 1889.

Followed: *The Cap Blanco*, [1911-13] All E.R. Rep. 365. Referred to: *Race-course Betting Control Board v. Secretary for Air*, [1944] 1 All E.R. 60

As to stay of proceedings in general, see 2 HALSBURY'S LAWS (3rd Edn.) 21 et seq.; and for cases see 2 DIGEST (Repl.) 477 et seq. For the Arbitration Act, 1950, see

B 29 HALSBURY'S STATUTES (2nd Edn.) 89.

Appeal from an order of DARLING, J., in chambers, in an action brought by the assignees of a policy of assurance which had been granted by the defendant company upon the life of Hugues Rabl. The defendants were an English company, but had an office in Budapest. The policy, which was dated "Londres" and bore an English stamp, was drawn up in the French language, and was alleged to have been made in Hungary. By it the premiums and the insurance money were made payable at Budapest and it contained the clause set out in the headnote. The defendants applied under s. 4 of the Arbitration Act, 1889, for a stay of the action on the ground that the clause above set out was a submission of all disputes arising out of the contract to the proper tribunal at Budapest. DARLING, J., refused the application and the defendants appealed.

D *J. A. Hamilton, K.C., and Leck* for the plaintiffs.

Haldane, K.C., and G. H. Devonshire for the defendants.

ROMER, L.J.—The point in this case seems to me to be a very simple one, though I can understand people taking different views about it. For myself I take the view that, this being a commercial contract, the clause has a distinct meaning in favour of the defendants. The question is, does the clause mean that if either party to the contract should be sued by the other in Budapest he would not raise any objection as to the jurisdiction of the court there, or does it mean that they agree that any dispute arising between them as to the contract shall be submitted to the jurisdiction of the courts in Budapest? I have no doubt that the latter is the true meaning of the clause. It does not mean merely that the insurance company would submit to the courts in Budapest, but that both parties to the contract agreed to submit all disputes between them arising out of the contract. If this clause had been drawn up in similar terms but with a submission to a named arbitrator, no one would have raised any doubt as to its meaning. I think that the appeal must be allowed, and the order of DARLING, J., discharged.

MATHEW, L.J.—I am of the same opinion. The clause seems to me to be perfectly clear. We are really being asked to alter its language.

Appeal allowed.

Solicitors: *Stokes & Stokes; Devonshire, Monkland & Co.*

[Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.]

EMARY v. NOLLOTH

[KING'S BENCH DIVISION (Lord Alverstone, C.J., and Channell, J.), May 28, 1903]

[Reported [1903] 2 K.B. 264; 72 L.J.K.B. 620; 89 L.T. 100; 67 J.P. 354; 52 W.R. 107; 19 T.L.R. 530; 47 Sol. Jo. 567; 20 Cox, C.C. 507]

Licensing—Offence—Sale of liquor to child—Sale by servant contrary to instructions of licensee—Liability of licensee—Intoxicating Liquors (Sale to Children) Act, 1901 (1 Edw. 7, c. 27), s. 2.

By s. 2 of the Intoxicating Liquors (Sale to Children) Act, 1901 [now s. 21 of the Licensing Act, 1961]: "Every holder of a licence who knowingly sells . . . or allows any person to sell . . . any description of intoxicating liquor to any person under the age of fourteen years for consumption by any person on or off the premises, excepting such intoxicating liquors as are sold . . . in corked and sealed vessels in quantities not less than one reputed pint for consumption off the premises only" is liable to penalties. A servant of a licensee, contrary to the express orders and without the knowledge of the licensee, knowingly sold intoxicating liquor to a child under fourteen in a bottle neither corked nor sealed. At the time of the sale, the licensee was himself in charge of the premises.

Held: the licensee had not "knowingly" allowed a person to sell intoxicating liquor to a child under fourteen in a vessel neither corked nor sealed, so as to commit an offence against s. 2 of the Act of 1901.

Notes. The Intoxicating Liquor (Sale to Children) Act, 1901, has been repealed. See now the Licensing Act, 1961, s. 21.

Applied: *Allchorn v. Hopkins* (1905), 69 J.P. 355; *McKenna v. Harding* (1905), 69 J.P. 354. Referred to: *Boyle v. Smith*, [1906] 1 K.B. 432; *Williams v. Pearce* (1916), 85 L.J.K.B. 959.

As to the sale of intoxicating liquor to children under eighteen, see 22 HALSBURY'S LAWS (3rd Edn.) 676-678, and for cases see 30 DIGEST (Repl.) 98, 99. For the Licensing Act, 1961, s. 21, see 41 HALSBURY'S STATUTES (2nd Edn.) 594.

Cases referred to:

- (1) *Brooks v. Mason*, [1902] 2 K.B. 743; 72 L.J.K.B. 19; 88 L.T. 24; 67 J.P. 47; 51 W.R. 224; 19 T.L.R. 4; 47 Sol. Jo. 13; 20 Cox, C.C. 464, D.C.; 30 Digest (Repl.) 98, 733.
- (2) *Police Comrs. v. Cartman*, [1896] 1 Q.B. 655; 65 L.J.M.C. 113; 74 L.T. 726; 60 J.P. 357; 44 W.R. 637; 12 T.L.R. 334; 40 Sol. Jo. 439; 18 Cox, C.C. 341, D.C.; 30 Digest (Repl.) 96, 721.
- (3) *Bond v. Evans* (1888), 21 Q.B.D. 249; 57 L.J.M.C. 105; 59 L.T. 411; 52 J.P. 613; 36 W.R. 767; 4 T.L.R. 614; 16 Cox, C.C. 461, D.C.; 14 Digest (Repl.) 50, 164.

Also referred to in argument:

- Cundy v. Le Cocq* (1884), 13 Q.B.D. 207; 53 L.J.M.C. 125; 51 L.T. 265; 48 J.P. 599; 32 W.R. 769, D.C.; 30 Digest (Repl.) 96, 719.
- Somerset v. Wade*, [1894] 1 Q.B. 574; 63 L.J.M.C. 126; 70 L.T. 452; 58 J.P. 231; 42 W.R. 399; 10 T.L.R. 313; 10 R. 105, D.C.; 30 Digest (Repl.) 95, 709.
- Worth v. Brown* (1896), 40 Sol. Jo. 515; 62 J.P. Jo. 658, D.C.; 30 Digest (Repl.) 95, 710.
- Bosley v. Davies* (1875), 1 Q.B.D. 84; 45 L.J.M.C. 27; 33 L.T. 528; 40 J.P. 550; 24 W.R. 140, D.C.; 25 Digest 430, 301.

Case Stated by the metropolitan police magistrate sitting at Southwark Police Court.

At a court of summary jurisdiction sitting at Southwark on July 17, 1902, the respondent, John Nolloth, preferred an information against the appellant, Alfred

A Emary, charging that, under s. 2 of the Intoxicating Liquors (Sale to Children) Act, 1901, he, being a person licensed for the retail sale of intoxicating liquors, on July 13, 1902, at his licensed premises known as the Spa Tavern public-house in Barmendsey, unlawfully and knowingly allowed a certain person named Barnes to sell intoxicating liquor for consumption off the premises to a person under the age of fourteen years, in a vessel which was not corked and sealed, and which contained

B not less than one reputed pint. The information was heard on July 26, 1902, when the following facts were proved. At half-past one o'clock in the afternoon of Sunday, July 13, 1902, a child aged nine years entered the appellant's licensed premises, and placed on the counter in the bar an empty bottle and one penny and a halfpenny to pay for a pint of porter. The bar was crowded with customers at the time. The appellant, who was then himself in charge of the premises, was present

C in another part of the bar, but did not see the child and had no knowledge of any intoxicating liquors being sold to her. One Barnes, a barman employed by the appellant, filled the bottle with porter and returned it to the counter, from which it was taken away by the child. The bottle was neither corked nor sealed. The bottle in which the porter was supplied had the appearance of having been sealed on a previous occasion, and it was proved that on all previous occasions on which

D the same child had been served with intoxicating liquor at the appellant's premises she had been so served in bottles corked and sealed. The appellant kept posted up in a conspicuous place in the bar a notice in the terms following:

"Notice to Employees.—Every servant employed at this establishment is expressly forbidden to supply any intoxicating liquors either for consumption

E on or off the premises to any child who is in his or her opinion under fourteen years of age except in sealed and corked bottles containing not less than one pint."

Prior to the sale complained of, the appellant had given express instructions to Barnes similar to the directions contained in the above notice, and had required him

F to observe and obey the same. The magistrate found that Barnes, in serving the child, was acting within the general scope of his employment as the appellant's barman, and he further found as a fact that Barnes, in breach of the appellant's express orders and without his knowledge, had knowingly sold the one pint of porter for consumption off the premises to a person under the age of fourteen years in a vessel neither corked nor sealed, and which contained not less than a reputed

G pint; and the magistrate was also satisfied that the appellant had not connived at the sale. It was contended on behalf of the appellant that the appellant had adopted all reasonable means to prevent sales taking place on his premises in contravention of the Intoxicating Liquors (Sale to Children) Act, 1901, and that the sale complained of had been effected while the appellant was himself in charge of the house without his knowledge and in disobedience to his express orders and directions

H by an employee to whom the appellant had not delegated the charge or superintendence of the licensed premises, and that, accordingly, he could not be convicted of the offence with which he was charged.

The magistrate found the appellant guilty and fined him 5s. and costs, and the appellant now appealed.

I *Danckwerts, K.C. (Bruce Williamson with him) for the appellant.*
Macmorran, K.C. (A. E. Gill with him) for the respondent.

LORD ALVERSTONE, C.J.—I am of opinion that the appeal must be allowed. No doubt the scope and object of the Intoxicating Liquors (Sale to Children) Act, 1901, was to prevent the sale of intoxicating liquors to small children, unless with certain precautions. If this is a criminal statute for this purpose, it probably was and is a *casus omnis* that the legislature have not included within the scope of the Act the case of a sale by any person on licensed premises, but have only provided for

the case of a sale by the holder of a licence. In all probability, if the Act is to have the effect that is desired, some amendment should be made in it in order to include a sale on licensed premises by a person other than the holder of the licence. We have to consider whether, under the circumstances of this case, the holder of the licence, who did not know of, and did not connive at, the sale, and who has not delegated his authority, can be convicted. This case has proceeded on the basis that the offence imports knowledge. The words of s. 2 amount to this: "Knowingly sells or delivers, or either unlawfully or knowingly allows any person to sell or deliver"—that word "allows" importing knowledge.

The whole point is whether or not for the purpose of this particular offence, the knowledge of the person who in fact sells, and who is the agent of the licence-holder, is sufficient to convict the licence-holder. It is not necessary to go through all the cases which have been cited, and I do not think that I should be serving a useful purpose by attempting to do so; but there seems to be derived from them three principles. If the act is prohibitive in itself, then knowledge is immaterial, as, for instance, in *Brooks v. Mason* (1), where the bottle of beer that was sold to the child was not in fact sufficiently corked and sealed, but was believed to be so. In that case, it was attempted to be argued that knowledge was material to the offence, but it was held by this court that it was not; and in the other instance of the same kind where there was a prohibition against selling, we held that knowledge was not material. Then there is a class of cases where the words "knowingly allows, permits, or suffers," have been used. There knowledge has been held to be essential; but the licence-holder has been held, and I should say rightly held, to permit or suffer the thing to be done, when he has delegated his authority to another by whom it is done; and this second principle seems to me to be derived from the cases that, where a man delegates his own authority and puts somebody else in charge, and, if I may adopt what my brother CHANNELL said, "has delegated his own power to prevent," then he has been held to permit or suffer the act to be done within the meaning of the statute. That seems to me to be a reasonable and logical conclusion so as to prevent Acts of Parliament from being defeated. The third matter which we have to consider is what is to be the case where, under such circumstances as appear in this case, there has been no delegation of authority, and the licence-holder is himself at the time controlling the business, and has given direct instructions to the persons employed there by a public notice that he himself is not going to allow any infraction of the Act. If there had been a delegation of the authority, the private prohibition, as has been pointed out in *Police Comrs. v. Cartman* (2) and *Bond v. Evans* (3), might become immaterial.

Having regard to the particular facts of the case before us, of the licence-holder in charge keeping control and not delegating his authority, the fact of one of his servants breaking or disobeying his orders does not make any offence in the licence-holder. I am, therefore, of opinion that the appeal should be allowed, and the conviction quashed.

CHANNELL, J.—I am of the same opinion, and for the same reasons.

Appeal allowed.

Solicitors: *Maitlands, Peckham & Co.; Wontner & Sons.*

[*Reported by W. W. ORR, Esq., Barrister-at-Law.*]

A

R. v. GOVERNOR OF HOLLOWAY PRISON. EX PARTE SILETTI

[KING'S BENCH DIVISION (Bigham and Darling, JJ.), July 25, 1902]

R. v. *Arton* 71 L.J.K.B. 935; 87 L.T. 332; 67 J.P. 67; 51 W.R. 191; 18 T.L.R. 771;
46 Sol. Jo. 686; 20 Cox, C.C. 353]

B

Extradition—Habeas corpus—Committal—Fresh evidence since committal—Jurisdiction to review magistrate's decision—Extradition Act, 1870 (33 & 34 Vict., c. 52), ss. 9, 10, 11.

On an application for a habeas corpus to bring before the court a fugitive criminal committed for extradition by a magistrate under the Extradition Act, 1870, the court has no power to review the decision of the magistrate on the ground that further evidence has come to light. The only questions the court can consider on an application for a habeas corpus are whether the crime alleged is outside the class of offences contemplated by the Extradition Act, 1870, and whether there was evidence upon which the magistrate could properly commit. Where further evidence has been obtained since the committal order it is entirely a question for the Secretary of State to inquire into before making an order for the surrender of the accused.

D

Notes. Considered: *R. v. Governor of Brixton Prison, Ex parte Perry*, [1924] 1 K.B. 455. Referred to: *R. v. Governor of Brixton Prison, Ex parte Servini*, [1914] 1 K.B. 77.

E

As to procedure on the extradition of offenders from the United Kingdom, see 16 HALSBURY'S LAWS (3rd Edn.) 567-579. For the Extradition Act, 1870, see 9 HALSBURY'S STATUTES (2nd Edn.) 874; and for cases on jurisdiction of court to review a magistrate's committal order under the Extradition Act, see 24 DIGEST 1006-7.

F

Cases referred to:

- (1) *Re Castioni*, [1891] 1 Q.B. 149; 60 L.J.M.C. 22; 64 L.T. 344; 55 J.P. 328; 39 W.R. 202; 7 T.L.R. 50; 17 Cox, C.C. 225, D.C.; 24 Digest (Repl.) 993, 36.
- (2) *Re Arton* (No. 2), [1896] 1 Q.B. 509; 65 L.J.M.C. 50; 74 L.T. 249; 60 J.P. 132; 44 W.R. 351; 12 T.L.R. 189; 40 Sol. Jo. 258; 18 Cox, C.C. 177, D.C.; 24 Digest (Repl.) 991, 21.

G

Also referred to in argument:

- Ex parte Haquet* (1873), 29 L.T. 41; 12 Cox, C.C. 551; 24 Digest (Repl.) 1006, 130.
R. v. Maurer (1883), 10 Q.B.D. 513; sub nom. *Re Maurer*, 52 L.J.M.C. 104; 31 W.R. 609, D.C.; 24 Digest (Repl.) 1007, 131.
Re Guerin (1888), 58 L.J.M.C. 42; 60 L.T. 538; 53 J.P. 468; 37 W.R. 269; 16 Cox, C.C. 596, D.C.; subsequent proceedings, sub nom. *Guerin v. Bank of France*, 5 T.L.R. 160; sub nom. *Re Guerin* (1889), 5 T.L.R. 188, D.C.; 24 Digest (Repl.) 998, 60.
Re Meunier, [1894] 1 Q.B. 415; 63 L.J.M.C. 198; 71 L.T. 403; 42 W.R. 637; 18 Cox, C.C. 15; 10 R. 400, D.C.; 24 Digest (Repl.) 994, 38.

H

Rule Nisi calling on the governor of His Majesty's prison at Holloway to show cause why a writ of habeas corpus should not issue directed to him to bring one Giuseppe Siletti before the court.

The rule was obtained at the instance of Siletti upon the ground "that further evidence had come to light since the magistrate's committal, which might have affected his mind in favour of the prisoner."

The facts were as follows: The applicant for the rule (Siletti) was brought before the police magistrate at Bow Street Police Court, under the Extradition Act, 1870, with a view to his being surrendered to the Belgian authorities, and on June 5, 1902, he was ordered by the magistrate to be kept in custody at Holloway

Prison until delivered thence in pursuance of the Extradition Act to the representatives of the Belgian government, on the ground of his being accused of committing larceny and of obtaining property or money by a fraud or trick, on Oct. 4, 1900, within the jurisdiction of the Belgian government, under the name of Van Mol.

The accused was not represented by any legal representative at the hearing before the magistrate. The evidence before the magistrate of his identity as the person who was guilty of the fraud was supplied largely by a photograph which was identified by the witnesses as being the photograph of the person who committed the fraud in Belgium, and upon the evidence then before him the magistrate made an order committing Siletti to prison to await extradition if the Secretary of State should make an order under the Act.

Since the order of committal was made on June 5 Siletti had brought forward certain documents for the purpose of showing that at the time when the fraud was committed he was serving in the Italian army, and obtained his discharge some ten days after the fraud was committed in Belgium.

In his affidavit the accused stated that he annexed thereto his certificate of discharge from the Italian army, and that it proved that he was called up for service on Mar. 26, 1900, at Turin, that he was transferred to Piacenza on Apr. 2, 1900, and that he served there till Oct. 11, 1900, on which date he obtained his discharge by special permission for private reasons; that on that day he left Piacenza for Turin, and that therefore he could not have committed the offence alleged against him; that the personal details set forth in the certificate of discharge exactly described himself, but that they did not agree with the description given of Van Mol by the prosecutor; that on his arrival at Turin he presented himself in his uniform to the mayor on Oct. 15, 1900, in accordance with the military rules, and that the mayor thereupon signed his certificate, and that he was discharged. He also stated that he was not the man Van Mol, and that he was not in Belgium on Oct. 4, 1900, the date of the alleged offence; and, further, that he could not produce his certificate of discharge before the magistrate as it was in the custody of the governor of Wormwood Scrubs Prison, in which he was detained.

The court who granted the rule nisi (CHANNELL and JULE, JJ.), were of opinion that there was reasonable and proper evidence before the magistrate on which he could make an order to commit, and a rule was not granted upon that point, but the rule was granted upon the point as to the effect of the new facts discovered. CHANNELL, J., pointing out that if those facts had been before the magistrate in all probability he would not have committed, and the court granted the rule as there was some doubt to what extent the court would review the decision of the magistrate under the circumstances.

The Extradition Act, 1870 (33 & 34 Vict., c. 52), provides :

"Section 9. When a fugitive criminal is brought before the police magistrate, the police magistrate shall hear the case in the same manner, and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England. The police magistrate shall receive any evidence which may be tendered to show that the crime of which the prisoner is accused or alleged to have been convicted is an offence of a political character, or is not an extradition crime.

Section 10. In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged. . . . If he commits such criminal to prison, he shall commit him to the Middlesex House of Detention, or to some other prison in Middlesex, there to await the warrant of a Secretary of State.

A for his surrender, and shall forthwith send to a Secretary of State a certificate of the committal, and such report upon the case as he may think fit.

B Section 11. If the police magistrate commits a fugitive criminal to prison, he shall inform such criminal that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of habeas corpus. Upon the expiration of the said fifteen days, or, if a writ of habeas corpus is issued after the decision of the court upon the return to the writ, as the case may be, or after such further period as may be allowed in either case by a Secretary of State, it shall be lawful for a Secretary of State, by warrant under his hand and seal, to order the fugitive criminal (if not delivered on the decision of the court) to be surrendered to such person as may in his opinion be duly authorised to receive the fugitive criminal by the foreign State from which the requisition for the surrender proceeded, and such fugitive criminal shall be surrendered accordingly."

C Section 12 provides for the discharge of persons apprehended if not conveyed out of the United Kingdom within two months.

D The Attorney-General (Sir Robert Finlay, K.C.) (H. Sallon with him) showed cause.

H: G. Rooth in support of the rule.

E BIGHAM, J.—I think this rule must be discharged. The accused in this case has the right which all persons accused before a magistrate have—the right to apply for a habeas corpus. The Extradition Act, 1870, does not give him that right. He has it already at common law. The Extradition Act, 1870, merely gives him the right to be informed of the fact that he may exercise the power of applying for a habeas corpus, if he chooses to do so. Then, if he applies for a habeas corpus and obtains a rule, the question arises what points may be taken upon the argument of the rule. For my part, I think the only question that this court can entertain is the question of jurisdiction, and, applying that observation to this particular Act, all that the accused person may say is that the crime with which he was charged was not a crime within the meaning of the Extradition Act—that is to say, that it did not come within the class of offences contemplated, or that it was an offence of a political character and therefore was outside the Act altogether. He may also say that there was absolutely no evidence upon which the magistrate could exercise his discretion as to whether he would commit or not. These things he may say; but I am clearly of opinion that there is one thing he cannot say—namely, that there is evidence one way and the other, and that this court ought to enter into the consideration as to whether the magistrate has exercised his discretion as to it properly. That he cannot say. It is said that the judgments in *Re Castioni* (1) show that the court can enter into the question of the weight of evidence, and can review the decision of the magistrate. For my part, I do not think that the learned judges in that case meant to say anything of the kind. If they did mean to say that, I am of opinion that their judgment in that respect was obiter, and was contrary to a long course of decisions which have been brought to our attention by the Attorney-General. Therefore I think that this rule ought to be discharged.

I DARLING, J. I am of the same opinion. With regard to the statement that it is only upon questions of jurisdiction that this court can interfere, I think jurisdiction is not quite the right word to use. It is used by my brother Bigham, as I understand it, to cover a good deal more than is usually meant when we use the word jurisdiction in ordinary cases. It is used to cover want of jurisdiction in the magistrate—that is, want of that which would properly be called jurisdiction. It is also used to cover the case of there being no evidence against the accused at all, and where there was, in the opinion of this court, no

evidence against the accused, not even a *prima facie* case against him, in such a case as that this court would go into the matter, and on ascertaining that there was no evidence, would make the rule absolute for a habeas corpus. The argument of counsel in support of this rule comes to this, that under this statute we have to discharge an absolutely different duty from that which we should discharge on the argument of a rule for a habeas corpus applied for by a person in respect of committal for a crime committed in England. I do not see anything in this Extradition Act to support that contention. It may be that it might be necessary to go into fresh evidence in some conceivable case, because in these extradition cases it may be necessary to apply foreign law as well as English law, for this reason, that it has to be ascertained that the offence charged is an offence by the law of England as well as by the law of the foreign country which applies for the extradition. If the proposition of counsel for the applicant is carefully looked at, it comes to this—and in fact I think he said so—that really he maintains that, on the argument for a rule for a habeas corpus, this court has jurisdiction to consider the application as though it were an application for a new trial on the point that the finding impeached was against the weight of the evidence.

In my opinion it is not open to the court to take that view of the matter. This case is a peculiar one, because it is contended that here we should see whether there ought not to be a new trial on the ground that the finding of the magistrate was against the weight of the evidence, and the evidence is evidence which has never yet been given. It is evidence which has been procured since the order was made, and it is said that, if the magistrate had had that evidence before him, it is conceivable that he would have come to a different conclusion; and it is said, therefore, that in any case where you can produce evidence which the magistrate has not had before him, but as to which it can be said to this court that, if the magistrate had had it before him it would have affected his decision, this court will order a rule for a habeas corpus to be made absolute. In my opinion to do so would be to do what the courts have never yet done. For myself I do not think we are overruling what was said by DENMAN and HAWKINS, JJ., in *Re Castioni* (1), but, if what we are now deciding necessitates our differing from that case, I think it is because that case makes it necessary for us to do so. I still, however, hold the opinion which my brother has expressed, that, if our decision is in conflict with that case, then it seems to me that we have authority for what we are now deciding in the passage which was cited to us in *Arton's Case* (2), where LORD RUSSELL, C.J., said ([1896] 1 Q.B. at p. 518):

"We are not a Court of Appeal on questions of fact from [the magistrate]. We have only to see that he had such evidence before him as gave him authority and jurisdiction to commit."

Here it is plain the magistrate had authority to commit. It is not alleged that he had not. He had jurisdiction to commit, and we have only to see whether he had such evidence before him as justified him in exercising that authority and jurisdiction. It is really not contended that he had not. What is contended is that if he had had something else before him, then he would not have committed. It seems to me that, when the matter is put in that way, it is perfectly plain that this rule ought to be discharged.

Rule discharged.

Solicitors: *J. Weaver Burnard; Treasury Solicitor.*

[Reported by W. W. ORR, Esq., Barrister-at-Law.]

R. v. PLUMMER

COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED (Lord Alverstone, C.J., Wright, Bruce, Darling and Jelf, JJ.), May 10, June 4, 1902]

Reported 1902 2 K.B. 339; 71 L.J.K.B. 805; 86 L.T. 836; 66 J.P. 647; 51 W.R. 137; 18 T.L.R. 659; 46 Sol. Jo. 587; 20 Cox, C.C. 269]

riminal Law—Conspiracy—Plea of Guilty by one defendant to joint indictment—Acquittal of co-defendants—Withdrawal of plea of Guilty.

On a joint indictment for conspiracy if one defendant pleads Guilty and has sentence passed on him and his co-defendants are acquitted, the defendant who pleaded Guilty must be allowed to withdraw his plea and must also be acquitted.

R. v. Brown (1) (1889), 24 Q.B.D. 357, applied.

Notes. By the Administration of Justice Act, 1960, s. 17 (5) (40 HALSBURY'S STATUTES (2nd Edn.) 225), references in that Act to an appeal to the Court of Criminal Appeal are to be construed as including references to proceedings under the Crown Cases Act, 1848.

Considered: *R. v. McNally*, [1954] 2 All E.R. 372. Referred to: *R. v. Gordon* (1925), 133 L.T. 734.

As to right of accused to withdraw a plea of Guilty, see 10 HALSBURY'S LAWS (3rd Edn.) 408, and for cases see 14 DIGEST (Repl.) 286, 287. For the Crown Cases Act, 1848, see 5 HALSBURY'S STATUTES (2nd Edn.) 701.

Cases referred to:

- (1) *R. v. Brown* (1889), 24 Q.B.D. 357; 59 L.J.M.C. 47; 61 L.T. 594; 54 J.P. 408; 38 W.R. 95; 15 Cox, C.C. 715, C.C.R.; 14 Digest (Repl.) 118, 814.
- (2) *Harrison v. Errington* (1627), Poph. 202; 79 E.R. 1292; 14 Digest (Repl.) 126, 878.
- (3) *R. v. Hcaps* (1699), 2 Salk. 593; 91 E.R. 502; sub nom. *R. v. Sudbury, Heaps, etc.*, 1 Ld. Raym. 484; 12 Mod. Rep. 262; 14 Digest (Repl.) 360, 3506.
- (4) *R. v. Thompson* (1851), 16 Q.B. 832; 20 L.J.M.C. 183; 17 L.T.O.S. 72; 15 J.P. 484; 15 Jur. 654; 5 Cox, C.C. 166; 117 E.R. 1100, C.C.R.; 14 Digest (Repl.) 128, 894.
- (5) *R. v. Manning* (1883), 12 Q.B.D. 241; 53 L.J.M.C. 85; 51 L.T. 121; 48 J.P. 536; 32 W.R. 720, D.C.; 14 Digest (Repl.) 131, 947.
- (6) *O'Connell v. R.* (1844), 11 Cl. & Fin. 155; 3 L.T.O.S. 429; 9 Jur. 25; 1 Cox, C.C. 413; 8 E.R. 1061; sub nom. *R. v. O'Connell*, 5 State Tr.N.S. 1, H.L.; 14 Digest (Repl.) 131, 941.
- (7) *R. v. Niccolls* (1745), 2 Stra. 1227; 13 East, 412, n.; 93 E.R. 1148; 14 Digest (Repl.) 131, 953.
- (8) *R. v. Scott* (1761), 3 Burr. 1262; 1 Wm. Bl. 291, 350; 97 E.R. 822; 15 Digest (Repl.) 794, 7481.
- (9) *R. v. Cooke* (1826), 5 B. & C. 538; 7 Dow. & Ry.K.B. 673; 3 Dow. & Ry.M.C. 510; 108 E.R. 201, C.C.R.; 14 Digest (Repl.) 132, 958.
- (10) *R. v. Ahernne* (1852), 6 Cox, C.C. 6; 2 L.C.L.R. 381; 14 Digest (Repl.) 132, *540.
- (11) *Lord Sanchar's Case* (1612), 9 Co. Rep. 114a, 116a, 117a, 120a.
- (12) *Robinson v. Robinson and Lane* (1859), 1 Sw. & Tr. 362; 29 L.J.P.M. & A. 178; 31 L.T.O.S. 268; 33 L.T.O.S. 96; 5 Jur.N.S. 392; 164 E.R. 767; 27 Digest (Repl.) 326, 2705.
- (13) *R. v. Waddington* (1800), 1 East, 143; 102 E.R. 56; 14 Digest (Repl.) 371, 3607.

- (14) *R. v. Cloutier and Heath* (1859), 8 Cox, C.C. 237; 14 Digest (Repl.) 286, 2615.
 (15) *R. v. Sell* (1840), 9 C. & P. 346; 14 Digest (Repl.) 286, 2621.
 (16) *R. v. Yendon and Birch* (1861), Le. & Ca. 81; 31 L.J.M.C. 70; 5 L.T. 329; 26 J.P. 148; 7 Jur.N.S. 1128; 10 W.R. 64; 9 Cox, C.C. 91, C.C.R.; 14 Digest (Repl.) 359, 3496.

Also referred to in argument:

- R. v. Faur* (1591), 4 Co. Rep. 44a; 2 Hale P.C. 251; 76 E.R. 992; 14 Digest (Repl.) 391, 3793.
R. v. Clark (1866), L.R. 1 C.C.R. 54; 36 L.J.M.C. 16; 12 Jur.N.S. 946; 15 L.T. 190; 15 W.R. 48; 10 Cox, C.C. 338.

Case Stated by the chairman of the Berkshire Quarter Sessions.

The appellant, R. E. Plummer, was indicted with William Fenton and Charles Wheeler on a joint indictment which charged that they had conspired together to obtain sums of money by false pretences from the Conservators of the River Thames. Plummer pleaded Guilty; Fenton and Wheeler pleaded Not Guilty and were tried and acquitted. Upon the verdict of Not Guilty being recorded against Fenton and Wheeler Plummer's counsel submitted that Plummer could not be convicted of conspiracy. The chairman overruled this submission, and also Plummer's counsel's application that Plummer be allowed to withdraw his plea of Guilty and enter a plea of Not Guilty. The chairman considered that he had no jurisdiction to grant this application, and passed sentence reserving the following questions for the consideration of the court: (i) Whether under the above circumstances a conviction could be recorded and judgment passed against Plummer; (ii) whether the court of quarter sessions had jurisdiction to permit him to withdraw his plea and plead Not Guilty; (iii) if the court of quarter sessions was wrong in giving judgment and passing sentence, what course ought to have been taken?

Dickens, K.C. (with him *A. J. David*) for the appellant.

Biron (with him *Frampton*), for the Conservators of the River Thames, did not argue.

Cur. adv. vult.

June 14, 1902. **WRIGHT, J.**, read the following judgment.—The appellant and two other persons were indicted together upon an indictment which contained five counts charging the obtaining of money by false pretences, and also a sixth count alleging a conspiracy between the three defendants to defraud the prosecutors. The sixth count did not allege that there were any other or unknown parties to the conspiracy. All three defendants were included in one arraignment. All pleaded Not Guilty to the five counts; the appellant pleaded Guilty to the sixth count, the other defendants pleading Not Guilty to that count as well as to the five. Thereupon, it is stated in the Case, a verdict of Not Guilty was returned in favour of the appellant on the first five counts, and the trial of the other defendants proceeded, and the appellant was called as a witness against them. We must, therefore, infer that the appellant was given in charge to the jury upon the five counts in order that, no evidence being offered against him upon these counts, the jury might find a verdict in his favour upon them. The jury acquitted the other defendants upon all the six counts. Counsel for the appellant, therefore, claimed that no judgment could pass upon the appellant in respect of his plea of Guilty to the count for conspiracy, inasmuch as the jury by their verdict in favour of the only other alleged parties to the conspiracy had negatived any conspiracy.

So far as we have been able to discover, there is no reported precedent which on the facts is exactly in point. There is much authority to the effect that if the

A appellant had pleaded Not Guilty to the charge of conspiracy, and the trial of all these defendants together had proceeded on that charge, and resulted in the conviction of the appellant and the acquittal of the only alleged co-conspirators, no judgment could have been passed on the appellant because the verdict must have been regarded as equivalent in finding that there was a criminal agreement between the appellant and the others and none between them and him: see *Harrison v. Hurrell* (2) where upon an indictment of three for riot two were found Not Guilty and one Guilty, and upon error brought it was held a "void verdict" and said to be

"like to the case in 11 Hen. 4, c. 2, conspiracy against two and only one of them is found guilty, it is void, for one alone cannot conspire."

C So in *R. v. Sudbury* (3) when only two out of three were found guilty of riot and no allegation of cum aliis the judgment was arrested. So in CHITTY'S CRIMINAL LAW (2nd Edn.), vol. 3, p. 1141, on the authority of those cases, "the conviction will be invalid, and no sentence can be passed." So in *R. v. Thompson* (4) (16 Q.B.D. at p. 844), per LORD CAMPBELL, C.J., "the acquittal of two involves the acquittal of the third."

D In *R. v. Manning* (5) this doctrine was perhaps somewhat extended. There two persons were put on their trial together at nisi prius for a conspiracy, no other parties being alleged. The jury convicted one with the sanction of the judge, although they were unable to agree, and were discharged as to the other; and upon a rule moved for a new trial it was held by LORD COLERIDGE, C.J., and MATHEW and STEPHEN, J.J., that there had been a misdirection. The issue, MATHEW, J., said, was whether both were guilty; and the jury had not agreed on that issue. It is true that the judgment in *R. v. Manning* (5) purports to be based mainly on the opinion of the judges in *O'Connell v. R.* (6) (11 Cl. & Fin. at pp. 236, 237), which does not seem to us to affect the present question; but the decision itself is in accordance with the previous authorities, which appear to establish that the mere possibility of the one defendant having been acquitted by reason of evidence not being forthcoming or admissible against him which was forthcoming or admissible against the other who has been tried with him, is not enough to cure the inconsistency apparent on the record.

It is equally clear, on the other hand, that if the appellant had been arraigned and tried alone for the conspiracy and had been convicted, his conviction would have been good at the time, and judgment could have been pronounced against him, although the other persons included in the indictment had not appeared, or were dead, or the trial of them had been postponed. See BROOKE'S ABRIDGEMENT, Conspiracy, p. 21; *R. v. Nicolls* (7), *R. v. Scott* (8), *R. v. Cooke* (9), *R. v. Ahearne* (10), in which case, however, it is difficult to see how the question really arose at all, since the indictment was not for a mere conspiracy to murder, but for actual murder, though laid into an averment of conspiracy, as appears from the sentence of death reported in 2 I.C.L.R. It is, however, not clearly settled whether, in such a case of separate trials, a subsequent acquittal of the other defendants upon their separate trial would or would not avoid the effect of the previous conviction of the appellant. So if, in the present case, the appellant had been sentenced, as he might have been, immediately upon his pleading guilty to the charge of conspiracy, the sentence would have been right when passed, but it is not certain whether, upon the acquittal of the other defendants, the sentence upon him must have been vacated or treated as erroneous, just as judgment against an accessory passed during the attainder of the principal was good during the attainder, but was ipso facto avoided when the attainder was removed (1 Hale, 622 et seq.; *Lord Sanchar's Case* (11) (9 Co. Rep. at pp. 116b, 119a and b). In *R. v. Cooke* (9) LITTLEDALE, J., suggested that a similar consequence might follow from an acquittal of the alleged co-conspirators at his own separate trial, and the same suggestion is made in the headnote to *R. v. Ahearne* (10) (6 Cox, C.C. 6),

though not so distinctly in the judgments. This suggestion is questioned by MR. GREAVES (*RUSSELL ON CRIMES* (4th Edn.), vol. 3, p. 146), but on grounds which would be to a large extent equally applicable to the case of a joint trial, and are, therefore, insufficient upon the authorities which have been cited.

The present case may be regarded as intermediate between the case of a wholly joint trial and the case of separate trials of the alleged co-conspirators. The appellant and his co-defendants were jointly indicted: they were arraigned together; they all pleaded Not Guilty to the five principal counts; there was only one venire; they were all apparently given in charge (as we have pointed out) to the same jury. If error had been brought, one record would have been made up (as in *Lord Sauchar's Case* (11), where the plea of Guilty by one prisoner, and the verdict of the jury as to the other, are set out), and the same record would have shown the inconsistent plea and verdict. We think that under the circumstances the trial ought to be regarded in substance as joint, and that the plea of Guilty ought not to be followed by judgment. There is an authority to this effect which, although it has not the effect of a decision, we cannot disregard. The very case is put in *Robinson v. Robinson* (12), where COCKBURN, C.J., says (1 Sw. & Tr. at p. 392):

"The case of an indictment against two persons for conspiracy suggested an apparent analogy; and as in such a case a plea of guilty by the one, if followed by the acquittal of the other, would not have supported a judgment of guilty against the defendant confessing and pleading guilty, so it may be said,"

etc. This passage is indeed treated by one of the judges in *R. v. Manning* (5) as a "mere dictum," but in truth it was this very analogy that the court in *Robinson v. Robinson* (12) had to consider and reject or adopt, and it forms part of a considered judgment of COCKBURN, C.J., WIGHTMAN, J., and SIR C. CRESSWELL—no mean authorities on the criminal law. It seems also to be supported by the language of LEE, C.J., in *R. v. Nicolls* (7), who said:

"On being acquitted on record, the conviction of his companions on the same record must be directly repugnant and contradictory to the other."

and there is nothing in the context to exclude the application of this language to a conviction on a plea of guilty.

Even apart from the conclusion of strict law at which we have arrived, we think that the unfettered power the Crown Cases Act, 1848, confers upon this court to make such order as justice may require might in this case be exercised in favour of the appellant who has been acquitted of the more serious charges alleged in the indictment, and who, in pleading Guilty to the minor charge, may have done so under misapprehensions of various kinds, and who certainly did not plead Guilty to any separate offence.

BRUCE, J., read the following judgment.—I agree with the judgment of WRIGHT, J., and with the reasons he has given. I do not propose to go through the authorities cited by him, but I wish to make a few observations of my own tending to the same conclusion on somewhat different grounds. I think that the statement in CHITTY ON CRIMINAL LAW (2nd Edn.), vol. 3, p. 1141, is correct, and is fully supported by the authorities. The statement in CHITTY is as follows:

"And it is holden that if all the defendants mentioned in the indictment, except one, are acquitted, and it is not stated as a conspiracy with certain persons unknown, the conviction of the single defendant will be invalid, and no judgment can be passed upon him."

That passage seems to me to apply exactly to the present case. The point of the passage turns upon the circumstance that the defendants are included in the same indictment, and I think it logically follows from the nature of the offence of

A conspiracy that where two or more persons are charged in the same indictment of conspiracy with one another, and the indictment contains no charge of their conspiracy with other persons not named in the indictment, then, if all but one of the persons named in the indictment are acquitted, no valid judgment can be passed upon the one remaining person, whether he has been convicted by the verdict of a jury or upon his own confession, because, as the record of conviction can only be made up in the terms of the indictment, it would be inconvenient and contradictory, and so bad on its face.

The gist of the crime of conspiracy is that two or more persons did combine, confederate, and agree together to carry out the object of the conspiracy. To quote from SIR WILLIAM ERLE (*THE LAW RELATING TO TRADE UNIONS*, p. 31):

C "With respect to the crimes classed under the term conspiracy, the external act of the crime in concert by which mutual consent to a common purpose is exchanged."

Where the indictment charges that A., B., and C., combined, confederated, and agreed together to do a certain thing, and A. and B. are acquitted by the verdict of a jury from the charge, it is inconsistent with that finding that there could have been any combination, confederation, and agreement between them and C., and unless they combined, confederated, and agreed together with C., C. cannot be found guilty of the charge. It seems to me it matters not whether the trial of A., B., and C. took place at the same time or not, so long as they are charged upon one indictment. Only one record can be drawn up based upon that indictment;

E if the proceedings have taken such a course as to negative mutual consent to a common purpose by all but one of the parties who are alleged to have conspired together, no valid record of a conviction against that one can be drawn up. If the record finds that A. and B. are acquitted of a charge of agreeing together with C., the same record cannot without inconsistency find that C. agreed together with A. and B. As to the note by MR. GREAVES in *RUSSELL ON CRIMES* (4th Edn.), vol. 3, p. 146; p. 276, 6th Edn., referred to in the judgment of WRIGHT, J., where it is suggested that a verdict of Not Guilty is not to be taken as establishing the innocence of the person acquitted, because the verdict may have been arrived at simply in consequence of the absence of evidence to prove his guilt, I think it is a very dangerous principle to regard a verdict of Not Guilty as not fully establishing the innocence of the person to whom it relates.

G If it is to be applied at all it would apply to persons tried at the same time, and yet it is perfectly clear upon the authorities that if two persons are tried together upon a charge of conspiracy with one another, and one is acquitted by the jury and the other convicted, the conviction cannot stand, although it is perfectly clear that the verdict of acquittal may have been obtained simply upon the ground that there was a failure of evidence to establish the charge against the person

H who was acquitted.

There is another point in the case. It is clear that the court had power to allow the appellant to withdraw his plea of Guilty. The court no doubt had a discretion in the matter, and if the court had exercised its discretion, it may be that that would be final and we should have no power to interfere with the exercise of its discretion. But the court, acting upon the erroneous opinion that

I it had no power to allow the withdrawal of the plea, never did exercise its discretion. If it had exercised its discretion, it is quite possible that it might have allowed the withdrawal of the plea, and if it had allowed the withdrawal of the plea of Guilty and allowed the appellant to plead Not Guilty, and he had been tried by the same jury who acquitted the other defendants or by another jury, it is quite possible that he would have been acquitted. The appellant has been deprived of this chance of acquittal by reason of a mistake of the court. I think every intendment should be made in favour of an accused person, and as the court, by reason of a mistake as to the extent of its powers, did not exercise a discretion which it

might have exercised in favour of the appellant, the appellant is, I think, entitled A
on that ground alone to have the conviction set aside.

DARLING, J. I agree with the judgments which have been delivered.

LORD ALVERSTONE, C.J.—JELF, J., and I concur in the judgment which B
has been delivered by our brother WRIGHT. But we have not come to this
conclusion without much hesitation as to the first point in the case, for we feel
that the course which we cannot hold to be illegal might be used to defeat the
ends of justice. We concur, because we can find no reason for dissenting. We
place great reliance on the fact that this was a joint indictment, and a failure
of justice can be guarded against in drawing the indictment. On the second point, C
the question of the withdrawal of the plea, we entirely agree.

Conviction quashed.

Solicitors: *Rooke & Sons*, for *Brain & Brain*, Reading; *W. S. Bunting*.

[*Reported by A. A. BETHUNE, Esq., Barrister-at-Law.*] D

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MOLINEAUX v. LONDON, BIRMINGHAM AND MANCHESTER INSURANCE CO., LTD.

COURT OF APPEAL (Sir Richard Henn Collins, M.R., Mathew and Cozens-Hardy,
L.JJ.), July 12, 14, 21, 1902] F

[Reported [1902 2 K.B. 589; 71 L.J.K.B. 848; 87 L.T. 324; 51 W.R. 36;
18 T.L.R. 753]

*Company—Director—Qualification—Implied agreement to take shares within
reasonable time—Right of company, on failure, to register shares in director's
name—Vacation of office—Failure to hold qualification shares—Increase in G
qualification after appointment—Companies Act, 1900 (63 & 64 Vict., c. 48), s. 3.*

In May, 1899, when the plaintiff was appointed director of a company,
the articles specified 50 shares as a director's share qualification, and through-
out the plaintiff held this number of shares. At general meetings of the
company held on Apr. 4 and Apr. 19, 1901, resolutions were passed and
confirmed increasing the company's capital and at the same time raising the H
directors' share qualification from 50 to 250 shares. The plaintiff, as a
director, was present at these meetings and was also present at earlier
board meetings at which the proposal to raise the share qualification was put
forward. On Apr. 20, 1901, the secretary and manager, unknown to the
plaintiff, entered his name on the register for 200 shares which together with
his original 50 shares made up the necessary share qualification. On Apr. 22 I
the plaintiff in his capacity as director signed the share prospectus which was
issued on the following day. On May 16, 1901, the plaintiff sent in his resignation
of the office of director. On May 22, the company made a call on him
for the 200 shares registered in his name.

Held: (i) the plaintiff had not vacated office on Apr. 19 (when the resolution
raising the share qualification was confirmed) for s. 3 (2) of the Companies
Act, 1900, did not apply to a case where the qualification was increased after
the director's appointment; (ii) the plaintiff had impliedly contracted with the

A company to obtain the necessary 200 shares within a reasonable time, and was, therefore, bound to obtain them before he signed the prospectus on Apr. 22, since the prospectus asserted that he was a fully qualified director; the plaintiff having failed so to obtain the shares, the company were to be deemed authorised to register a claim against his name; further, the plaintiff could not throw himself from the obligation to take the shares by his act of resignation.

B Since the obligation was binding on him before the date of his resignation, and, therefore, the plaintiff was liable for the amount of the call.

Notes. As to share qualifications of directors see now s. 182 of the Companies Act, 1948, sub-ss. (1) and (3) of which are in similar terms to s. 3 (1) and (2) of the Companies Act, 1900. As to the register of members being evidence of the matters inserted therein see now s. 118 of the Companies Act, 1948, which is identical with s. 37 of the Act of 1862. As to the definition of member see s. 26 of the Companies Act, 1948, which contains similar terms to s. 23 of the Act of 1862.

As to directors' qualification shares, see 6 HALSBURY'S LAWS (3rd Edn.) 284 et seq.; and for cases see 9 DIGEST (Repl.) 462 et seq. For the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

D Cases referred to:

- (1) *Re Metropolitan Public Carriage and Repository Co., Brown's Case* (1873), 9 Ch.App. 102; 43 L.J.Ch. 153; 29 L.T. 562; 22 W.R. 171, L.C. & L.J.J.; 9 Digest (Repl.) 474, 3103.
- (2) *Re Portuguese Consolidated Copper Mines, Ltd., Ex parte Lord Inchiquin*, [1891] 3 Ch. 28; 60 L.J.Ch. 556; 64 L.T. 841; 39 W.R. 610; 7 T.L.R. 591, C.A.; 9 Digest (Repl.) 471, 3083.
- (3) *Re Anglo-Austrian Printing and Publishing Union, Isaacs' Case*, [1892] 2 Ch. 158; 66 L.T. 593; 40 W.R. 518; 8 T.L.R. 501; sub nom. *Re Anglo-Austrian Printing and Publishing Co., Ex parte Isaacs, Ex parte Kegan Paul*, 61 L.J.Ch. 481; 36 Sol. Jo. 427, C.A.; 9 Digest (Repl.) 469, 3072.
- (4) *Re Printing, Telegraph and Construction Co. of Agence Havas, Ex parte Cammell*, [1894] 2 Ch. 392; 63 L.J.Ch. 536; 70 L.T. 705; 10 T.L.R. 441; 38 Sol. Jo. 437; 1 Mans. 274; 7 R. 191, C.A.; 9 Digest (Repl.) 471, 3082.
- (5) *Re Portuguese Consolidated Copper Mines, Ltd., Ex parte Budman, Ex parte Bosanquet* (1890), 45 Ch.D. 16; 63 L.T. 423; 39 W.R. 25; 2 Meg. 249, C.A.; 9 Digest (Repl.) 278, 1745.

G Appeal by the plaintiff from a judgment of PHILLIMORE, J., on the counterclaim of the defendant company at the trial of the action without a jury.

At the trial PHILLIMORE, J., gave judgment for the plaintiff for the amount of his claim, which was not disputed, and gave judgment for the defendant company on their counterclaim for £50, the amount of a call on 200 shares registered in the plaintiff's name. The plaintiff appealed.

H Disturnal for the plaintiff.

J. A. Hamilton, K.C., Sherwood and Barrington for the defendant company.

Cur. adv. vult.

July 21, 1902. COZENS-HARDY, L.J., read the following judgment of the court.

I — The question in this appeal is whether the plaintiff is liable, under a counterclaim, to pay £50, the amount of a call on 200 shares in the defendant company standing in the plaintiff's name. The material facts may be shortly stated. The plaintiff was appointed a director of the company in May, 1899. By art. 70, the qualification of a director was the holding in his own right of £50 in shares in the capital of the company. The plaintiff throughout held this number of shares. He had at one time 200 shares, but he sold fifty to Brown, and he transferred 100 to his brother apparently as trustee for himself. In February, 1901, at board meetings at which the plaintiff was present, it was resolved that a resolution be put to the

shareholders at the next general meeting to alter the qualification of a director from fifty shares to 250 shares, and that the plaintiff should be elected a life-member of the board, subject to confirmation at the annual meeting. In March the share prospectus was provisionally approved. This had reference to a contemplated increase of the capital of the company from £10,000 to £100,000. The increase of the capital and the enlargement of the directors' qualification were parts of one scheme. On Apr. 4, 1901, a general meeting was held at which resolutions were unanimously passed for increasing the capital by the creation of 90,000 new shares of £1 each, and for altering the articles so as to make the plaintiff a life director; and art. 70 was cancelled, and a new article substituted, making the qualification of a director 250 shares. On Apr. 19 a board meeting was held, at which the date of the issue of the share prospectus was fixed for the 23rd inst.

On the same day a general meeting was held at which the resolutions passed on Apr. 4 were duly confirmed, and they became special resolutions. The plaintiff was present at all these meetings. On Apr. 22 the plaintiff signed the share prospectus, in which his name appeared as one of the directors. It was issued on Apr. 23. On Apr. 20 the secretary and manager entered the plaintiff's name on the register in respect of 200 shares, making with his original fifty his qualification. This was entered as of Apr. 4, on which day there was some conversation with the plaintiff on the subject of qualification. The plaintiff says he was not aware of this entry on the register until after his resignation. On Apr. 26 the plaintiff wrote to the secretary as follows :

"If you can obtain a purchaser of my 200 shares at 10s. I shall be pleased to hand you £5 and resign my seat on the board."

The plaintiff's view is that this relates not to the 200 new shares required to make up his qualification, but to the 200 old shares, of which he still considered himself the real owner. He wrote a similar letter on May 3. A board meeting was held on May 8, at which the plaintiff was present, but not, as he says, as a director. A discussion took place. The plaintiff was under an impression that he had originally applied for 250 shares, and that he could get them back, and thus acquire his qualification. The board did not accept this view. No conclusion was arrived at. On May 16 the plaintiff sent in his resignation of the office of director, which by art. 82 would become operative on June 16. The call in question was made on May 22. The plaintiff was not present at any board meeting after May 8. No application has been made by the plaintiff for rectification of the register. Under these circumstances PHILLMORE, J., has held the plaintiff liable in respect of the call on the 200 shares.

Counsel for the plaintiff contended that the plaintiff is not liable (i) by reason of the provisions of s. 3 of the Companies Act, 1900, and (ii) because he never agreed to take these 200 shares from the company or to become a member in respect of them. It will be convenient to deal with these points separately.

(i) Section 3 of the Act of 1900 is as follows :

"(1) Without prejudice to the restrictions imposed by the last foregoing section, it shall be the duty of every director who is by the regulations of the company required to hold a specified share qualification, and who is not already qualified, to obtain his qualification within two months after his appointment, or such shorter time as may be fixed by the regulations of the company. (2) The office of director of a company shall be vacated, if the director does not within two months from the date of his appointment, or within such shorter time as may be fixed by the regulations of the company, obtain his qualification, or if after the expiration of such period or shorter time he ceases at any time to hold his qualification."

It is argued that the plaintiff ceased to hold his qualification on Apr. 19, when his qualification was raised from £50 to £250, and that, therefore, he necessarily vacated office, and that no subsequent acts on his part purporting to be done as

A director can afford ground for raising the implication of a contract to take qualifying shares. But, on a careful consideration of the language of the section, it seems to us that this argument cannot prevail. Sub-section (1) deals with the original appointment of a director, and states that it is his duty to obtain the "specified share qualification" within two months after his appointment at the latest. This could not apply to the plaintiff, who was appointed in May, 1899, for the Act did not come into operation until Jan. 1, 1901. Sub-section (2) states the consequences of breach of the duty referred to in sub-s. (1). It provides that the office of director shall be vacated if he does not within the prescribed period obtain his qualification, i.e., the specified share qualification,

"or if after the expiration of such period or shorter time he ceases at any time to hold his qualification."

These last words plainly contemplate that the director once had, but no longer has, the specified share qualification. It is an abuse of language to say that the plaintiff "ceased" to hold 250 shares on Apr. 19. The section does not touch a case like the present, where, after election, the share qualification has been varied. The opposite view would lead to this strange result, that a prosperous company, increasing its capital and also the qualification of directors, might find that the passing of the special resolution instantaneously vacated the office of every director, and left the company without any executive. Neither the language nor the policy of the Act compels us to arrive at this conclusion.

The case must, therefore, be decided apart from s. 3 of the Act of 1900. (ii) On principle, and apart from authority, it seems to us that a person who accepts an appointment as director, knowing that the holding of a certain number of shares is a necessary qualification, and acts as director, must be held to have contracted with the company that he will, within a reasonable time, obtain the requisite shares either by transfer from existing shareholders or directly from the company. If he has not obtained the shares within a reasonable time from the public, the company are authorised to put him on the register in respect of the shares. What is a reasonable time must depend upon all the circumstances. As a general rule, and apart from any special provisions in the articles, the qualification ought, in the case of an established company, to be obtained before acting. Where a director takes an active part in the scheme for increasing the qualification, the "reasonable time" may well begin to run before the date of the second confirmatory resolution, and may be held to have ended at the latest on the first occasion when he does an important act as director after that date. The articles, though not themselves a contract between the company and the director, must be regarded as showing the terms upon which on the one hand he agrees to act as director, and on the other hand the company agree to pay him remuneration for his services. By s. 37 of the Companies Act, 1862, the register is *prima facie* evidence that a person on the register is a member in respect of shares registered in his name. His position is not the same as it would be if his name were not on the register and the liquidator were seeking to make him a contributory. Moreover, he is absolutely bound as a member, under s. 23, if it can be shown that he has "agreed," expressly or by implication, "to become a member" in respect of the shares which are registered in his name. The conditions of s. 23 are satisfied if a reasonable time has elapsed without his having obtained the shares *aliunde*.

The authorities in the Court of Appeal are consistent with the above propositions. We refer especially to *Brown's Case* (1); *Lord Inchiquin's Case* (2); *Isaacs' Case* (3); and *Cammell's Case* (4).

Applying these principles, we think the plaintiff was bound to have acquired his qualification before signing the prospectus of Apr. 22. This was a statutory duty imposed on him as director by s. 9 (2) of the Companies Act, 1900. It was a solemn assertion that he was a duly qualified director. He was so if, but only

if, the insertion of his name on the register on Apr. 20 can be deemed authorized. True, it was the act of the manager and secretary; but it was ratified and adopted by the board on May 22, by making a call on the plaintiff in respect of these particular shares: *Re Portuguese Consolidated Copper Mines, Ltd.* (5). It is of no moment that the plaintiff was not aware at the time that his name was placed on the register.

We ought perhaps to allude to an argument which was strongly pressed upon us as to the effect of the resignation on May 16. If, as we hold, there was a binding contract prior to that date, the plaintiff could not, by his own sole act, release himself from its obligation. Nor is there any ground for holding that there was an implied condition in the contract that he might thus release himself. It follows that we consider the judgment of PHILLIMORE, J., on the counterclaim correct, and that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *James Mitchell*, for *R. A. Willcock & Taylor*, Wolverhampton; *Harrey Clifton*.

[Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.]

NEALE v. GORDON-LENNOX

[House of Lords (The Earl of Halsbury, L.C., Lord Macnaghten, Lord Brampton, and Lord Lindley), July 29, 31, August 1, 1902]

[Reported [1902] A.C. 465; 71 L.J.K.B. 939; 87 L.T. 341; 66 J.P. 757; 51 W.R. 140; 18 T.L.R. 791; 46 Sol. Jo. 319]

Judgment—Setting aside—Order for reference—Consent—Counsel exceeding authority to agree to order.

Where counsel has authority from his client to agree to a reference upon certain conditions, and he disregards such limitations and agrees to an order of reference unconditionally, the court has a discretion not to enforce such order against the wish of the client.

Notes. Distinguished: *Little v. Spreadbury*, [1910] 2 K.B. 658. Considered: *Welsh v. Roe*, [1918-19] All E.R. Rep. 620. Applied: *Shepherd v. Robinson*, [1919] 1 K.B. 474. Referred to: *Sourendra Nath Mitra v. Srimati Tarubala Dasi* (1930), 46 T.L.R. 191.

As to setting aside a compromise, see 30 HALSBURY'S LAWS (3rd Edn.) 405; and for cases see DIGEST (Pract.) 620 et seq.

Case referred to:

(1) *Wright v. Soresby* (1834), 2 Cr. & M. 671; 4 Tyr. 434; 3 L.J.Ex. 207; 149 E.R. 930; 3 Digest (Repl.) 382, 335.

Appeal from a decision of the Court of Appeal (SIR RICHARD HENY COLLINS, M.R., ROMER and MATHEW, L.J.J.), reported [1902] 1 K.B. 838, who had reversed an order of LORD ALVERSTONE, C.J., setting aside an order made by consent for a reference of the matters in dispute in the action to arbitration.

The action, in which the appellant, Miss Neale, was plaintiff, was brought to recover damages from Lady Amelia Gordon-Lennox for alleged slander and libel. The action came for trial before the Lord Chief Justice on Feb. 12, 1902. Before the action was reached the Lord Chief Justice made a communication to *Refus*

A Isaacs, K.C., counsel for the respondent, requesting him to communicate with *Sir Edward Clarke*, K.C., counsel for the appellant, with a view to having the action referred to some independent person. Thereupon *Sir Edward Clarke* obtained from the appellant her consent to a reference of the action to some independent person, upon terms which were embodied in a written document signed by the appellant as follows:

B "Defendant stating by her counsel that she never imputed or meant to impute anything against the moral character of the plaintiff, and is satisfied that there is no ground for any such imputation.

"Case referred to — to say what should be done between the parties in satisfaction of all matters in difference between them.

C "Case referred to — to say what sum, if any, should be paid by the defendant in compensation for the matters complained of in this action.

"I consent to either alternative *Sir E. Clarke* adopts.—*Dora Beatrice Neale*. —12.2.02."

Sir Edward Clarke copied on separate papers the first three paragraphs of the document, and, *Rufus Isaacs* declining to consider any suggestion of a reference of

D matters outside the action, *Sir Edward Clarke* handed to him the copies of paras. (1) and (3) as containing the terms upon which he was authorised to refer the action. Then *Sir Edward Clarke* and *Rufus Isaacs* had an interview with the Lord Chief Justice, at which it was agreed that the action should be referred, but counsel were unable to agree as to the form of words to be used in court when withdrawing a jury, and *Sir Edward Clarke* in open court stated that a jury would be withdrawn.

E but no statement was made withdrawing any imputations on the appellant's character, and the order was made. The appellant, immediately on leaving the court, informed her solicitor that she objected to the order without a statement made in court by counsel on behalf of the respondent withdrawing all imputations as to her character in accordance with her instructions, and requested her solicitor to see *Sir Edward Clarke* with reference to having the action restored to the list for

F trial before a judge and a special jury. Her solicitor did so on Feb. 13, 1902, and the appellant on Feb. 14, 1902, saw *Sir Edward Clarke* in consultation with reference to the matter. After communications between the solicitors on either side notice was issued on behalf of Miss Neale to set aside the order, and the motion was heard on Mar. 4. The Lord Chief Justice, on the hearing of the motion, set aside the order of reference, and ordered the action to be restored to the list. The respondent

G appealed to the Court of Appeal, and on Apr. 8 that court reversed the decision of the Lord Chief Justice, and ordered the case to go to a special referee. Miss Neale appealed to this House.

Sir R. Reid, K.C., and *R. J. Drake* for the appellant.

Rufus Isaacs, K.C., and *Norman Craig* for the respondent.

H **THE EARL OF HALSBURY, L.C.**—I am of opinion that the judgment of the Court of Appeal ought to be reversed. I do not propose to go through the different cases which have been cited before your Lordships, because I think that there is a higher and much more important principle at stake than that which is involved in discussing whether a particular part of a bargain has or has not been within the exact authority given to the learned counsel.

I The undisputed facts in this case are these. The learned counsel who was employed for the plaintiff was desirous, for reasons which I appreciate and entirely share, of sparing his client the necessity of wading through by a public trial such a cause of action as is involved in the trial of this cause. I myself was desirous of giving the parties an opportunity, even at this late hour, of preventing that which would, I should think, be injurious and certainly exceedingly painful to them both. But when the parties have resolved that their rights are to be determined by a regular tribunal, and that they will not agree to those courses which others may think more advantageous and more pleasant for them, the court has no authority

to insist upon their abstaining from the exercise of their legal rights. They must be permitted to conduct their litigation as they will. Sir Edward Clarke, being moved by the desire to which I have referred, obtained in writing from his client a distinct consent upon certain terms to refer this cause. It is important to look at the terms with reference to an observation that I will make presently. The terms are these—that the defendant, who was sued upon an allegation of having spoken certain grave and slanderous words of the plaintiff, should publicly at the time of the reference of the cause state by her counsel that no imputation had been made, that no imputation was intended to be made, and that the defendant was satisfied that there was no ground for any imputation upon the plaintiff's moral character. Can anybody doubt that this condition was one of supreme importance to the party who insisted upon it? It seems to me that a great many people would share the view of the plaintiff—I do not care whether they would be right or wrong in that view—but they would say, "If I am to go before a tribunal which has not the weight and authority of a public trial, I must have it perfectly understood, before I go before that private tribunal, that every imputation of any sort or kind upon my private character is withdrawn."

The learned counsel who has last addressed us suggests that this does not involve the negative. I entirely disagree with him. I think that insisting upon such a preliminary to entering into a reference at all does involve in the most emphatic form the negative: "Unless that is done I absolutely decline to have it tried otherwise than by a public tribunal." And that authority is in writing. We are not dealing here with an uncertain recollection of conversations. That is a written authority given, and, nevertheless, it is sought to refer the cause by the agreement of counsel without any such public statement, although the court has before it the fact that such was the authority given, and that the preliminary statement about the plaintiff's character was an essential condition of the bargain by which the case was referred.

As I said, I will not go through the cases, because to my mind there is a higher and much more important principle involved. The court is asked for its assistance—and I entirely repudiate the technical distinction between what is called an application for specific performance and an order to be made that such and such things should be done—the court is asked for its assistance when it is asked to make and enforce this order, that the trial of the cause should not go on; and to suggest to me that a court of justice is so far bound by the unauthorised act of learned counsel that it is deprived of its general authority over justice between the parties is, to my mind, the most extraordinary proposition that I ever heard. That condition of things seems not to have been in the contemplation of the Court of Appeal. I will only say for myself that I should absolutely repudiate any such principle. Where the contract is something which the parties are themselves by law competent to agree to, and where the contract has been made, I have nothing to say to the policy of law which prevents that contract from being undone; the contract is by law final and conclusive. But when two parties seek as part of their arrangement the intervention of a court of justice to say that something shall or shall not be done, although one of the parties to it is clearly not consenting to it, but has in the most distinct form said that the consent to refer—to take it from the jurisdiction of the ordinary tribunal—shall only be on certain terms—to say that any learned counsel can so far contradict what his client has said, and act without the authority of his client as to bind the court itself, is a proposition to which I certainly will never assent. That appears to me to be decisive of this case.

A great many cases have been quoted, but it seems to me that of every one of those cases it would be true to say that no court has suggested that the court had not the power to do such a thing. It has been said, "If you allow this, everybody will be making similar applications." That is policy. It has been said that in such and such a case the parties were present in court and did not immediately repudiate the transaction, and therefore I must assume that they did consent. Those are all examples of what, in the exercise of its discretion, a court might or might not

A It is because it was or was not satisfied that the circumstances of the case did not justify the undoing of a bargain which had been made. And I can well adopt, and feel that I could safely affirm, every one of the decisions referred to. But when I come to this case, and consider the question of what should be the position of the other party who has acted upon the apparent authority of counsel, there are cases in which the court undoubtedly, in the exercise of its discretion (and that is the observation which I intended to make), might well say, "If it is only a question of money, if it is only a question which costs will rectify, this matter can be put right by the payment of costs." That is one example. Or the position of the other party might have been altered and changed—for instance, I could imagine the case to be so delayed that it made the Statute of Limitations to run so that there was no possibility of trying the action again; and other cases might be put which would raise the question of the other party being put into such a position by the unauthorised act of counsel that one might well say: "This is a case in which one of two innocent parties must suffer; then the person by the act of whose counsel (the counsel for whom he is responsible for employing) the difficulty has been created must suffer; the position of the parties has been totally altered by what has taken place, and therefore we cannot interfere." That would be because, upon its general jurisdiction to do justice between the parties, the court would think that it was not a case in which it ought to interfere. This was in effect the language of LORD LYNCHURST, C.B., in one of the cases which have been cited—*Wright v. Soresby* (1).

But, turning to the present case, I can hardly conceive a case in which there is a more important principle involved than a case in which a person is coming to vindicate her character in public. What is the argument on the other side? What injustice is done to the other side by the action being tried now instead of its being tried then? Nobody can suggest any. It is said, "Your counsel made a bargain, and we will not let you off the bargain which he made." It seems to me that it is unarguable to say, if it is a matter of discretion at all, that that is a matter which would prevent the court from exercising its discretion. The effort to put this right by an application made to the court was attended with certain costs. The Lord Chief Justice has with great propriety, I think, said that the party by the act of whose counsel the difficulty has arisen must pay the costs of that proceeding; but now that that is out of the way, what injustice or what impropriety is there in the cause being restored to the list and being tried in due course? I can see none. On the other hand, to tell me that the person whose character is alleged to have been attacked—I am not saying whether it is true or not—is to be deprived by this unauthorised act of the opportunity of vindicating her character in public, seems so gross an injustice that, upon the general jurisdiction that every court has over its procedure, this court ought to refuse to allow that injustice to be committed. I therefore move your Lordships that this appeal be allowed, and that the order of the Court of Appeal be reversed.

H **LORD MACNAGHTEN.**—I am of the same opinion. I agree entirely in the two propositions which counsel for the appellant laid down in his reply. I do not think that the court is entirely in the hands of counsel, and bound to give the seal of its authority to any arrangement that counsel may make when the arrangement itself is not in its opinion a proper one. In the next place, I do not think that counsel has authority to compel his client against his will to refer an action which he desires to try in open court.

LORD BRAMPTON.—I am also of opinion that this decision ought to be reversed, and that the parties ought to be remitted to try the case in the ordinary course. I have rarely heard anything more preposterous than the notion that a suitor can impose no effective veto upon a course proposed to be taken by his or her own counsel which, rightly or wrongly, in his or her judgment, will operate most prejudicially to his or her interest in an action, and possibly to the ruin of his or her

character. I quite agree, therefore, that this appeal ought to be allowed and the case restored to the paper.

LORD LINDLEY.—I am of the same opinion. It appears to me that the Court of Appeal inadvertently, or for some reason which I do not understand, omitted to take into account the duty and function of a court in a matter of this kind. The judgment of the Court of Appeal proceeds upon the ordinary doctrines of agency: but the ordinary doctrines of agency are only half of what is to be considered in a matter of this kind. The real facts are extremely simple. The court which originally made the order made an order referring an action of libel and slander to a gentleman for trial. It made that order by the consent of the parties—it had no jurisdiction and no right to make that order except on the footing that the parties consented. The order is good on the face of it, and the learned judge who made it was perfectly justified in making it, having regard to the evidence before him. But before that order is drawn up one of the parties interested discovers that it is made without her consent at all, and not only without her consent, but in spite of her express instructions. I venture to say that if that had happened in the Chancery Division, with the practice of which I am familiar, it would have been a matter of course for the learned judge who made that order to stay the drawing of it up if he had been informed that the court had inadvertently made the order upon the assumption that the parties were consenting when in fact they did not consent. I cannot imagine that it would cross his mind for a moment that anything ought to be done except to stay the drawing up of that order. Unfortunately the plaintiff here, wishing to get rid of the order, drew it up with the view of getting it set aside: and in form this is an application, not to defer the drawing up of the order, but to have it set aside: but that is mere form—mere machinery. It would be absolutely wrong, to my mind, for the court to allow that order to be acted on and to take effect the moment it is judicially ascertained and brought to its attention that it is an order which the court never would have dreamt of making if the court had known the facts. That point of view seems to me to have been overlooked by the Court of Appeal, and to be fatal to the validity of the order. The order made by the Lord Chief Justice was, as I understand it, that the order should be set aside and the action set down for trial, the costs of the application to set it aside being the defendant's in any event; and that, to my mind, ought to stand. The appeal ought to be allowed with costs—that is to say, the decision appealed from ought to be reversed with costs.

Appeal allowed.

Solicitors: *W. H. Jamieson; Lewis & Lewis.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

HERNE BAY STEAM BOAT CO. v. HUTTON

Court of Appeal (Vaughan Williams, Romer and Stirling, L.J.J.), August 6, 1903

[Reported [1903] 2 K.B. 683; 72 L.J.K.B. 879; 89 L.T. 422; 52 W.R. 183;
19 T.L.R. 680; 47 Sol. Jo. 768; 9 Asp.M.L.C. 472]

Contract—Frustration—Hire of ship for particular purpose—Purpose of hire not concern of shipowner, nor foundation of contract.

The defendant entered into a contract with the plaintiff steamship company whereby the company agreed to place their ship at the disposal of the defendant on June 28, 1902, to take out a party "for the purpose of viewing the Naval Review and for a day's cruise round the fleet; also on Sunday, June 29, 1902, for a similar purpose." On June 25, 1902, the Naval Review was postponed and the defendant repudiated the contract on the ground that it ceased to be binding.

Held: the postponement of the Naval Review did not discharge the defendant from his obligations under the contract as (a) the object of the defendant in hiring the vessel did not concern the plaintiff, the risk being the defendant's alone; and (b) the happening of the Naval Review was not the foundation of the contract.

Taylor v. Caldwell (1) (1863), 3 B. & S. 826, distinguished.

Notes. It is difficult to reconcile this decision with that of *Krell v. Henry*, ante, p. 20, which was under consideration by a Court of Appeal constituted as was the court in the present case at the time this judgment was given. In that case the court held that the postponement of the coronation celebrations owing to the illness of King Edward VII did discharge a contract for the hire of a room for the purpose of viewing the coronation procession. It has been suggested that the present decision might be distinguished from the decision in that case on the ground that some of the purposes of the contract might still have been attained, e.g., the cruise round the fleet.

Referred to: *Metropolitan Water Board v. Dick, Kerr & Co.*, [1917] 2 K.B. 1; *Blackburn Bobbin Co. v. Allen* (1918), 87 L.J.K.B. 1085; *The Lord Strathcona*, [1925] P. 143; *The Penelope*, [1928] P. 180; *Tatem, Ltd. v. Gamboa*, [1938] 3 All E.R. 135.

As to frustration of contracts, see 8 HALSBURY'S LAWS (3rd Edn.) 178 et seq.; and for cases see 12 DIGEST (Repl.) 414 et seq. As to charterparty by demise, see *ibid.* vol. 35 p. 249; and for cases see 41 DIGEST 352, 353.

Cases referred to:

(1) *Taylor v. Caldwell* (1863), 3 B. & S. 826; 2 New Rep. 198; 32 L.J.Q.B. 164; 8 L.T. 356; 27 J.P. 710; 11 W.R. 726; 122 E.R. 309; 12 Digest (Repl.) 418, 3242.

(2) *De Mattos v. Gibson* (1859), 4 De G. & J. 276; 28 L.J.Ch. 498; 34 L.T.O.S. 36; 5 Jur.N.S. 555; 7 W.R. 514; 45 E.R. 108, L.C.; 28 Digest (Repl.) 832, 740.

Also referred to in argument:

Nickoll and Knight v. Ashton, Edridge & Co., post; [1901] 2 K.B. 126; 70 L.J.K.B. 600; 84 L.T. 804; 49 W.R. 513; 17 T.L.R. 467; 9 Asp.M.L.C. 209; 6 Com. Cas. 150, C.A.; 41 Digest 460, 2923.

Blakeley v. Muller & Co., *Hobson v. Pattenden & Co.*, [1903] 2 K.B. 760, n.; 88 L.T. 90; 67 J.P. 51; 19 T.L.R. 186; 47 Sol. Jo. 239, D.C.; 12 Digest (Repl.) 463, 3455.

Jackson v. Union Marine Insurance Co. (1874), L.R. 10 C.P. 125; 44 L.J.C.P. 27; 31 L.T. 789; 23 W.R. 169; 2 Asp.M.L.C. 435, Ex. Ch.; 41 Digest 330, 1859.

Dean v. Hogg (1834), 10 Bing. 345; 4 Moo. & S. 188; 3 L.J.C.P. 113; 131 E.R. 937; 41 Digest 356, 2048.

Lucas v. Nockells (1828), 4 Bing. 729; 2 Y. & J. 304; 1 Moo. & P. 783; 130 E.R. 950, Ex. Ch.; on appeal (1833), 7 Bli. N.S. 140, H.L.; 41 Digest 583, 4069.

Appeal from a decision of GRANTHAM, J.

The plaintiff company were the owners of the steamboat *Cynthia*, which was usually employed in carrying passengers daily between Herne Bay, Gravesend, and other places. It having been announced that there would be a Naval Review at Spithead by the King on June 28, 1902, the defendant entered into negotiations with the plaintiff company for the hire of a steamboat, and the following agreement was entered into between the defendant and Henry C. Jones on behalf of the plaintiff company:

"The *Cynthia* to be at Mr. Hutton's disposal at an approved pier or berth at Southampton on the morning of June 28, perils of the sea, etc., permitting, to take out a party not exceeding the number for which the vessel is licensed to the position assigned by the Admiralty for the purposes of viewing the Naval Review and for a day's cruise round the fleet; also on Sunday, June 29, for similar purposes. Owners to provide crew, coals, and all necessary assistance. Mr. Hutton to pay all tolls, pier dues, etc. Owners to have the right of ten persons above crew, etc., on board. Price £250, payable £50 down, balance before ship leaves Herne Bay."

The *Cynthia* was fitted for this trip, and supplied with coal. On June 25, 1902, it was officially announced that the Review was postponed, and the plaintiffs telegraphed to the defendant on June 26, 1902:

"What about *Cynthia*? She is ready to start six tomorrow. Waiting cash.— Jones, Herne Bay."

No reply being received, the ordinary sailings of the *Cynthia* were continued by the plaintiffs on the days mentioned in the agreement of May 23, 1902, and the difference between the takings on those days and the price under the agreement was £90. The plaintiffs claimed for £200 due under an agreement dated May 23, 1902, the balance of the hire of the steamboat *Cynthia*, and the defendant counterclaimed for £50 paid by him under that agreement. The action was tried by GRANTHAM, J., without a jury, the claim being reduced by deducting the £90 from the £200 and leaving a balance of £110. Judgment was given for the defendant on the claim with costs, and also on the counterclaim with costs. The plaintiff company appealed.

Montague Lush, K.C., and *A. S. Poyser* for the plaintiffs.

Hansell and Ferminger for the defendant.

VAUGHAN WILLIAMS, L.J.—I am of opinion that this appeal must be allowed. I wish first to call attention to the fact that what the plaintiffs originally claimed in this action was £200, the balance of the agreed price which was to be paid. In my judgment they were not entitled to recover that sum, and I do not think that counsel for the plaintiffs bore in mind that that was the plaintiffs' original claim, and therefore he took some of the observations of GRANTHAM, J., dealing with the original claim as if they were intended to deal with the amended claim. I think here that before the time came for the performance of this contract there was a plain repudiation by the defendant of his obligations under it. He refused to carry out his contract, and the plaintiffs, very properly, under the circumstances, used the steamer in her usual daily services, and made what profit they could out of it during the two days on which, under the contract, the defendant was to have the use of her. Under those circumstances the action is really one for damages caused by the defendant's refusal to carry out a contract, and the amount of the damages has been agreed at £200, less the profit made by the plaintiffs from having the use of the ship after the repudiation of the contract by the defendant. To those damages the plaintiffs are in my opinion entitled. This contract, I think, placed the ship at

A the disposal of the defendant for those particular days, and does not contain a demise of the ship. A charterparty seldom contains a demise of the ship. Generally the ship is not demised, but remains under the control of the shipowner. Under this contract this ship remains under the management and control of the master, but it is placed at the disposal of the defendant in the same way as under a charterparty a vessel is placed at the disposal of the charterers.

B What is there in this case besides that? The defendant when hiring this boat had the object in view of taking people to see the Naval Review, and on the next day of taking them round the fleet and also round the Isle of Wight. But it does not seem to me that, because those purposes of the defendant became impossible, it is a legitimate inference that the happening of the Naval Review was contemplated by both parties as the foundation of the contract, so as to bring the case within the doctrine of *Taylor v. Caldwell* (1). On the contrary, when the contract is properly considered, I think that the purposes of the defendant, whether of going to the review or going round the fleet or the Isle of Wight with a party of paying guests, do not make those purposes the foundation of the contract within the meaning of *Taylor v. Caldwell* (1).

D Having expressed this view, I do not know that there is any advantage to be gained by in any way defining what are the circumstances which might or might not constitute the happening of a particular contingency the foundation of the contract. I will only say I see nothing to differentiate this contract from a contract by which some person engaged a cab to take him on each of three days to Epsom to see the races, and for some reason, such as the spread of an infectious disease or an anticipation of a riot, the races are prohibited. In such a case it could not be said
E that he would be relieved of his bargain. So in the present case it is sufficient to say that the happening of the Naval Review was not the foundation of this contract.

ROMER, L.J.—I am of the same opinion. This is not a case where the subject-matter of the contract is a mere licence to the defendant to use the ship for the purpose of seeing the Naval Review and going round the fleet. It is really a contract for hiring the ship by the defendant for a certain voyage, though the object of the hirer is stated—viz., to see the Naval Review and the fleet. But that object was one with which the defendant as hirer of the ship was alone concerned, and not the plaintiffs, the owners. This contract cannot, in my opinion, be distinguished from many common cases of the hiring of vessels in which the object of the hiring is stated; very often the contract states the details of the voyage and the nature and details of the cargo to be carried. If the voyage is a pleasure trip it might also state the object in view, which is a matter which concerns the passengers, but this statement of the objects of the hirer would not, in my opinion, make the owner of the ship as much concerned with these objects as the hirer himself. The shipowner would say: "I am concerned with the ship only as a passenger or cargo carrying machine. It is for the hirer to concern himself with the objects." In the present case
H it is suggested that the provision that the plaintiffs were to have the right of having ten persons on board besides the crew changed the nature of the hiring; but there is nothing in that provision to prevent the court treating the transaction as a hiring of the vessel by the defendant. It does not make it in any sense a joint speculation. It only amounts to this, that the defendant, being the hirer, gives the owners a
I licence to put ten men on board. This view of the general effect of the contract is borne out by this consideration. The ship itself had nothing to do with the review or the fleet. It was only a carrier of passengers to see it, and many other ships would have done just as well. It is similar to the hiring of a cab or other vehicle, on which, though the object of the hirer was stated, that statement would not make the object any less a matter for the hirer alone, and would not affect the person who was letting the vehicle for hire. There was not here, by reason of the review not taking place, a total failure of the consideration, nor anything like a total destruction of the subject-matter of the contract. Nor can I on this contract imply any condition which

would relieve the defendant from liability to carry out the contract. Conditions are only implied to carry out the presumed intentions of the parties, and I cannot find any such presumed intention here. It follows that in my opinion, so far as the plaintiffs are concerned, the objects of the passengers on this voyage with regard to sightseeing do not form the subject-matter or essence of the contract. On the question of fact on which the defendant relies, that the owners of the ship had put themselves in a position of not being able to carry out the contract, I do not think the defendant has proved his case. A E

STIRLING, L.J.—I am of the same opinion. The plaintiffs are owners of a steam vessel used for carrying passengers from Herne Bay to Gravesend and other places. The defendant formed the idea of making a profit by carrying passengers on June 28 and 29 from Southampton to see the Naval Review, and afterwards to cruise round the fleet. The correspondence appears to me to show that the venture was a venture of the defendant's alone, and, although the plaintiffs assisted him by selling some tickets and posting notices of what was proposed to be done, yet the venture was entirely that of the defendant. In that state of things the defendant entered into this contract by which the steamship belonging to the plaintiffs was to be employed by the defendant for the purposes of his venture, and the contract was put into writing. The most material part of it is that the vessel is to be at the defendant's disposal to take out a party of passengers. I agree that this contract did not amount to a demise of the ship. It was, however, a contract entered into for a valuable consideration for the employment of the ship on those days. It conferred at least this interest on the defendant, that if the plaintiffs had attempted to violate the agreement, the defendant could have obtained an injunction to prevent them. That is established by *De Mattos v. Gibson* (2). It is said that, in consequence of the reference in the contract to the Naval Review, the existence of the review formed the basis of the contract, and therefore, as the review did not take place, the parties were discharged from further performance of the contract, as in *Taylor v. Caldwell* (1). I cannot come to that conclusion. It seems to me that the reference in the contract to the review is explained by the object of the voyage, and I am quite unable to treat the reference to the voyage as the foundation of the contract so as to entitle either party to the benefit of the doctrine in *Taylor v. Caldwell* (1). I come to that conclusion more readily as the object of the voyage was not to see the review only, but included a cruise round the fleet. The fleet was there, and the passengers might have been willing to go round it. It seems to me that that was the business of the defendant, whose venture it was. I am therefore unable to agree with the decision of **GRANTHAM, J.**, and I think the defendant was not discharged from the performance of the contract. I also agree that there is no evidence that the plaintiffs repudiated the contract before any breach of it by the defendant. C D E F G

Appeal allowed. H

Solicitors : *Jones & Hamp; Biggs, Roche, Sawyer & Co.*

[*Reported by W. C. BISS, Esq., Barrister-at-Law.*]

BROADBENT v. SHEPHERD

King's Bench Division (Lord Alverstone, C.J., and Lawrence, J.), May 2, 1901]

Reported [1901] 2 K.B. 274; 70 L.J.K.B. 628; 84 L.T. 844; 65 J.P. 499;
49 W.R. 521; 17 T.L.R. 460; 45 Sol. Jo. 486]

Nuisance—Statutory nuisance—Abatement notice—Purpose of order—"Owner"—Owner ceasing to be owner before order—Power of court to make order—Purpose of order—Public Health Act, 1875 (38 & 39 Vict., c. 55), ss. 4, 94, 95, 96, 104.

An order for the abatement of a nuisance under s. 94 of the Public Health Act, 1875, held not to be merely a personal remedy against the owner of premises, for the point of such an order was the right which it gave to the local authority to enter the premises and themselves abate the nuisance if necessary and to recover the expenses from the person responsible. Accordingly, the fact that an owner ceased to be owner before the order was made was no bar to the making of the order.

Notes. The Public Health Act, 1875, ss. 4, 94-96, 98, 104, have been re-enacted in substantially the same terms by the Public Health Act, 1936, ss. 93-96, 343 (19 HALSBURY'S STATUTES (2nd Edn.) 380-382, 495), as amended by the Public Health Act, 1961 (*ibid.*, vol. 41, p. 859).

As to the meaning of "owner," see 31 HALSBURY'S LAWS (3rd Edn.) 51; as to the summary abatement of nuisance, see *ibid.*, pp. 363 et seq. For cases see 36 DIGEST (Repl.) 332 et seq.

Cases referred to in argument:

Parker v. Inge (1886), 17 Q.B.D. 584; 55 L.J.M.C. 149; 55 L.T. 300; 51 J.P. 20, D.C.; 36 Digest (Repl.) 340, 814.

Scarborough Corp. v. Scarborough Sanitary Authority (1876), 1 Ex.D. 344; 34 L.T. 768; 40 J.P. 726, D.C.; 36 Digest (Repl.) 339, 812.

R. v. Trimble (1877), 36 L.T. 508; sub nom. *R. v. Cumberland Justices, Ex parte Trimble*, 41 J.P. 454, D.C.; 36 Digest (Repl.) 340, 813.

Case Stated by justices of the West Riding of Yorkshire.

A complaint was preferred by the appellant Broadbent on behalf of the Castleford Urban District Council against the respondent as the statutory owner of certain premises in the district, alleging failure on the part of the respondent to comply with a notice served on him under s. 94 of the Public Health Act, 1875, requiring him to abate certain nuisances on the said premises. The complaint originally came on for hearing before the justices on June 27, 1900. It was then proved that the nuisances existed as alleged, but it appeared that the respondent was not the proprietor of the premises in question, but merely the agent and rent collector of the proprietor, a Mr. Donkersley. The justices dismissed the complaint on the ground that the respondent was not the owner of the premises within s. 94 of the Public Health Act, 1875. On appeal by Case Stated a Divisional Court (consisting of Lord Alverstone, C.J., and Kennedy, J.), on Nov. 15, 1900, held, that the respondent as agent was owner of the premises for the purposes of s. 94 of the Public Health Act, 1875, and remitted the Case to the justices with an intimation to this effect. On Dec. 25, 1900, the complaint, having been reinstated in accordance with the decision of the High Court, came on for hearing before the justices. It then appeared that the respondent was no longer agent or rent collector for the premises in question, he having since the previous hearing resigned his agency; and it was admitted that the actual owners of the property had recently been served with notice to abate the nuisances, and that they had actually commenced and carried through part of the work. It was proved, however, that part of the premises was still in a state

dangerous to the lives of the tenants, and it was urged on behalf of the appellant that the justices should make an order on the respondent ordering him to abate the nuisance complained of. The justices, however, held that they had no power to make an order on the respondent on the ground that such an order can only be made on a person who is an "owner" of the premises when the order is made. From this decision the appellant again appealed.

By the Public Health Act, 1875 :

"Section 4. In this Act, if not inconsistent with the context, the following words and expressions have the meanings hereinafter respectively assigned to them—that is to say . . . 'Owner' means the person for the time being receiving the rackrent of the lands or premises in connection with which the word is used, whether on his own account or as the agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rackrent.

Section 94. On the receipt of any information respecting the existence of a nuisance, the local authority shall, if satisfied of the existence of a nuisance, serve a notice . . . on the owner or occupier of the premises on which the nuisance arises, requiring him to abate the same. . . .

Section 95. If the person on whom a notice to abate a nuisance has been served makes default in complying with any of the requisitions thereof . . . the local authority shall cause a complaint relating to such nuisance to be made before a justice, and such justice shall thereupon issue a summons requiring the person on whom the notice was served to appear before a court of summary jurisdiction.

Section 96. If the court is satisfied that the alleged nuisance exists . . . the court shall make an order on such person, requiring him to comply with all or any of the requisitions of the notice. . . .

Section 98. Any person not obeying an order to comply with the requisition of the local authority or otherwise to abate the nuisance shall, if he fails to satisfy the court that he has used all due diligence to carry out such order, be liable to a penalty . . . ; moreover, the local authority may enter the premises to which any order relates and abate the nuisance and do whatever may be necessary in execution of such order, and recover in summary manner the expenses incurred by them from the person on whom the order is made.

Section 104. All reasonable costs and expenses incurred in making a complaint, or giving notice, or in obtaining any order of the court or any justice in relation to a nuisance under this Act, or in carrying the same into effect, shall be deemed to be money paid for the use, and at the request of the person on whom the order is made . . . and in case of nuisances caused by the act or default of the owner of premises, such costs and expenses may be recovered from any person who is for the time being owner of such premises."

Macmorran, K.C. (Scholefield with him) for the appellant.
The respondent did not appear.

LORD ALVERSTONE, C.J.—When the case was originally before the court, which consisted of my brother KENNEDY and myself, in November last, we held that the justices ought to have made the order because the person against whom it was sought was the "owner" of the premises in question within the definition of that word contained in s. 4 of the Public Health Act, 1875. For the purposes of the present case I must assume that the order that the justices would have made would have been an order for the abatement of the nuisance within a certain number of days. What happened is that at some time after the first hearing of the case by the justices the respondent, who was then the agent for the true owner of the property, resigned his agency. If the sole object of the application against him were a personal remedy against the individual either by fine or by the imposition of a

- A** personal responsibility, different considerations would arise, and it might be said that the court ought not to make an order which would in effect be futile. However, I do not desire to express any opinion on the point. But when ss. 96, 98, and 104 are considered it appears to be plain that the point of the order is in the right which it gives the local authority to enter the premises, and themselves abate the nuisance if necessary, and recover the expenses from the person who is responsible.
- B** The justices had originally jurisdiction to make the order against the respondent as owner within the meaning of s. 4, and, therefore, in my opinion, when the case went back to them from my brother KENNEDY and me they ought to have made the order which they would have made in the first instance had they then properly construed the Act, that is to say, an order on the respondent to abate the nuisance. That order being disobeyed, the local authority have power under s. 98 to enter upon the premises and do whatever may be necessary in execution of the order, and then by s. 104 there is power given them to recover the costs and expenses from the owner for the time being of the premises. I am for these reasons of opinion that the justices ought to have made this order upon the respondent notwithstanding that he had ceased to be the agent for the property when the case was actually determined. The case must be remitted to the magistrates with this expression of our
- D** opinion.

LAWRANCE, J.—I concur.

Case remitted.

Solicitors: *G. T. B. S. Thurnell*, for *Claude Kemp*, Castleford.

- E** [Reported by J. ANDREW STRAHAN, ESQ., Barrister-at-Law.]

F **BRADLEY AND ANOTHER v. CARRITT**

HOUSE OF LORDS (Lord Macnaghten, Lord Shand, Lord Davey, Lord Robertson and Lord Lindley), February 24, 26, May 11, 1903]

[Reported [1903] A.C. 253; 72 L.J.K.B. 471; 88 L.T. 633; 51 W.R. 636; 19 T.L.R. 466; 47 Sol. Jo. 534]

- G** *Mortgage—Redemption—Clog on equity—Collateral advantage to mortgagee—Mortgage of shares in company—Agreement by mortgagor to secure employment of mortgagee as broker to company—Restraint on use of shares by mortgagor after redemption—Need to vote in favour of mortgagee as broker—Mortgage made irredeemable for reasonable period—Stipulation for additional remuneration for mortgagee.*

H The appellant, who held shares in a company, mortgaged them to the respondent as security for a loan under an agreement which contained a stipulation that the appellant would use his best endeavours to secure that the mortgagee should "always hereafter" have the sale of all the company's produce as broker, and, in the event of any of it being sold otherwise than through the mortgagee, that he (the appellant) would pay to the mortgagee the amount of commission which he would have earned if the produce had been sold through him. The loan was paid off, the shares were re-transferred to the appellant, and shortly afterwards the company ceased to employ the mortgagee as broker. In an action brought by him against the mortgagor for damages for breach of the agreement,

- I** **Held:** equity would not permit any device or contrivance designed to prevent or impede redemption, whether directly or indirectly; on the payment

by a mortgagor of the principal, interest, and costs, together with any bonus, or anything in the nature of a bonus which had been properly stipulated for and become payable, the mortgage contract came to an end, and the mortgagee was entitled to get his property back unaltered in character, condition, and incidents, and was thenceforth relieved from the burden imposed on him by the contract; in the present case the mortgagee after redemption had indirectly retained a hold on the mortgagor's shares, for to fulfil the contract the mortgagor would be bound to use the voting power conferred on him by the shares in favour not, in some circumstances, of his own interest or of that of the company, but of the employment of the mortgagee as broker; and, therefore, the provision in the contract relating to that employment was invalid, and the mortgagee's action failed.

Per LORD MACNAGHTEN: A mortgage may be made irredeemable for a reasonable period. A stipulation for additional remuneration for the mortgagee during the continuance of a mortgage is valid, for the additional remuneration is only interest in another form, and such a stipulation does not hinder or obstruct redemption.

Santley v. Wilde (1), [1899] 2 Ch. 474, overruled.

Notes. Applied: *Samuel v. Jarrah Timber and Wood Paving Corp.*, [1904] A.C. 323. Distinguished: *Davies v. Chamberlain* (1909), 25 T.L.R. 766. Applied: *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 1 Ch. 354. Considered: *Morgan v. Jeffreys*, [1910] 1 Ch. 620. Distinguished: *Kreglinger v. New Patagonia Meat and Cold Storage Co., Ltd.*, [1911-13] All E.R. Rep. 970. Considered: *Re Rainbow Syndicate, Owen v. Rainbow Syndicate*, [1916] W.N. 178; *Knightsbridge Estates Trust, Ltd. v. Byrne*, [1938] 4 All E.R. 618. Referred to: *Lewis v. Frank Love, Ltd.*, [1961] 1 All E.R. 446.

As to restrictions on the right to redeem, see 27 HALSBURY'S LAWS (3rd Edn.) 235-239, and for cases see 35 DIGEST 352 et seq.

Cases referred to:

- (1) *Santley v. Wilde*, [1899] 2 Ch. 474; 68 L.J.Ch. 681; 81 L.T. 393; 48 W.R. 90; 15 T.L.R. 528, C.A.; 35 Digest 239, 1.
- (2) *Rice v. Noakes & Co.*, [1900] 1 Ch. 213; 69 L.J.Ch. 43; 81 L.T. 482; 48 W.R. 110; affirmed, [1900] 2 Ch. 445; 69 L.J.Ch. 635; 82 L.T. 784; 48 W.R. 629, C.A.; affirmed, sub nom. *Noakes & Co., Ltd. v. Rice*, ante p. 34; [1902] A.C. 24; 71 L.J.Ch. 139; 86 L.T. 62; 66 J.P. 147; 50 W.R. 305; 18 T.L.R. 196; 46 Sol. Jo. 136, H.L.; 35 Digest 241, 19.
- (3) *Biggs v. Hoddinott, Hoddinott v. Biggs*, [1898] 2 Ch. 307; 67 L.J.Ch. 540; 79 L.T. 201; 47 W.R. 84; 14 T.L.R. 504, C.A.; 35 Digest 356, 993.
- (4) *Teevan v. Smith* (1882), 20 Ch.D. 724; 51 L.J.Ch. 621; 47 L.T. 208; 30 W.R. 716, C.A.; 35 Digest 301, 509.
- (5) *Browne v. Ryan*, [1901] 2 I.R. 653; 35 Digest 352, 946iii.
- (6) *Salt v. Marquess of Northampton*, [1892] A.C. 1; 61 L.J.Ch. 49; 65 L.T. 765; 40 W.R. 529; 8 T.L.R. 104; 36 Sol. Jo. 150, H.L.; 35 Digest 352, 954.

Also referred to in argument:

- Bunbury v. Winter* (1820), 1 Jac. & W. 255; 37 E.R. 372, L.C.; 35 Digest 354, 965.
- Mainland v. Upjohn* (1889), 41 Ch.D. 126; 58 L.J.Ch. 361; 60 L.T. 614; 37 W.R. 411; 35 Digest 355, 976.
- Jarrah Timber and Wood Paving Corp., Ltd. v. Samuel*, [1902] 2 Ch. 479; 71 L.J.Ch. 688; 87 L.T. 44; 50 W.R. 601; 18 T.L.R. 674; affirmed, [1903] 2 Ch. 1; 72 L.J.Ch. 262; 88 L.T. 106; 51 W.R. 439; 19 T.L.R. 236; 10 Mans. 296, C.A.; affirmed, sub nom. *Samuel v. Jarrah Timber and Wood Paving Corp.*, [1904] A.C. 323; 73 L.J.Ch. 526; 90 L.T. 731; 52 W.R. 673; 20 T.L.R. 536; 11 Mans. 276, H.L.; 35 Digest 353, 957.

A Appeal from a decision of the Court of Appeal (A. L. SMITH, M.R., VAUGHAN WILLIAMS and STIRLING, L.J.J.), reported [1901] 2 K.B. 550, affirming a decision of BIGHAM, J., in an action tried by him with a special jury.

Montague Lush, K.C., and Buckmaster, K.C., for the appellants.

J. A. Hamilton, K.C., and Dawson Miller for the respondent.

B Their Lordships took time for consideration.

May 11, 1903. The following opinions were read.

LORD MACNAGHTEN.—This appeal raises in a slightly different form, and with some difference of circumstance, the question which this House had to consider in *Noakes & Co., Ltd. v. Rice* (2). Your Lordships, I think, have nothing to do now but to determine whether the distinction between the present case and *Noakes & Co., Ltd. v. Rice* (2), as finally decided, is or is not a solid and substantial difference leading to a different result. Other points, no doubt, were discussed at the Bar, but the only effect of the discussion was to encumber and embarrass the argument on the one point which was really arguable. In my view, all these other points were and are immaterial, and I pass them by altogether.

D The distinction between *Noakes & Co., Ltd. v. Rice* (2) and the case under review is brought out very clearly in the judgment of the Court of Appeal which was delivered by STIRLING, L.J. It is, I need not say, a most careful judgment, to which little or nothing could be added by the learned counsel for the respondent. But, if I am not mistaken, it shows some trace of the difficulties created by recent decisions and dicta in the Court of Appeal. And certainly it is only fair to bear in mind that at the time when it was delivered *Noakes & Co., Ltd. v. Rice* (2) had not gone beyond the Court of Appeal, while the principles re-established, or definitely asserted, by this House in *Noakes & Co., Ltd. v. Rice* (2) had been shaken and obscured by the decision of the Court of Appeal in *Santley v. Wilde* (1). I am aware that LORD LINDLEY, from whom I should never differ without the greatest hesitation and mis-giving, still holds that *Santley v. Wilde* (1) was rightly decided. My noble and learned friend will, I am sure, pardon me for saying that I am unable to concur in that view. I think the method of the judgment questionable, and the effect subversive of a settled doctrine of equity.

Santley v. Wilde (1) was the case of a mortgage to secure an advance of money. The loan was the occasion of the mortgage. The end and purpose of the mortgage was to secure the loan, and but for one stipulation in the mortgage deed the transaction would have been a matter of ordinary everyday occurrence. The mortgagee stipulated, of course, for repayment of principal, and for payment of interest properly so called, and by way of further remuneration for the accommodation afforded, he stipulated for a share of the profits to be derived from the use of the mortgaged property, which happened to be a theatre held under lease for a term of years. Now that the usury laws have been repealed, there cannot, I think, be any objection to such a stipulation, provided it comes to an end when the mortgagee is paid principal, interest, and costs. But in *Santley v. Wilde* (1) the stipulation was that the mortgagee should receive his share of profits after the mortgage was paid off during the continuance of the mortgagor's interest in the property, for the whole term of the lease. That stipulation was, as it seems to me, unquestionably part of the mortgage transaction. Well, the mortgagee calls in the loan. The mortgagor tenders principal, interest, share of profits up to date, and costs and demands a re-assignment. The demand is refused, and then he brings an action for redemption. Reversing BYRNE, J., the Court of Appeal held that the mortgagor was not entitled to redeem. The way by which the court arrived at that conclusion was this. SIR NATHANIEL LINDLEY, M.R., said :

"A mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given."

I cannot help thinking that the double aspect which this definition apparently presents may have had something to do with the decision. For the Court of Appeal proceeded to split up the mortgage transaction into two parts, a security for payment of the debt, and a security for the discharge of an additional obligation. They say in effect "the mortgagor may pay off the debt if he likes, but that will not discharge the mortgage. The mortgage will remain as security for the performance of the obligation relating to the share of profits. As long as that obligation lasts the mortgage stands."

The result, therefore, was, to use the words of COZENS-HARDY, J., in *Rice v. Noakes & Co.* (2), [1900] 1 Ch. at p. 218, that "the proviso for redemption was nugatory," because it only came into operation when there was "nothing on which it could operate." That seems to me to be a very far-reaching decision. It reduces the rule that a mortgage cannot be made irredeemable to a dead letter. You have only to tack on some stipulation, such as men of business might well agree to if there were no mortgage, and the thing is done. In *Noakes & Co., Ltd. v. Rice* (2), the mortgagee suffered, it would seem, merely because his legal advisers had the misfortune to know a little law, and had not learned the secret of *Santley v. Wilde* (1). They thought that they could make the covenant on which they meant to rely run with the land. If they had not puzzled over a matter which is often one of some difficulty—if they had only inserted a covenant to the effect that the mortgagor and his assigns should get their beer from the mortgagee, and from no one else, so long as the lease lasted, and if the proviso for redemption had been so expressed as to cover that obligation, the mortgage, according to *Santley v. Wilde* (1), would have been irredeemable, and the covenant open to no objection.

What was the Court of Appeal in the present case to do when it was confronted by the decision in *Santley v. Wilde* (1), and at the same time warned by what was said in *Biggs v. Hoddinott* (3), that judges were not to go one step beyond what had been actually decided? I must say that I think that the court took the only course open to it. In the first place, it is observed in the judgment of the Court of Appeal that it has never been laid down that it is essential to the validity of what are called, not very happily, I think, collateral stipulations that they should cease to operate on redemption. That is perfectly true. But it may be said with equal truth that, putting aside *Santley v. Wilde* (1), there is no case to be found in the books from the earliest times to the present day in which a mortgagee after redemption ever attempted to keep on foot the benefit of any collateral stipulation which was part and parcel of the mortgage transaction. That, surely, is far more significant. You could hardly expect to find in any judicial utterance a note of warning against an experiment which before *Santley v. Wilde* (1) no one ever thought of trying. Then it is to be observed that it was the view of COZENS-HARDY, J., and the Court of Appeal in *Rice v. Noakes & Co.* (2), that the covenant in question in that case imposed an actual burden on the land which was the subject of the mortgage. HENX COLLINS, L.J., said ("1900" 2 Ch. at p. 460):

"The covenant imposes a 'tie' upon the house, not a personal restriction upon the mortgagor."

Giving great weight to this circumstance, and intending, no doubt, to keep strictly within the line of decided cases, the learned judges of the Court of Appeal came to the conclusion that a direct fetter on the equity of redemption, such as that which was supposed to exist in *Noakes & Co. Ltd. v. Rice* (2), was not permissible, but that a fetter, or restriction operating indirectly, though it might have the same effect, was not open to objection, and, indeed, was sanctioned by principles said to have been laid down in *Biggs v. Hoddinott* (3).

The real question is whether this distinction can be supported. It is necessary, I think, to examine closely the reasoning on which the conclusion of the learned judges of the Court of Appeal was based. At the outset they were met by a

A passage in a former judgment of RIGBY, L.J., who, in *Rice v. Neales & Co.* (2), said ([1900] 2 Ch. at p. 457):

"The property which comes back to the mortgagor must not be worse than it was when it was mortgaged, and the mortgagee must not, either expressly or by implication, reserve to himself any hold upon the property after the time for redemption has arrived and the right of redemption has been put in force."

That was very much what was said in this House when the case was before your Lordships, and it is quite right so far as it goes. To that expression of opinion exception was taken. The words "by implication" are explained away by saying "it is an expression which we consider to have been used by RIGBY, L.J., with reference to a class of cases in which the obligation takes the form of a penal sum or liquidated damages by way of penalty on the doing of a particular thing." I am not quite sure that I understand the force or application of that observation. The judgment goes on to observe:

"It is said, however, that the shares, after redemption, are fettered, inasmuch as the stipulations into which the mortgagor had entered would prevent him from dealing so freely with his property as he otherwise would."

Then follow these important words:

"It is quite possible that an indirect effect of this nature may flow from these stipulations, but the same result would have followed if the stipulations had been entered into on the occasion of an advance being made by the plaintiff to the defendant, William Bradley, on his personal security, and in that case the stipulation would, as it seems to us, be perfectly valid."

There again I have some difficulty in following the reasoning of the Court of Appeal. I should not have supposed that anyone would contend that the peculiar doctrines of equity applicable to mortgage transactions apply in all cases, whether there is a mortgage or not, and I rather doubt whether the circumstance that a stipulation is valid when it is not part of a mortgage transaction is an argument for its validity when it is. The judgment concludes by repeating what was said at the outset:

"There is no decision that such indirect effect of the stipulations brings them within the doctrine of equity under consideration, and so to hold would reduce the operation of the decision in *Biggs v. Hoddinott* (3) within very narrow limits. For these reasons we think that the equity of redemption ought not in the present case to be held clogged."

I have stated, in the words of their judgment, the reasons which induced the learned judges of the Court of Appeal to decide against the present appellants. I doubt whether those reasons can be regarded as altogether satisfactory. As to the last reason, I must say, speaking for myself, that I am not sure that it would be a great misfortune if the operation of every decision were to be confined to the matter decided, and to the principles on which the decision rests. Harm, I think, is sometimes done by general expressions, even in praise of a principle which everyone admires in the abstract, when they are not necessary for the purpose in hand. Though true in themselves, they are apt to be misunderstood owing to the connection in which they are found. One learned judge we know thought that *Santley v. Wilde* (1) was covered by *Biggs v. Hoddinott* (3), though the actual decision in *Biggs v. Hoddinott* (3) does not, I think, touch the point raised in *Santley v. Wilde* (1). *Biggs v. Hoddinott* (3) was a plain case. It purported to decide two things. In the first place, it purported to decide that a mortgage may be made irredeemable for a reasonable period. Well, everybody knows that when money was placed out on mortgage as an investment nothing was more

common than to make the mortgage irredeemable for a certain limited time. It was an old and well-established practice, and a very reasonable practice, too. I do not understand that in *Teeran v. Smith* (4), SIR GEORGE JESSEL, M.R., treated the point as open to any possible doubt. He referred to it, I think, as a practice well understood and perfectly valid. The other matter which *Biggs v. Hoddinott* (3) purported to decide was that a stipulation for additional remuneration during the continuance of the mortgage was valid. That, again, was a matter which was hardly open to question after the repeal of the usury laws. As LORD DAVEY pointed out in *Noakes & Co. Ltd. v. Rice* (2) the additional remuneration is only interest in another form. Such a stipulation does not prevent the mortgagor getting back his property or impede or obstruct redemption.

It seems to me to be playing with words to say in the present case that on redemption these shares came back to Mr. Bradley no worse than they were when he mortgaged them. If I part with property owing to a temporary necessity and the property is returned to me afterwards, do I get it back just as it was when it comes enveloped in an atmosphere of danger which was not present when I parted with it? Is it none the worse—is its usefulness to be unimpaired if it now requires delicate handling and cautious treatment to prevent its becoming a source of mischief to its owner? Mr. Bradley could not have safely sold or mortgaged any of these shares when he got them back. True, their value to a purchaser or a mortgagee would be just the same. But what would have been Mr. Bradley's position? We were told, and it seems to stand to reason, that the only market for shares of this description is to be found among tea-brokers. Tea-brokers want to get hold of shares in a tea company in order to have the sale of the company's teas. That means or points to the displacement of the acting broker. A change of brokers in Mr. Bradley's company would, if the respondent be right, necessarily expose Mr. Bradley to a heavy liability. The Court of Appeal says that this is not enough; the mortgagee has not retained any direct hold upon the shares, though he may have indirectly brought about the same result. I do not think it necessary that there should be any hold upon the property, direct or indirect. I think, as I ventured to say in *Noakes & Co., Ltd. v. Rice* (2), that equity will not permit any device or contrivance designed or calculated to prevent or impede redemption, and I think that your Lordships gave sanction to that proposition when you approved the decision in the Irish case of *Browne v. Ryan* (5). Can you impose on the equity of redemption a fetter operating indirectly when you cannot, as is admitted, impose a fetter which operates directly? I should have thought that that question answered itself—you cannot do indirectly that which you must not do directly.

The result, therefore, in my opinion, is that the judgment of the Court of Appeal cannot be maintained, and the action must fail. For the reasons which I have given, I move your Lordships that the appeal be allowed and the action dismissed, and that the respondent do pay the costs both here and below.

LORD SHAND.—In this case I have had the advantage of reading and carefully considering the opinion of LORD LINDLEY, and I agree with him in thinking that the judgments of BIGHAM, J., and of the Court of Appeal should be affirmed, and the appeal dismissed. In the case of James Bradley there is merely a reference to the loan which the plaintiff, Mr. Carritt, had given to his brother, William Bradley, and in consideration of this he agrees, as a shareholder in the Septhunjuri Bheel Tea Co., and in every other capacity that Mr. Carritt, or any firm of brokers in which he shall for the time being be a partner,

“shall always hereafter have the sale of all the company's teas as broker, and in case of any of the company's teas being sold otherwise than through you or your firm, I personally engage and agree to pay you the amount of the commission which you or your firm would have earned if the teas had been sold through you or your firm.”

A This obligation is unconditional and simple. In respect of a loan given an obligation is granted, and not a word is added which can suggest the argument as to fettering or clogging the security afforded by the temporary transfer of shares in the case of his brother William Bradley in the action against him.

B Then, as regards William Bradley. After an acknowledgment of money lent, an obligation to repay with interest, a bill, and a transfer of shares in the company as security, subject, of course, to a right of redemption on the repayment of the loan and interest, the agreement proceeds :

"4. I further agree as a shareholder in the Septhunjuri Bheel Tea Co., and in every other capacity, to use my best endeavours to secure that you, or any firm of brokers in which you for the time being shall be a partner (as you shall elect) shall always hereafter have the sale of all the company's teas as broker, and in the event of any of the company's teas being sold otherwise than through you or your firm, I personally engage and agree to pay to you or your firm the amount of the commission which you or your firm would have earned if the teas had been sold through you or your firm."

D I confess that I think it unfortunate for the law that the rule, now called a principle, "once a mortgage always a mortgage," with all its consequences, was ever carried further than was necessary for the purpose of relieving borrowers from forfeiture of their property on nonpayment on a fixed day of the sum lent. I strongly agree with the expressions of opinion of LORD BRAMWELL in *Salt v. Marquess of Northampton* (6), of ROMER, J., and SIR NATHANIEL LINDLEY, M.R., in *CHITTY and HENK COLLINS, L.JJ., in Biggs v. Hoddinott* (3), that in agreements and obligations which cannot be represented to be unconscionable, or to have been procured by fraud or undue influence, and are expressed in clear language quite understood by the parties who have entered into them, effect should be given to the terms used, having regard to the true nature of their bargain.

F I believe, however, that the origin of the rule is to be traced not to its natural and reasonable meaning in itself, but to the provisions of the usury laws which existed when it was introduced. "Once a mortgage always a mortgage," however, had, and I think still has down to the present day, application only where the power of redemption by repayment of the loan is itself fettered or clogged by conditions which prevent full redemption even where such repayment is made or offered; and I agree with LORD LINDLEY in holding that where, as here, redemption can be fully obtained by repayment of the loan and interest, a separate obligation for a different or collateral advantage to the lender is valid and enforceable. It was argued that by cl. 4 of the agreement William Bradley became bound to remain for all time a shareholder of the company, and that this obligation was a fetter on his right to redeem his shares, and to dispose of them, which by agreement affected the shares as his property after the redemption of the loan. I am clearly of opinion that there was no such obligation undertaken either expressly or by implication. If he continued to be a shareholder, no doubt he undertook to use his influence in that character to continue Mr. Carritt as broker: but he was quite free to sell his shares, as he was also free to redeem them on repayment of the loan. The true force of the agreement was contained in the entirely separate obligation that if the company's teas should be sold otherwise than through Mr. Carritt's firm, he nevertheless personally bound himself to pay the broker's commission to Mr. Carritt or his firm. It may be assumed that if he had not agreed to grant that obligation, he would not have obtained the loan. By the agreement there was no restraint, fetter, or impediment on the power of redeeming the mortgage. On payment of principal and interest Mr. Bradley was entitled to have the mortgage entirely discharged or redeemed, and to recover the subject of it exactly as he had previously possessed it. The case is entirely distinguished from such a case as *Noakes & Co., Ltd. v. Rice* (2), or similar cases, where even after repayment of the principal and interest of the loan the subject of the security still remained

fettered by the condition that it was by the agreement to be a tied house. So in all the cases which have occurred in which the rule "once a mortgage always a mortgage" has been enforced, the subject of the mortgage, notwithstanding the redemption by repayment of principal and interest, remained in some way fettered. Here the merely personal obligation to continue to pay commission on the withdrawal of the business of selling the teas in no way affects the subject of the security. The obligation was entirely separable and separate from anything relating to the subject of the security, which was Mr. Bradley's shares in the company, and there is no reason for holding that the obligation is in any way invalid.

It appears to me, on my construction of the agreement, that, if the appellants are to succeed in their present argument, the rule of law said to be founded on equity must henceforth not be merely "once a mortgage always a mortgage," but, "once a mortgage and a separate personal agreement or obligation by the mortgagor, always a mortgage only, and no such binding agreement or obligation"; and that it may be contended hereafter that the rule in this form may be enforced even where the security and the subject of the security can be completely redeemed by the simple repayment of principal and interest. I confess that I think that such a proposition is unreasonable and unwarranted, for it operates so as to prevent the owner of a property from using its value to the full extent in obtaining a loan upon it, and enables him to disregard a clear obligation undertaken for onerous causes. If the right of redemption of the mortgage is quite unfettered, the authorities do not, I think, apply, and that is the case here. In *Noakes & Co., Ltd. v. Rice* (2) I simply concurred in the judgment given. LORD HALSBURY, L.C., had entirely expressed my view of the law, which I strongly hold, in his judgment to the effect that SIR NATHANIEL LINDLEY, M.R., had "given a most authoritative exposition of the true effect of the rule in *Santley v. Wilde* (1)." SIR NATHANIEL LINDLEY, M.R., had there said ([1899] 2 Ch. at pp. 474, 475) in words quoted by the Lord Chancellor ([1902] A.C. at p. 28), in which I entirely agree:

"Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption, and is, therefore, void. It follows from this that 'once a mortgage always a mortgage,' but I do not understand that this principle involves the further proposition that the amount or nature of the further debt or obligation, the payment or performance of which is to be secured, is a clog or fetter within the rule."

The Lord Chancellor carefully added (*ibid.* at p. 29):

"It is and must be in each case a question of the particular thing which is advanced as a clog or a fetter, and in some cases it may be said to come very near the line. Whatever rule is laid down, one can reduce it to something like an absurdity by taking an extreme case."

The only case to which I think it necessary to refer is that of *Brown v. Ryan* (5), one of that very class which, as the Lord Chancellor says, "may be said to come very near the line." In that case the mortgagee sought "damages for the breach of a contract depriving the mortgagor of his property even after its redemption by him," thus leaving a fetter on the security, as LORD LINDLEY observes in his judgment in this case, and so it may be taken simply as an illustration of the rule "once a mortgage always a mortgage," and is in this view clearly to be distinguished from the present case, for in this case there is no fetter of any kind on the power of redemption.

LORD DAVEY.—In advising this House in *Noakes & Co., Ltd. v. Rice* (2) I endeavoured to express my views as to the meaning and effect of the equitable rules affecting the redemption of mortgage securities. I see no reason to dissent from

A anything that I then said, and I need not repeat it. I might, however, have added that the expression "clogging" or "fettering" the equity of redemption is not the happiest mode of expressing the object to which the rule referred to by me is directed.

B The principle, as it appears to me, is that on payment of the principal, interest, and costs, together with any bonus, or anything in the nature of a bonus, which has been properly stipulated for, and has become payable, the mortgage contract comes to an end, and the mortgagee is entitled to get his property back unaltered in character, condition, and incidents, and is henceforth relieved from the burden imposed upon him by the contract. If this be the true principle, as I think it is, the decision of the present case presents no difficulty. There can be no doubt that the obligation assumed by the first appellant in cl. 4 of the agreement of May 16, 1892, is part of the mortgage contract, and the corresponding advantage to respondent was derived therefrom exclusively. The form of the agreement shows this. It begins with the words: "In consideration of £2,050 this day advanced by you to me." Then follow six numbered paragraphs containing the terms agreed to by the mortgagee, including the fourth clause, which commences with the words "I further agree," and so forth. If, therefore, any breach of the agreement in the fourth clause had taken place during the currency of the mortgage, or any moneys had become exigible under it, I make no doubt that the appellant, William Bradley, would have been liable. But the mortgage has now been paid off, and everything which became due during the currency of it has been paid. The breach which is complained of has taken place since redemption, and I am really at a loss to understand how, consistently with the equitable doctrine, a mortgagee can insist on retaining the benefit of a covenant in the mortgage contract materially affecting the enjoyment of the mortgaged property, after all principal, interest, and costs, and everything which has become payable before redemption, has been paid.

E I agree with LORD MACNAGHTEN in thinking that *Santley v. Wilde* (1) was wrongly decided. I thought so when *Noakes & Co., Ltd. v. Rice* (2) was under consideration by this House, and a further examination of the report of the case has confirmed me in my opinion. Two of the learned judges who decided that case in the Court of Appeal thought that it was covered by *Biggs v. Hoddinott* (3). I cannot agree. It is, to my mind, plainly distinguishable. All that I understand to have been decided in *Biggs v. Hoddinott* (3) is, first, that a stipulation for the continuance of a loan for five years was valid; and, secondly, that a covenant to take beer from the mortgagee, limited to the continuance of the security, did not clog the equity of redemption, and was enforceable by injunction. SIR NATHANIEL LINDLEY, M.R., however, based his decision in *Santley v. Wilde* (1) upon a broader ground, but he seems to me to have divided the transaction into two parts—viz., a loan of £2,000, and a sale of two-thirds of the profit of the theatre. That seems to me to be a fallacious and wrong way of looking at the transaction. There was only one transaction, which was a mortgage transaction, and the only consideration for the grant of two-thirds of the profits was the loan of the money. It appears to me that the claim to retain the security as a security for the share of profits was in fact imposing a fetter on the redemption on payment of principal, interest, and costs, and I understand this to be the view taken by LORD MACNAGHTEN.

H It is, in my opinion, idle to say that the mortgagor in the present case has got his property back unfettered, or that he has the unrestricted enjoyment of it, if the agreements contained in cl. 4 of the contract of May 16, 1892, are held to constitute a continuing obligation. It is said that the performance of these agreements is not secured on the shares, but that is not necessary. The agreements which were held to be objectionable both in *Browne v. Ryan* (5) and in *Noakes & Co., Ltd. v. Rice* (2) did not constitute charges on the mortgaged property, but they fettered the mortgagor, in the one case in the free disposition, and in the other case in the free enjoyment, of his property. In the present case the agreement is that the appellant, William Bradley, will "as a shareholder" use his best endeavours

to secure the sale of the company's teas by the respondent or his firm, and, in the event of the teas being sold through another broker, will pay to the respondent the amount of the commission which he or his firm might have earned. In other words, he agrees to use the voting power attached to his shares in a particular way for the respondent's benefit. What is a "share"? It is but a bundle of rights, of which the right of voting at meetings of the company is not the least material. Can it be said that the mortgagee does not retain a hold upon the shares which form the mortgaged property; or that the mortgagor has full redemption of it, when he is not free to exercise a material right in such manner as he may think most conducive to his own interests? He may think it advantageous to the company to employ another broker, or that the change would produce a better return on his shares, but if he gives effect to his opinion he incurs what is in effect a heavy penalty. Again, the appellant could not part with or otherwise deal with his shares without losing the influence in the company's counsels which might enable him to secure the performance of the first part of the agreement, or without running a serious risk of liability under the second part. I can see no difference in principle between this case and *Browne v. Ryan* (5), which has already been approved in this House. The respondent can no more claim a right to be continuously employed as broker for the sale of the teas of the appellants' company, or to be compensated for the loss of his commission if not so employed, than the land agent in *Browne v. Ryan* (5) could claim a right to be employed in the sale of the former's estate, or to be compensated for the loss of his commission.

I am, therefore, of opinion that, even if cl. 4 of the contract bears the construction which has been put upon it by the courts below, the agreements contained in it are such as cannot, in the circumstances, be enforced by the courts of this country. But I doubt whether we ought to put that construction on the clause in question. *Prima facie*, a clause in a mortgage contract is limited to the duration of the mortgage relations between the contracting parties. In this clause we have the words "always hereafter," but I observe that in two other clauses—the third and the fifth—a similar phrase, "at any time hereafter," is used, and is limited by the context to the duration of the mortgage. I am disposed to say that the words "always hereafter," having regard to the nature and purport of the agreement, in like manner mean "at any time hereafter during the currency of the loan." But in the view which I take of the case it is not necessary for me to express a decided opinion on this question. With regard to the appellant James Bradley's agreement, I think that it was part of the same transaction, and ancillary to the principal agreement, and by way of further security to the respondent, and increased remuneration to him for the use of his money, and I am of opinion that it must be construed in the same way, and stand or fall with the principal agreement. I am, therefore, of opinion that the decision of the Court of Appeal should be reversed, and instead thereof that the action should be dismissed with costs, and that the respondent should pay the costs in the Court of Appeal and in this House.

LORD ROBERTSON.—In considering this case I have found myself greatly aided by first forming a clear conception of what is the respondent's theory of Mr. W. Bradley's rights and duties as a shareholder in this company. Before this loan and agreement William Bradley was entitled, like everyone else, to use his position as a shareholder solely for his own benefit. In particular he could vote for such tea brokers as he thought would bring in good profits, and, therefore, good dividends on his 1,541 shares. Now, according to the respondent, he is not entitled to do this. On the contrary, he is bound to vote in the important matter of choosing a tea broker, not in the interests of himself, the shareholder, but in the interests of the respondent, the candidate for the brokership. It is true that he has the option (somewhat derisory, as I cannot but think) of voting freely, and paying two tea brokers, for if the respondent is not appointed, then Mr. W. Bradley has got to make good to the respondent the commission lost by his non-employment, as

A well as to contribute to the payment of the broker who is appointed. This, according to the respondent, is to be the tenure of his shares by Mr. W. Bradley for all time, or at least so long as the respondent or his firm carry on business. If it be asked: "Why is Mr. Bradley thus limited in the enjoyment of his shares and made bound to use them for the respondent's benefit," the answer must be: "Because once upon a time the respondent lent Mr. Bradley money, long since repaid, and he gave him his shares as security, long since re-transferred." This is not merely historically the fact, but the mortgage itself sets out that this limitation of Mr. Bradley's right to deal with those shares as his own is agreed to in consideration of the advance. Accordingly, on this question of fact it seems to me perfectly plain that, if the respondent is right in his law, one result of the agreement was that, in consideration of the advance, Mr. Bradley had the respondent permanently quartered upon him, and that as regards that part of his estate—viz., the 1,541 shares—he was bound to use it in one important relation no longer for his own interest, but for that of the respondent, and for his own only so far as that did not conflict with the respondent's. When I turn to the law of the case I speak with much more diffidence, for the system of jurisprudence in which I was trained does not, in the matter of mortgages, impose any restraint on free contracts. But I have made it my duty to study and understand the law now in question, and I do not hold myself entitled to question it, or detract from it, and I am not able to resist the conclusion that the appellants are entitled to prevail. I entirely agree in the opinion of LORD DAVEY.

E LORD LINDLEY.—Mr. Carritt (the respondent in this case) brought an action against several persons, including the two appellants, for the recovery of damages for breaches by them of certain agreements entered into by them with him. The agreements sued upon were contained in three letters—viz.: (i) A letter, dated Aug. 14, 1889, signed by William Bradley on behalf of himself and all the other defendants. (ii) A letter, dated May 16, 1892, signed by William Bradley alone. (iii) F A letter of the same date signed by James Bradley alone. The plaintiff discontinued his action against the defendants other than the two Bradleys, and the action against them was tried before BIGHAM, J., and a special jury. The plaintiff obtained a verdict and judgment for £750 against the two Bradleys for their breaches of their agree- G ments of May 16, 1892. From this verdict and judgment they appealed to the Court of Appeal, and asked that the verdict and judgment against them might be set aside, and that judgment might be entered for them with costs, or that a new trial might be directed. This appeal was dismissed with costs. The two Bradleys now appeal to your Lordships and ask that judgment may be entered for them. No question now arises as to the first agreement of 1889, and except as part of the history of the two letters of May 16, 1892, the letter of 1889 is of no importance. The two Bradleys put in a joint amended defence, and alleged that, if the letters of May H 16, 1892, were to be construed as the plaintiff contended, then those letters did not express the real agreement between the parties and ought to be rectified, and in the court below evidence was gone into to establish this defence. The attempt to do so failed, and it was not seriously renewed either in the Court of Appeal or before your Lordships and it is unnecessary to refer further to this controversy.

I The questions raised by this appeal are: (i) The true construction of the two letters of May 16, 1892; (ii) Their validity, having regard to equitable doctrines relating to mortgage transactions. I will not detain your Lordships by reading at length the two letters in question. The first of them—viz., that signed by William Bradley—is the most important, and the only one which need be considered in discussing the meaning and validity of both. In order to understand this letter, the position of the writer and of Mr. Carritt, to whom it was written, should be known. The tea company mentioned in the letter had been formed in 1889 by the Bradleys, and Mr. Carritt had assisted them in the issue of debentures on the formation of the company. Mr. Carritt was a member of a firm of tea brokers, carrying on business under the

name of Lloyd, Matheson, and Carritt. In 1889 that firm had been appointed the tea brokers of the tea company, and the firm had been its tea brokers ever since. There had been some controversy, however, about the permanency of their appointment, and different views on this subject had been expressed. The two Bradleys were large shareholders in this tea company, and were also directors of it. William Bradley wanted to borrow £2,250, and Mr. Carritt lent it to him on the terms mentioned in the letter. It is quite immaterial to consider the sources from which Mr. Carritt obtained the money. As between him and William Bradley, Mr. Carritt was the lender, and the advance of the money is not disputed. The letter states that, in consideration of the advance, Bradley agrees to repay it with interest at 7 per cent., and as security he hands over (i) his promissory note for that amount and interest; (ii) a transfer of 1,541 fully paid-up shares in the tea company, and a certificate for those shares in Bradley's name. Then comes a power of sale in case of default of payment (cl. 3), and this is followed lower down by a special power to sell forty-one of the shares even before any default is made (cl. 5). So far there is nothing more than a loan, a promise to pay, a promissory note, and an agreement for a mortgage of a certain number of shares with the powers of sale mentioned. There is another clause—cl. 6—by which Bradley agrees to execute any further documents which Mr. Carritt shall require for perfecting or giving effect to the security intended to be thereby made.

In addition, however, to this mortgage transaction there is cl. 4 which runs thus :

"I further agree, as a shareholder in the Sephunjuri Bheel Tea Co. and in every other capacity to use my best endeavours to secure that you or any firm of brokers of which you for the time being shall be a partner (as you shall elect) shall always hereafter have the sale of all the company's teas as broker. And in the event of any of the company's teas then being sold otherwise than through you or your firm, I personally engage and agree to pay to you or your firm the amount of the commission which you or your firm would have earned if the teas had been sold through you or your firm. This engagement on my part is in addition to and without prejudice to any previous engagements to you, and in particular to the contract of Aug. 14, 1889, by which I agreed on behalf of the proprietors to give you the sale of all the company's teas."

The plaintiff's action, so far as Mr. William Bradley is concerned, is for a breach of this agreement. The loan was called in and was paid off, and the shares which had been transferred and registered in the name of Mr. Carritt or his nominee were duly re-transferred to and registered in the name of William Bradley. But in August, 1899, the company changed their tea brokers and ceased to employ Mr. Carritt or his firm, and this action was then brought.

The first question which arises is the true construction of this cl. 4. The defendants contend that when the loan was paid off this clause ceased to be operative; that it was part of the security for the loan; and that the words "always hereafter" ought to be construed as the words "at anytime hereafter" in cl. 3 and 5 giving the powers of sale must be construed. This contention appears to me quite untenable. It is obvious that the powers of sale are conferred in order to enable the mortgagee to get back his money, and for no other purpose, and the words "at any time hereafter" in those powers have no sensible meaning and no legal operation after the loan is repaid. This reasoning is wholly inapplicable to cl. 4. Again, to say that cl. 4 is part of the security appears to me quite incorrect. It is true that the loan of the money is the consideration for the whole agreement, including cl. 4; but the security for the loan is the promise to repay it, the promissory note, and the shares with the powers to sell them. Clause 4 is in no sense part of the security for the money, but it is an additional advantage stipulated for by the mortgagee. Clause 4 means what it says. It gives Mr. Carritt the option of himself, or any firm of tea brokers of which he is a member, becoming an applicant for the appointment of tea broker to the company, and binds Mr. William Bradley to use his best endeavours

A to secure that appointment, and if any other broker should be employed by the company to sell the company's teas, then Bradley undertakes to pay to Carritt, or his firm, as the case may be, the commission lost by their non-employment. The only limit to the duration of this agreement is that set by the possibility of carrying it out. It would necessarily cease if Mr. Carritt gave up the business of tea broker, or if the company gave up selling tea; but I can discover no other event on which it would come to an end. I can discover no legitimate ground for implying that it was to last only for a reasonable time, nor can I find any measure for such a period. To use BIGHAM'S, J.'s, language, the words "always hereafter" in this clause mean so long as I am in a position to sell the teas and the teas are there for me to sell. It is hardly necessary to add that Mr. James Bradley's letter bears the same meaning. This letter is to the same effect as cl. 4, but Mr. James Bradley did not make himself liable for the loan, although the loan was the consideration for the promise which he made.

I pass now to the second question—viz., the validity of the contracts sued upon, and it will be convenient to take Mr. James Bradley's letter first. If he had been sued separately for a breach of his contract, I cannot conceive what defence he would have had to the action. Legal defence is out of the question, and there being no fraud, undue influence, oppression, or extortion, I can discover no ground whatever for the interference of a court of equity with the legal rights of the plaintiff. Mr. James Bradley contracted as a principal; he was not a mortgagee; he was not a surety, or in any way responsible for the mortgage debt; he had no interest in the shares mortgaged; he would not be a necessary or proper party to any suit in equity by or against William Bradley for the redemption or foreclosure of his mortgage. I cannot see that Mr. James Bradley's position is altered by the fact that he has been made a co-defendant with Mr. William Bradley in the present action, or by the fact that the two defendants have joined in defending it. This procedure was, I suppose, adopted to save expense, but it cannot, in my judgment, affect the merits of the case in any way whatever. As regards Mr. James Bradley, I am unable to discover any defence or semblance of defence to the plaintiff's action.

Mr. William Bradley's position is, no doubt, different, for he was a mortgagee, and he is sued upon an agreement imposing upon him an obligation beyond that of repaying the money lent with interest and costs, and that agreement was entered into in consideration of the loan for which he mortgaged his shares. Before considering the validity or invalidity of this additional agreement it is essential to bear in mind that Mr. Bradley raised no defence to the action on the ground of fraud, undue influence, extortion, or oppression. No issue was raised or left to the jury on which a verdict could have been given for the defendant on any of these grounds. The only defence set up was mistake, and this failed. The legal point that the agreement was invalid, on equitable doctrines applicable to the admitted or established facts is, of course, still open for argument. But no other defence can, I apprehend, be now properly listened to. I refer more particularly to such a possible ground of defence as oppression or unfairness in the bargain. BIGHAM, J., and the Court of Appeal both referred to this suggested defence, and said that, in their opinion, the agreement was not oppressive or unreasonable, and I agree with them.

If the agreement contained in cl. 4 is to be held invalid, it must be upon some equitable principle applicable to the terms of the bargain itself and to the facts not now in controversy. The equitable grounds relied on are, as I understand them, two in number—viz.: (i) That cl. 4 is a clog on the redemption, and infringes the well-settled equitable principle once a mortgage always a mortgage; (ii) that it is part of the mortgage transaction, and must, as a matter of law, cease with it, in conformity with the rule once a mortgage always a mortgage, and nothing but a mortgage. As to the first ground, cl. 4 gives the mortgagee of the shares no right or interest in them, legal or equitable. So long as he holds them as mortgagee he has the ordinary rights of a mortgagee, with the right of selling them conferred by the other clause of the agreement; but when he is paid off his principal interest,

and costs, he is bound to re-transfer the shares to the mortgagor, and cl. 4 contains nothing whatever which entitles or purports to entitle the mortgagee to retain the shares or to control the use of them when returned to the mortgagor. Clause 4 in no way fetters the right to redeem nor obstructs the mortgagee in the practical exercise of that right, or of the use or enjoyment of his shares when he gets them back. He can then do what he likes with them free from all control by the mortgagee. How it can be said that cl. 4 elogs the equity of redemption or infringes the rule, once a mortgage always a mortgage, passes my comprehension. It is admitted that after redemption the mortgagor can sell the shares; but it is said that so long as he holds them he is bound to use whatever influence they give him in favour of the mortgagee so as to enable him to retain his position of broker to the tea company. This observation, so far as it is true, applies to whatever shares Mr. William Bradley might happen to hold when it became necessary to use his influence in Mr. Carritt's favour. But cl. 4 gives Mr. Carritt no legal or equitable right to have shares, still less any particular shares held by Mr. Bradley used in any particular way.

By the first part of cl. 4 Mr. Bradley has bound himself to use his best endeavours to secure the tea brokerage for Mr. Carritt; this might or might not involve voting for him. The votes conferred by the shares might be too few to be of any use, and other endeavours than voting in respect of them might be more likely to prevail. But to say that the equitable principle under discussion is infringed, and that cl. 4 is invalid simply because it might be necessary for Mr. Bradley to use the influence which the mortgaged shares, if retained, would confer in order to perform his engagement to Mr. Carritt, seems to me to stretch the doctrine under consideration to an extent not warranted by principle or authority. The second part of cl. 4 binds Mr. Bradley to pay commission if Mr. Carritt loses the tea brokerage to the company, even although Mr. Bradley may have used his best endeavours to prevent such loss. The second part of cl. 4 increases the inducement to make such endeavours, but that is its only bearing on the present controversy; and it is plain from the summing-up of BIGHAM, J., that the action was for a breach of this part of cl. 4, and that the damages were assessed for this breach. The second part of the clause does not depend upon the first part, and comes into operation whether the first has been broken or whether it has been duly performed.

But then reliance is placed upon authority, and especially on *Salt v. Marquess of Northampton* (6), *Noakes & Co., Ltd. v. Rice* (2), *Browne v. Ryan* (5), and the disapproval by some of your Lordships of *Santley v. Wilde* (1). I will, therefore, shortly refer to these cases. *Salt v. Marquess of Northampton* (6) turned entirely on the question whether the policy then in question was mortgaged, and for what. As soon as that was settled, there was no difficulty in applying the doctrine once a mortgage always a mortgage. That case does not appear to me to assist your Lordships to decide the present controversy one way or the other. In *Noakes & Co., Ltd. v. Rice* (2), if the decision had been the other way, and the contract had been upheld, the public-house, which was free when mortgaged, would have been tied to the mortgagee when redeemed. In *Browne v. Ryan* (5) the mortgagee, who was an auctioneer, had stipulated for the right to sell the mortgaged property within twelve months after redemption, and whether the mortgagor desired to sell or not. In *Noakes & Co., Ltd. v. Rice* (2) this House approved that decision, although I expressed my doubts about its correctness. It goes further than any other case that I know of. I have searched in vain for any similar case in which the Court of Chancery restrained a common law action. But treating *Browne v. Ryan* (5) as having been properly decided, the difference between that case and this is apparent, for the mortgagee there sought damages for the breach of a contract depriving the mortgagor of his property, even after its redemption by him.

In *Santley v. Wilde* (1) the Court of Appeal held that upon the true construction of the contract the property mortgaged, which was a theatre held for a short term of years, was made a security (i) for money borrowed and interest, and (ii) for the

A performance of an agreement confining the mortgagee to a share of profits earned by the mortgagor during the lease, even although the loan might have been repaid with interest. The Court of Appeal, over which I then presided, considered that the security for both of these was valid. In *Noakes & Co., Ltd. v. Rice* (2) two of your Lordships thought this decision wrong, and so did the Court of Appeal in Ireland in *Hosmond v. Ryan* (5). The error in the decision in *Savile v. Wilde* (1), in the view of those who think it wrong, was that the property mortgaged was burdened with more than the loan made upon it, and that redemption was impossible. That is not so in the case now before your Lordships, as I have endeavoured to show. *Savile v. Wilde* (1) was a difficult case, and it may have been wrongly decided, although I do not think that it was. Be this as it may, I do not understand that the legal principles laid down in it have been condemned by the House as unsound. I say this after carefully considering the observations made on that case by the noble Lords who decided *Noakes & Co., Ltd. v. Rice* (2).

It remains to consider the second ground—viz., that cl. 4 is part of the mortgage transaction, and must cease with it, or, in other words, that it infringes the last part of the rule once a mortgage always a mortgage, and nothing but a mortgage. When the usury laws were in force, and every device for evading them had to be defeated, the above language was convenient and as free from objection as most concise statements are, for every stipulation in a mortgage in favour of a mortgagee and conferring pecuniary benefits on him in addition to repayment of his principal moneys and lawful interests and costs was open to the objection that it was a cloak for usury. But now that the usury laws are abolished such language is much too wide. *Biggs v. Hoddinott* (3), which was approved by this House in *Noakes & Co., Ltd. v. Rice* (2), shows it to be so. Laying aside the usury laws and all rules to prevent their evasion, and laying also aside all considerations of fraud, undue influence, oppression, and illegality on other grounds, I am not aware of any authority which invalidates a contract between a mortgagor and mortgagee unless it affects or purports to affect the property mortgaged, or the right to redeem it. Any contract which does that has always been held invalid in equity, and must now be treated as invalid by all courts. The restoration of the mortgaged property to the mortgagor on performance of the obligation to secure which it was mortgaged, is the grand object which courts of equity have always steadily kept in view and insisted on, all agreements to the contrary notwithstanding. The wasting away of leasehold or other property does not affect the principle, but only modifies its application.

I hope that nothing which ever has fallen from me or which may fall from me now will cast any doubt on this matter. But beyond that I am not prepared to go. I cannot bring myself to believe that it is part of the law of this country that mortgagors and mortgagees cannot make what bargains they like with each other so long as such bargains are not inconsistent with the right of the mortgagor to redeem the property mortgaged by discharging the debt or obligation to secure which the mortgage was effected. I have given my reasons already for holding that this principle is not infringed in this case. Upon the merits, therefore, my opinion is that BIGHAM, J., and the Court of Appeal were right in giving judgment for the plaintiff, and that this appeal should be dismissed.

Appeal allowed.

Solicitors: *Merriman, White & Thompson; W. A. Crump & Son.*

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

DEVERGES v. SANDEMAN, CLARK & CO.

[COURT OF APPEAL (Vaughan Williams, Stirling and Cozens-Hardy, L.J.J.), January 24, 30, March 1, 1902]

[Reported [1902] 1 Ch. 579; 71 L.J.Ch. 328; 86 L.T. 269; 50 W.R. 404;
18 T.L.R. 375; 46 Sol. Jo. 316]

Mortgage—Sale—Implied power—No time for redemption fixed—Notice to mortgagor of intention to sell—Reasonable opportunity to mortgagor to redeem.

Where on a mortgage of stocks or shares no time for repayment by the mortgagor has been fixed, before the mortgagee can exercise a power of sale a notice must be given to the mortgagor which must be reasonable in all respects having regard to the circumstances, and default in payment must be made by the mortgagor after receipt of such notice.

Per STIRLING, L.J.: A notice demanding payment of an excessive sum has been held to be bad: *Pigot v. Cubley* (1) (1864), 15 C.B.N.S. 701. The notice must give a reasonable opportunity to the mortgagor to pay what is due under the mortgage, and I think it is at least desirable that it should fix a day for that purpose, and also convey to the mind of the mortgagor that, if he fail to avail himself of that opportunity, the mortgagee will be in a position to put in force his rights.

Per COZENS-HARDY, L.J.: Mortgagees have a power of sale provided that a reasonable time has elapsed after notice requiring payment. The notice need not state that the mortgagee will sell; it is sufficient that the notice requires payment of the mortgage money.

Notes. Considered: *Stubbs v. Slater*, [1910] 1 Ch. 632.

As to the implied power of sale of a mortgagee, see 27 HALSBURY'S LAWS (3rd Edn.) 294, 295, and for cases see 35 DIGEST 496, 497.

Cases referred to:

- (1) *Pigot v. Cubley* (1864), 15 C.B.N.S. 701; 3 New Rep. 607; 33 L.J.C.P. 134; 9 L.T. 804; 10 Jur.N.S. 318; 12 W.R. 467; 143 E.R. 960; 35 Digest 496, 2265.
- (2) *Wilson v. Tooker* (1714), 5 Bro. Parl. Cas. 193; 2 E.R. 622; sub nom. *Tucker v. Wilson*, 1 P. Wms. 261, H.L.; 35 Digest 496, 2257.
- (3) *Re Hardwick, Ex parte Hubbard* (1886), 17 Q.B.D. 690; 55 L.J.Q.B. 490; 59 L.T. 172, n.; 35 W.R. 2; 2 T.L.R. 904; 3 Morr. 246, C.A.; 37 Digest 13, 83.
- (4) *Re Morrill, Ex parte Official Receiver* (1886), 18 Q.B.D. 222; 56 L.J.Q.B. 139; 56 L.T. 42; 35 W.R. 277; 3 T.L.R. 266, C.A.; 35 Digest 497, 2267.
- (5) *Henderson v. Astwood, Astwood v. Cobbold, Cobbold v. Astwood*, [1894] A.C. 150; 6 R. 450, P.C.; 35 Digest 500, 2306.
- (6) *Re Richardson, Shillito v. Hobson* (1885), 30 Ch.D. 396; 55 L.J.Ch. 741; 53 L.T. 746; 34 W.R. 286, C.A.; 35 Digest 374, 1166.

Also referred to in argument:

Lockwood v. Ewer, Lady Child v. Chanstilet (1742), 9 Mod. Rep. 275; 2 Atk. 303; 88 E.R. 448, L.C.; 35 Digest 496, 2258.

Wayn v. Lewis (1853), 1 Drew. 487.

Halliday v. Holgate (1868), L.R. 3 Exch. 299; 37 L.J.Ex. 174; 18 L.T. 656; 17 W.R. 13; 35 Digest 247, 74.

Jennings v. Broughton (1854), 5 De G.M. & G. 126; 23 L.J.Ch. 999; 43 E.R. 818, L.J.J.; 35 Digest 14, 68.

Greening v. Wilkinson (1825), 1 C. & P. 625; 171 E.R. 1344, N.P.; 43 Digest 521, 587.

- A** *Johnson v. Stear* (1863), 15 C.B.N.S. 330; 3 New Rep. 425; 33 L.J.C.P. 130; 9 L.T. 538; 10 Jur.N.S. 99; 12 W.R. 347; 143 E.R. 812; 43 Digest 510, 490.
- Miller v. Dell*, [1891] 1 Q.B. 468; 60 L.J.Q.B. 404; 63 L.T. 693; 39 W.R. 342; 7 T.L.R. 155, C.A.; 43 Digest 487, 236.
- Wilkinson v. Verity* (1871), L.R. 6 C.P. 206; 40 L.J.C.P. 141; 19 W.R. 604; sub nom. *Williamson v. Verity*, 24 L.T. 32; 32 Digest 327, 136.
- B** *Spinkman v. Foster* (1883), 11 Q.B.D. 99; 52 L.J.Q.B. 418; 48 L.T. 670; 47 J.P. 455; 31 W.R. 548, D.C.; 32 Digest 344, 271.
- Martin v. Porter* (1839), 5 M. & W. 351; 2 Horn. & H. 70; 151 E.R. 149; 34 Digest 657, 567.
- Re Bihar and San Francisco Rail. Co.* (1868), L.R. 3 Q.B. 584; 9 B. & S. 844; 37 L.J.Q.B. 176; 18 L.T. 467; 16 W.R. 862; 9 Digest (Repl.) 404, 2590.
- C** *Re Ottes Koppje Diamond Mines, Ltd.*, [1893] 1 Ch. 618; 62 L.J.Ch. 166; 68 L.T. 138; 41 W.R. 258; 37 Sol. Jo. 115; 2 R. 257, C.A.; 9 Digest (Repl.) 396, 2544.
- Owen v. Routh* (1854), 14 C.B. 327; 23 L.J.C.P. 105; 22 L.T.O.S. 260; 18 Jur. 356; 2 W.R. 222; 2 C.L.R. 365; 139 E.R. 134; 4 Digest (Repl.) 337, 3068.
- McArthur v. Lord Seaforth* (1810), 2 Taunt. 257; 127 E.R. 1076; 17 Digest (Repl.) 97, 136.
- D** *Michael v. Hart & Co.*, [1901] 2 K.B. 867; 70 L.J.K.B. 1000; 85 L.T. 548; 50 W.R. 154; 17 T.L.R. 761; on appeal [1902] 1 K.B. 482; 71 L.J.K.B. 265; 86 L.T. 474; 50 W.R. 308; 18 T.L.R. 254, C.A.; affirmed sub nom. *Hart & Co. v. Michael* (1903), 89 L.T. 422, H.L.; 12 Digest (Repl.) 377, 2962.

E **Appeal** by the plaintiff in an action by him against a firm of stockbrokers for damages for the wrongful sale of the shares in a company.

In July, 1897, the defendants, acting on the instructions of the plaintiff, who was a Spaniard, bought for him on the Stock Exchange 400 shares in Central Boulder Gold Mines, Ltd. The plaintiff was only able to provide part of the purchase money, and the balance, amounting to £538 odd, was paid by the defendants on the verbal agreement that the shares would be transferred into the names of two members of the defendants' firm, to be held by them by way of mortgage to secure the sum due from the plaintiff to them thereon. On Aug. 31, 1897, the defendants wrote to the plaintiff as follows:

G "We have been expecting to receive from you the further remittance as promised by you to complete the amount due to us on the purchase of the 400 shares, which have been, as desired by you, registered in our names, and are, subject to the amount you owe us plus interest to the next account day, Sept. 15, at your disposal. Should you not place us in funds by that date, we shall deem ourselves at liberty to sell at our discretion as to date and at the then market price the shares we hold. We must recall to your mind our conversation by reiterating that it is not our practice to open speculative accounts, and hence our desire to have this transaction completed in the usual manner."

H The plaintiff did not comply with the terms of this letter, nor did he make any further payment in respect of these shares, although repeatedly requested by the defendants to do so. Subsequently, a further 300 shares were bought. A year having elapsed, and the defendants still retaining the shares, the company went into liquidation with a view to reconstruction, and its assets and undertaking were transferred to a new company. In the course of the reconstruction the defendants received a circular to the effect that the holders of the shares in question would be entitled to 1,050 shares in the new company on the payment of a balance of 3s. a share. This circular was sent by the defendants to the plaintiff. The plaintiff did not remit any money, and the defendants having paid the balance of 3s. a share, the shares in the new company were allotted to them. These shares having subsequently risen on the market, they in February and March, 1899, sold them without further reference to the plaintiff, believing that they were entitled to them as absolute owners. In July, 1899, the plaintiff applied to the defendants for an

account, which they rendered, showing a large balance due to them, and they informed the plaintiff that, inasmuch as he had failed to provide the necessary funds for taking up the shares in the new company, he had forfeited all right to any interest in that company. The plaintiff brought this action, alleging that the sale was without notice to him, and, as since the sale the price of the shares had risen in value, he had sustained loss by reason thereof. The defendants admitted the sale, and, although at the time they claimed to retain the whole of the proceeds for their own benefit, by their defence they expressed a willingness to account, and delivered an account showing a balance in favour of the plaintiff of £55 4s. 11d., which they brought into court, and submitted that the sum was in satisfaction of the plaintiff's claim. FARWELL, J., held, [1901] 1 Ch. 70, that a mortgagee of shares registered in his own name had an implied power to sell them if the mortgagor failed to pay after a reasonable time. He, accordingly, gave judgment for the defendants, and the plaintiff appealed.

The following letters are referred to in the judgments :

April 6, 1898.—Defendants to plaintiff :

"If there is still any likelihood of your being unable to visit London in the immediate future, we shall feel obliged by your remitting us the amount due."

May 31, 1898.—Defendants to plaintiff :

"Having received no reply to our letter we addressed to you on April 6 (a copy of which we beg to annex), we send this under registered cover in order that there can be no doubt of its being placed in your hands, and that you will be consequently cognisant of our desire that you will not further delay in fulfilling your promise to liquidate your indebtedness to us, which amounted at the end of March to £577 10s. 8d., and carries an accruing 6 per cent. interest. Twice you intimated that you were coming to London and would then settle the amount with us, and we feared that possibly illness might perchance have caused you to delay your visit, but are at a loss to understand the reason of our receiving no word whatever from you. The Central Boulder shares in which you are interested to the extent of 700 shares are now only worth a doubtful 10s. per share, and hence we are waiting to receive either funds from you to pay for them or your instructions to sell them at a given price, and moneys to meet the deficiencies which have gradually accumulated since your purchases by an unhappy but continuous depreciation in market value."

June 7, 1898.—Plaintiff to defendants :

"Your letter of April 6 came to hand in due course, and also your registered letter of May 31. The funds I shall have in London have not been given me, and this is the cause of the delay. I expect to receive them in the course of this month, and then I will settle with you. Our country is going through a tremendous panic, but this will not last long I hope."

June 13, 1898.—Defendants to plaintiff :

"We beg to enclose herewith two papers which will indicate to you the rough terms of a proposed amalgamation between the Central Boulder Gold Mines, in which you are interested, with the neighbouring West Boulder Gold Mine. . . . We are this day favoured with your letter of the 7th inst., in which you state that, not having received from others, you are unable to send us the moneys you had promised, and we trust you will hasten to make such arrangements as will enable you to remit to us the moneys now for some time since overdue. If the above scheme is passed, you would have further to remit us the 3s. per share due on the new shares, failing which the company could and would legally forfeit the shares belonging to you (but which are registered in our names); therefore, to avoid total loss, you would have either to sell your holding to someone willing to adopt the liability on reconstruction at whatever the

A market price may be or to make the payment on your behalf. We will thank you to give us by return of post your positive instructions as to selling your holding of Central Boulder shares or your intimation of your desire to participate in the new company and your adoption of the liability thereon. In either case we count on receiving your remittance for the amount overdue on your purchases of the original shares, and regret that your delay in so doing most unfortunately compels us to press you to do so at a time when your country and its resources are unhappily embarrassed by a war which we trust will be as short as it is sad, or that our action in so doing might erroneously appear unsympathetic."

Aug. 22, 1898.—Defendants to plaintiff :

C "We have twice written to you on the subject of your holding of Central Boulder Co. shares (which are in our names), and have asked you to consider the papers we sent you . . . and to give us your decision whether you intend participating in the reconstruction of the company, thereby incurring a liability of 3s. on 1,050 shares, or whether you will adopt the only other alternative of allowing your shares to be forfeited, and thereby accept the entire loss and sacrifice of the shares you have purchased (but which you have not entirely paid us for). It seems wise to join in the scheme on the off chance of success, or with a view of seizing some possible opportunity of selling at a price in advance of the amount payable on joining this scheme. Having regard to the position you have placed us in, we are compelled to give you clear notice that we shall not apply for the 1,050 shares, adopting the liability of 3s. per share (which must be done previous to Sept. 9), on your behalf or for your benefit, excepting always that you have previously remitted to us, and also accompany your instructions with a further remittance to cover the amount payable on these new shares. We further regret having to inform you that, as you have not fulfilled your promise by remitting us the money to complete the purchase of the shares and that we are unprotected by any security, we shall deem ourselves at liberty to adopt at our pleasure such steps as may unfortunately be necessary to recover the debts due by you to us here."

Sept. 9, 1898.—Defendants to plaintiff :

G "We are in receipt of a letter, dated the 3rd inst., written on your behalf, and now confirm our telegram of this date 'must have cash remittance.' We fully explained in our letter of the 22nd ult. the position, and that we would do nothing on your behalf unless we received a remittance of the moneys due to us, with a further sum to cover the amount payable on claiming and taking up the new shares. Unless we receive a remittance in response to our telegram above referred to, we must reluctantly take steps to recover the debt due by you to us, as stated in our last letter already referred to."

H Sept. 15, 1898.—Defendants to plaintiff :

I "Confirming our cablegram and letter of the 9th inst., we now enclose copy of a notice issued by the Central Boulder Co. extending the time to applying for the new shares to the 23rd inst. As this is final, we must receive a remittance from you before that day in order to take the new shares on your behalf. We would impress on you that if you fail to remit you will lose all interest in the shares, and we must proceed against you to recover the sums we have paid on your account."

Robert Wallace, K.C., and G. H. Stutfield for the plaintiff.
Upjohn, K.C., and Stewart-Smith for the defendants.

Cur. adv. vult.

Mar. 1, 1902. The following judgments were read.

VAUGHAN WILLIAMS, L.J.—The main question in this case is whether the sale by the defendants of certain shares in March, 1899, was a sale within their powers. There may be some doubt whether the defendants were, strictly speaking, mortgagees, but as both sides argued the case before us on the assumption that the defendants were mortgagees, I shall deal with the case on that assumption. The plaintiff in his statement of claim so asserted, and, although the defendants by the form of their pleading denied this allegation, yet, in the argument before us and in the court below, counsel for the defendants, with the assent of counsel for the plaintiff, withdrew this denial.

The defendants, being mortgagees, have in equity, notwithstanding their legal title to the shares, no estate sufficient to enable them to sell, and thus exclude the mortgagor from his equitable right to redeem, unless there is either an express or implied power of sale in the mortgage. In the present case there is no express power of sale, and we have, therefore, to ascertain whether or not there is, in the circumstances of this case, an implied power of sale. I wish at once to say that I do not think that the circumstances which will give rise to an implication of a power of sale in favour of a mortgagee of a chattel, or even of stock or shares, can differ in favour of the mortgagee from those which are necessary to give a right of sale to a pledgee. In both cases the creditor holding security is allowed, as against the debtor in default, to enlarge his interest or estate. In the case of a pledge, whether of chattels or of stock or shares, a power of sale is implied at law if a day is fixed by the contract for the payment of the debt, for in such case it is inferred that the contract between the parties is that, if the borrower do not repay the advance, the lender shall be at liberty to reimburse himself by the sale of the thing pledged. In the case of a mortgage in which there is a fixed day for payment and default in payment, a similar power of sale would seem to arise, if not in the case of a mortgage of a chattel, at all events in the case of a mortgage of stock or shares. This seems established by *Tucker v. Wilson* (2). In the present case no day is fixed for payment by the original contract. In the case of a pledge at law, it would seem now to be fairly well established that, when a loan is for an indefinite time, the lender may terminate the credit by giving notice to the debtor to pay on a certain day, and that upon default to pay on that day the pledgee may sell the pledge, but I know of no case in which the power of sale of a pledge has been held to arise in a case where no day has been fixed by the creditor for payment, and I know of no reason or authority for the proposition that a power to sell should arise in a case of a mortgage of stock unless a day certain has been fixed for the payment.

So far I have dealt only with the law apart from the Conveyancing Act, 1881 [see now Law of Property Act, 1925, ss. 101, 103]. Sections 19 and 20 of that Act do not apply to the present case, because the mortgage was not by deed, and, even assuming that the so-called notice in the present case would have been, in the case of a deed, a notice requiring payment of the mortgage money served on the mortgagor, and assuming that there would have been default in payment for three months after such service—all of which assumptions I doubt—I yet think that the presence of these provisions in the Conveyancing Act would not justify us in departing from the law as it appeared to be established before the passing of that Act.

Let me now consider the reason of requiring a notice as a condition of the implied power of sale. It may be said that the object of the notice is to put the mortgagor in default, and that it is this which is, in essence, the condition of the power of sale. Perhaps so. But in what respect is the mortgagor to be in default before the pledge can be sold against him? The debt is due, and an action could, *ex hypothesi*, be brought against him. Moreover, why is it that the notice must be "reasonable," as by all the authorities it must be? To my mind, the answer is plain—to give the mortgagor a reasonable opportunity to redeem. [His Lordship referred to the correspondence which had passed between the

A parties and continued.) In my judgment, none of the letters did give the mortgagor a reasonable opportunity to redeem. There was nothing in them to put a certain end to the indefinite credit or to lead the mortgagor to suppose that he must redeem by a definite day or suffer a sale of the pledge. It follows that, in my opinion, the sale of the 1,050 shares substituted as security for the 700 was wrongful, and that the plaintiff is entitled to damages, but I think that those damages are limited to the price realised by the shares less the amount due to the defendants for principal, interest, and proper charges. As the £55 brought into court was not sufficient to offset the plaintiff's claim, I think that the plaintiff is entitled to judgment, with costs, but, as both my learned brethren have arrived at a different conclusion, the appeal must be dismissed with costs.

C STIRLING, L.J.—This case was decided in the court of first instance, and has been argued in this court on the basis that the relation between the plaintiff and the defendants was that of mortgagor and mortgagee, and I think that it must now be dealt with on that footing.

I agreed with FARWELL, J., in thinking that the statement of the law at p. 276 of ROBBINS ON MORTGAGES is correct. The passage is as follows :

D “If stock is itself made the security for money, and the day appointed for payment is passed, the mortgagee may at once proceed to sell the stock and repay himself principal and interest, without any authority from the mortgagor and without commencing an action of foreclosure.”

E This, however, leaves open the question: What are the rights of the mortgagee where no day has been appointed for payment? I have nowhere found any authoritative statement of the law on this head. Some light may be derived from what has been said by learned judges as to the rights of a pawnee or pledgee of chattels in like circumstances. Thus BOWEN, L.J., says in *Re Harwick, Ex parte Hubbard* (3) (17 Q.B.D. at p. 698):

F “There is at common law an authority to the pledgee to sell the goods on the default of the pledgor to repay the money either at the time originally appointed or after notice by the pledgee.”

In *Re Morritt, Ex parte Official Receiver* (4), COTTON, L.J., says (18 Q.B.D. at p. 232):

G “A contract of pledge carries with it the implication that the security may be made available to satisfy the obligation, and enables the pledgee in possession (though he has not the general property in the thing pledged, but a special property only) to sell on default in payment and after notice to the pledgor, although the pledgor may redeem at any moment up to sale.”

H He afterwards says, with reference to the position of a mortgagee of personal chattels (*ibid.* at p. 233):

I “Where there is no express power of sale given by the mortgage, he has, after default in payment, and after he has given the mortgagor a reasonable time to pay the money due, a power to sell and give a good title to the purchaser, though, of course, the mortgagor has, at any time before sale, a right, on payment of the money due, including expenses, to prevent the sale and redeem the chattels.”

According to these authorities it would seem to me that where no time for payment has been originally fixed, then, before the power of sale can be exercised, notice is to be given to the mortgagor, and default must be made by him in payment after such notice. What this notice is to contain is nowhere defined; but it must, of course, be a notice which is in all respects reasonable, regard being had to the circumstances of the case. A notice demanding payment of an excessive sum has been held to be bad: *Pegot v. Cable* (1). The notice must give a reasonable oppor-

tunity to the mortgagor to pay what is due under the mortgage; and I think it is at least desirable that it should fix a day for that purpose, and also convey to the mind of the mortgagor that if he fail to avail himself of that opportunity the mortgagee will be in a position to put in force his rights. A

[His Lordship referred to the facts and the correspondence and concluded: In my judgment the defendants had, under the letter of Aug. 22, 1898, power to sell all the 700 shares at any time after Sept. 24, 1898, and also, as regards the first 400 shares, the power derived from the letter of Aug. 31, 1897. Both these powers were available over the new shares substituted for them respectively. I do not think that the fact found by FARWELL, J., that the defendants sold *bonâ fide*, believing themselves to be absolute owners, precludes them from defending themselves on the ground of a power of sale which they were entitled to exercise; and I think that *Henderson v. Astwood* (5) is an authority in support of that view. In my opinion, the judgment of FARWELL, J., was right, and the appeal ought to be dismissed. B C

COZENS-HARDY, L.J.—The difference of opinion between my two colleagues has made me approach this case with anxiety, but after mature consideration, I think the judgment of FARWELL, J., was correct and ought to be affirmed. The plaintiff alleges in his statement of claim that 700 shares, which were purchased for the plaintiff by the defendants acting as his brokers, were, in accordance with a verbal arrangement between the plaintiff and the defendants, transferred into the names of two members of the defendants' firm "by way of mortgage to secure the sum so due from the plaintiff." This allegation was not admitted by the statement of defence, but it was admitted before FARWELL, J., and the argument before us has proceeded on that footing. D E

Assuming the true relation between the parties to be that of mortgagor and mortgagees of shares, I think it is settled law (*Tucker v. Wilson* (2)) that the mortgagees have a power of sale, provided that a reasonable time has elapsed after notice requiring payment. The notice need not state that the mortgagees will sell; it is sufficient that the notice requires payment of the mortgage money. On this point s. 20 of the Conveyancing Act, 1881 [see now Law of Property Act, 1925, s. 103], may be referred to. It clearly expresses that which is implied when judges speak of the necessity of reasonable notice, without saying what the notice should comprise. In the present case I think the letters written by the defendants of April 6, May 31, June 13, Aug. 22 and Sept. 9 and 15, 1898, were, both separately and collectively, good notices requiring payment of the mortgage debt. I do not rely upon the letter of Aug. 31, 1897, because at that date only 400 shares had been purchased, and the letter could only have relation to those 400 shares. No time being originally fixed for payment of the mortgage debt, it was payable on demand, and each and all of the letters I have referred to must be regarded as a demand for payment. It is true that in *Tucker v. Wilson* (2) there was a definite time fixed originally for payment, but, in my opinion, that was not essential to the decision. F G H

The position of a mortgagee is at least as good as, and I think in some respects better than, the position of a pawnee. In *Re Richardson, Shillito v. Hobson* (6), FRY, L.J., states the law as follows (30 Ch.D. at p. 403):

"The pawnee would have a right to sell the chattel pawned, either in default of payment at the time fixed, if there be a time fixed, or in default of payment after reasonable notice, if no time be fixed." I

And in *Re Hardwick, Ex parte Hubbard* (3), BOWEN, L.J., uses similar language (17 Q.B.D. at p. 698):

"In all such cases there is at common law an authority to the pledgee to sell the goods on the default of the pledgor to repay the money, either at the time originally appointed or after notice by the pledgee."

A I may observe that the letters to which I have referred, with one exception, do not contain any statement, accurate or inaccurate, as to the amount due, but, although a mistake as to the amount due may destroy the effect of the notice as notice of plaintiff and pledgee (*Pearce v. College* (1) 1), I think that is not the law as between mortgagor and mortgagee. In order to restrain a mortgagee from selling in the absence of fraud, it is not sufficient to contest the amount due on the mortgage. The mortgagor must pay into court, or tender to the mortgagee, the amount claimed to be due. Having regard to the nature of the property, a fortnight, or at the outside a month, would in the present case be a reasonable time. If, therefore, the defendants had sold the 700 shares in February and March, 1899, I should have felt no difficulty in this case. But some difficulty is occasioned by the fact that the 700 shares have ceased to exist, and that under a so-called reconstruction scheme the defendants applied for and obtained an allotment of 1,050 shares in a new company in respect of these 700 shares, they were foolish enough to fancy that they could claim the benefit of those shares as their own property not subject to any rights of the plaintiff, and they sold those new shares in February and March, 1899, not as mortgagees, but as absolute owners. It is clear that those 1,050 new shares were as much subject to the mortgage as the original 700 shares. It is precisely similar to the case of a renewed lease granted to the mortgagee. This is the plaintiff's allegation. It follows that the substituted property is subject to the same power of sale as the old property was subject to. Nor can I see that it makes any difference that the defendants sold under the belief that they were no longer mortgagees. FARWELL, J., has found that they were not fraudulent; and, this being so, if authority is wanted, I think the decision in the Privy Council in *Henderson v. Astwood* (5) suffices to show that the sales in February and March, 1899, may be supported as sales under their power as mortgagees.

E I cannot help expressing my regret at the conclusion at which I have arrived, because I am convinced that in fact the relation between the parties was not that of mortgagor and mortgagee. The plaintiff was in Spain, and the defendants were in London. The verbal arrangement pleaded is a mere fiction. The relation between the parties was simply that of client and brokers, and if the plaintiff had sued the defendants on that footing, as at present advised, I think he might have recovered damages for wrongful conversion. The rights of a broker, in respect of a broker's lien, or under the rules of the Stock Exchange, are not the same as the rights of a mortgagee under an express contract of mortgage. In the view which I take F it is unnecessary to consider what would have been the proper measure of G damages if the conversion of the shares had been wrongful.

Solicitors: *E. F. Weldon; Morley, Shirreff & Co.*

[Reported by W. C. BISS, Esq., Barrister-at-Law.]

BANKES v. JARVIS

[KING'S BENCH DIVISION (Lord Alverstone, C.J., Wills and Channel, JJ.), January 28, 1903]

[Reported [1903] 1 K.B. 549; 72 L.J.K.B. 267; 88 L.T. 20;
51 W.R. 412; 19 T.L.R. 190]

Practice—Counterclaim—Set-off—Action by trustee or agent for third person—Counterclaim for damages admitted to be due from third person to defendant—Right of defendant to set up counterclaim as set-off to trustee's claim—Supreme Court of Judicature Act, 1873 (36 & 37 Vict., c. 66), s. 24 (2), (3)—R.S.C., Ord. 19, r. 3.

Where an action to recover a sum of money is brought by a person as agent or trustee for another, the defendant can set up by way of defence to the trustee's claim a counterclaim for damages for a larger sum admitted to be due to the defendant from the person on whose behalf the action is brought, and such counterclaim is a good answer to the plaintiff's claim.

Notes. Section 24 of the Supreme Court of Judicature Act, 1873, has been repealed. See now ss. 38 and 39 of the Supreme Court of Judicature (Consolidation) Act, 1925.

Considered: *Baker v. Adam*, [1908-10] All E.R. Rep. 632. Distinguished: *McCreagh v. Judd*, [1923] W.N. 174. Considered: *Morgan & Son v. S. Martin Johnson & Co., Ltd.*, [1948] 2 All E.R. 196; *Harak v. Green*, [1958] 2 All E.R. 141.

As to right of set-off and counterclaim, see 34 HALSBURY'S LAWS (3rd Edn.) 395 et seq., and for cases see 40 DIGEST (Repl.) 406 et seq. For the Supreme Court of Judicature (Consolidation) Act, 1925, ss. 38 and 39, see 18 HALSBURY'S STATUTES (2nd Edn.) 475-477.

Cases referred to :

- (1) *Jeffs v. Day* (1866), L.R. 1 Q.B. 372; 7 B. & S. 250; 35 L.J.Q.B. 99; 8 Digest (Repl.) 613, 536.
- (2) *Agra and Masterman's Bank v. Leighton* (1866), L.R. 2 Exch. 56; 4 H. & C. 656; 36 L.J.Ex. 33; 6 Digest (Repl.) 154, 1107.

Also referred to in argument :

- Mersey Steamship Co. v. Shuttleworth* (1883), 10 Q.B.D. 468; 48 L.T. 389; affirmed 11 Q.B.D. 531; 52 L.J.Q.B. 522; 48 L.T. 625; 32 W.R. 245, C.A.; 40 Digest (Repl.) 467, 524.
- Westacott v. Beran*, [1891] 1 Q.B. 774; 60 L.J.Q.B. 536; 66 L.T. 263; 39 W.R. 363; 7 T. L.R. 290, D.C.; 40 Digest (Repl.) 443, 311.
- Amon v. Bobbett* (1889), 22 Q.B.D. 543; 58 L.J.Q.B. 219; 60 L.T. 912; 37 W.R. 329, C.A.; 40 Digest (Repl.) 443, 310.
- Young v. Kitchen* (1878), 3 Ex.D. 127; 47 L.J.Q.B. 579; 26 W.R. 403; 40 Digest (Repl.) 417, 115.
- Macdonald v. Bode* (1876), 20 Sol. Jo. 241; Bitt. Prac. Cas. 102; 2 Char. Chan. Cas. 2; 40 Digest (Repl.) 456, 416.
- MacDonald v. Carington* (1878), 4 C.P.D. 28; 48 L.J.Q.B. 179; 39 L.T. 426; 27 W.R. 153; 40 Digest (Repl.) 445, 330.
- Richards v. James* (1848), 2 Exch. 471; 17 L.J.Ex. 277; 11 L.T.O.S. 225; 12 Jur. 464; 154 E.R. 577; 40 Digest (Repl.) 411, 57.
- Furness v. Booth* (1876), 4 Ch.D. 586; 46 L.J.Ch. 112; 25 W.R. 267; 40 Digest (Repl.) 446, 335.
- Stumore v. Campbell & Co.*, [1892] 1 Q.B. 314; 61 L.J.Q.B. 463; 66 L.T. 218; 40 W.R. 101; 8 T.L.R. 99; 36 Sol. Jo. 90, C.A.; 40 Digest (Repl.) 444, 319.

A Appeal by the defendant from Hastings County Court.

The action, which was remitted from the High Court, was brought to recover a balance of £50 due to the plaintiff in respect of the sale of a business. The defendant admitted that the balance was due, but set up, by way of defence to the claim, a counterclaim for damages which he had, not against the plaintiff, but against the person for whom, as he alleged, the action was brought.

B The plaintiff claimed £50 from the defendant as the balance of purchase money due and payable by the defendant under the terms of an agreement, dated May 18, 1901, by which the plaintiff agreed to sell and the defendant agreed to buy the business of a veterinary surgeon, together with some chattels connected with the business. At the date of the agreement the business was being carried on by the plaintiff, Mrs. Bankes, with the assistance of a veterinary surgeon. The business had previously been carried on by the plaintiff's son, who had left England for New Zealand. The son before leaving had engaged a locum tenens. The plaintiff's son had originally purchased the business from the defendant with money provided for him by his mother (the plaintiff) by way of gift, and the defendant was buying back the business. The agreement of May 18, 1901, was made between the plaintiff and the defendant, a veterinary surgeon. After reciting that the plaintiff's son **C** Vernon Bankes had lately carried on the business of a veterinary surgeon at Battle, but some time since had relinquished the same and left the country, having first by a signed document dated Jan. 19, 1901, authorised his mother (the plaintiff) to sell the practice, provided that the plaintiff agreed to sell and the defendant agreed to purchase the goodwill of the practice with the fixtures, fittings, and instruments belonging thereto for £100, to be paid, as to £50 on the signing of the agreement, **E** and as to the remaining £50 at the expiration of one month after the locum tenens, who then carried on a similar practice at Battle, should have ceased to do so. The defendant paid the plaintiff the £50 when the agreement was signed. Before action brought the locum tenens retired, and it was not disputed that according to the terms of the agreement the balance of the purchase money claimed by the plaintiff was payable by the defendant.

F The defence set up was a counterclaim for damages payable, not by the plaintiff personally to the defendant, but by the son to the defendant. It appeared that the plaintiff's son originally bought the business from the defendant with money advanced to him by way of gift from the plaintiff and in connection with the business he acquired a lease of a house and premises at Battle from the defendant and entered into the ordinary covenant with the defendant to indemnify him against **G** the payment of rent payable by him to the superior landlord, and for the performance of covenants. The plaintiff said that she did not dispute that her son owed two quarters rent (£20) in respect of the house, and £31 damages for not repairing it; and it was not disputed that the defendant became liable to the superior landlord for £51 for rent and repairs, and that, if the son were plaintiff instead of his mother, **H** the defendant would be able to recover £51 on the counterclaim against the son. This sum of £51 was paid by the defendant to the landlord after this action was brought. In answer to this counterclaim, which was for damages, it was contended on behalf of the plaintiff (i) that the plaintiff was entitled to recover the £50 balance of purchase money in her own right, and that therefore the counterclaim could not be set up against her; (ii) that, assuming that the plaintiff could only maintain the **I** action as agent for her son, still that, though there might be a right of set-off, there was no right to counterclaim.

The county court judge held that the defendant could not sustain the counterclaim. He was of the opinion that the plaintiff was the son's agent and could sue in her own name, and though the defendant could set off an ordinary debt or demand due from the principal against the debt payable by the defendant to the plaintiff suing as agent for her son, he could not counterclaim for damages for breach of a covenant by the son to indemnify. He, therefore, gave judgment for the plaintiff for £50, with costs of claim, and he dismissed the counterclaim without costs, and

without prejudice to any action that might be brought by the defendant against the son. The defendant appealed. By the Supreme Court of Judicature Act, 1873, s. 24:

"In every civil cause or matter commenced in the High Court law and equity shall be administered by the High Court and the Court of Appeal respectively according to the rules following: . . . (2) If any defendant claims to be entitled to any equitable estate or right, or to any relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim asserted by any plaintiff or petitioner in such cause or matter, or alleges any ground of equitable defence to any claim of the plaintiff or petitioner in such cause or matter, the said courts respectively, and every judge thereof, shall give to every equitable estate, right, or ground of relief so claimed, and to every equitable defence so alleged, such and the same effect, by way of defence against the claim of such plaintiff or petitioner, as the Court of Chancery ought to have given if the same or the like matters had been relied on by way of defence in any suit or proceeding instituted in that court for the same or the like purpose before the passing of this Act. (3) The said courts respectively, and every judge thereof, shall also have power to grant to any defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right, or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading, and as the said courts respectively, or any judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner; and also all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any rule of court or any order of the court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose . . ."

R.S.C., Order 19, r. 3, provides:

"A defendant in an action may set off or set up by way of counterclaim against the claims of the plaintiff any right or claim, whether such set-off or counterclaim sound in damages or not, and such set-off or counterclaim shall have the same effect as a cross-action, so as to enable the court to pronounce a final judgment in the same action, both on the original and on the cross-claim."

Thorn Drury for the defendant.

E. E. Humphreys for the plaintiff.

LORD ALVERSTONE, C.J.—I thought before argument that there was authority, but I may say after the argument that there is no direct authority for the defendant's contention. The action was brought by the plaintiff to recover a balance of £50 due under an agreement, and that agreement clearly stated that it was entered into by the authority and on behalf of the plaintiff's son. The county court judge has found for the purposes of this judgment that the present plaintiff was bringing this action for her son and on his behalf, and that she would have to account to him for the amount received. He further found that it was not disputed that the defendant became liable to the superior landlord for £51 for rent and repairs, and that, if the son were plaintiff instead of his mother, the defendant would be able to recover £51 on the counterclaim against the son. I think that is a clear finding or admission that £51 was agreed to be due from the son to the defendant. Counsel for the plaintiff has contended that this sum cannot be set up by way of counterclaim against the present plaintiff. The case therefore seems to me to raise the simple point

A whether, when an action is rightly brought by a person as trustee for another and when the defendant has a counterclaim against the person on whose behalf the action is brought, he (the defendant) can counterclaim against the plaintiff in the same way that he can set off a liquidated debt against the principal of the plaintiff.

B I think the case is covered by the Judicature Acts and rules. It seems to me that it must have been intended by the Judicature Act that that equitable defence should be open to the defendant in such cases. Sub-section (2) of s. 24 of the Judicature Act, 1873, says that where a defendant claims to be entitled to relief upon any equitable ground, or alleges any ground of equitable defence to any claim of the plaintiff, the courts shall give to every equitable right or ground of relief so claimed and to every equitable defence so alleged such and the same effect by way of defence against the claim of the plaintiff as the Court of Chancery ought to have given if the same or the like matters had been relied on by way of defence in any suit instituted in that court for the same or the like purpose before the passing of the Act. Then, by sub-s. (3) the courts are to have power to grant to any defendant in respect of any equitable estate or right, or other matter of equity, all such relief against any plaintiff as such defendant shall have properly claimed by his pleading, and as the courts might have granted in any suit instituted for that purpose by the

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D same defendant against the same plaintiff.

As I understand that statutory power, it is that the defendant might set up by way of defence to the plaintiff's claim any equitable defence, and, if he could show that he could have framed a bill in Chancery to restrain the plaintiff from proceeding with his claim, then effect should be given to that equitable defence. Then r. 3 of Ord. 19 says that a defendant in an action may set off or set up by way of counterclaim against the claims of the plaintiff any right or claim, whether such set-off or counterclaim sound in damages or not, and such set-off or counterclaim shall have the same effect as a cross-action, so as to enable the court to pronounce a final judgment in the same action, both on the original and on the cross-claim. If this had been a claim by the defendant in respect of the £51 due from the son to him, there would have been a right of set-off of the £50 balance of the purchase money due under the agreement. I think that *Jefferies v. Day* (1) and *Agra and Masterman's Bank v. Leighton* (2) are authorities to show that in an action by a trustee the defendant can set up against the trustee's claim the debt due from the cestui que trust, and that it would have been a good equitable defence to show that the action was brought by the plaintiff as trustee for a third person, and that against that third person there was a set-off or an equitable defence which would make it wrong for the trustee to bring the action on behalf of the cestui que trust. I cannot say that a person in such a position as the plaintiff can be in a stronger position than an assignee for value suing in his own name, against whom such right of set-off or equitable defence could be set up. I am of opinion, therefore, that, the judge having found that there was due a sum of £51 from the son to the defendant, judgment ought to have been given in the action for the defendant on the ground that he had an equitable claim which was a good counterclaim against the person for whom the action was brought. I think, therefore, that the appeal should be allowed. I may add that this principle has been frequently acted upon at chambers, though it does not seem to have been directly decided.

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I **WILLS, J.**—I am of the same opinion. I confess I have a difficulty in seeing here how the plaintiff has any right to sue in this action; but that is not in discussion at present. I must take it that she had a right to represent her son and to sue in her own name. Here she is suing as trustee for her son, and I cannot understand how any person who is suing as a trustee for another can entitle himself to a superior right than the person has for whom he is trustee. It seems to me on the broadest possible principle that, as the plaintiff is suing on behalf of her son and as trustee for him, she can only sue subject to all the rights which are available to the defendant as against her son. If so, I cannot see any reason or justice which prevents

the defendants from setting up any defence to her claim which he could have set up against the son if the son had been suing.

CHANNELL, J.—I agree. I think this counterclaim ought to have been allowed as a set-off. It could not have been allowed as a counterclaim to the extent of £51, but to the extent of the plaintiff's claim it ought to have been allowed as a set-off, and it would have been a good answer to the claim. Before the Judicature Acts it could have been set off against the plaintiff's claim because the plaintiff was suing as trustee for her son, and *Agra and Masterman's Bank v. Leighton* (2) is an authority to show that in such a case a liquidated amount due to the defendant from the person for whom the plaintiff was suing as trustee could have been set off against the plaintiff's claim by way of equitable set-off. Then came the Judicature Act and the rules made thereunder, which enabled a defendant to set up against a plaintiff's claim any equitable defence to the claim, and Ord. 19, r. 3, distinctly puts unliquidated claims on the same footing as liquidated claims for purposes of set-off. This is a claim which could have been set off before the Judicature Acts, and the effect of the Judicature Act and rules is that the amount may be set off, notwithstanding that it is unliquidated.

Appeal allowed.

Solicitors: *Kingsford, Dorman & Co.*, for *W. Cruttenden*, Hastings; *Altree, Johnson & Ward*, for *C. Sheppard*, Battle.

[*Reported by W. W. ORR, Esq., Barrister-at-Law.*]

COOKE v. CHARLES A. VOGELER CO.

[HOUSE OF LORDS (the Earl of Halsbury, L.C., Lord Macnaghten, Lord Davey, Lord James of Hereford, Lord Brampton and Lord Robertson), August 2, December 14, 1900]

[Reported [1901] A.C. 102; 70 L.J.K.B. 181; 84 L.T. 10; 17 T.L.R. 153; 8 Mans. 113]

Bankruptcy—Act of bankruptcy—Act done by foreigner abroad—Trading debts incurred in England through agent.

A foreigner, who has never been in England, and has personally done no act within the jurisdiction of the Bankruptcy Court, cannot be made bankrupt by reason of his having traded through an agent, incurred debts in England, and done in his own country an act which, if done in England, would have been an act of bankruptcy.

Re Pearson, Ex parte Pearson (1), [1892] 2 Q.B. 263, applied.

Notes. The Bankruptcy Act, 1869, and ss. 4 and 6 of the Bankruptcy Act, 1883, have been repealed. The latter two sections have been replaced by ss. 1 and 3 of the Bankruptcy Act, 1914.

Considered: *Dulancy v. Merry*, post; [1901] 1 K.B. 536. Followed: *Re Debtors* (No. 836 of 1935), *Petitioning Creditor v. Debtors*, [1936] 1 All E.R. 875. Distin-

A *Re Deblor* (No. 270 of 1941), *Ex parte R. v. Deblor*, [1948] 2 All L.R. 533. Considered: *Thompson v. S.G.*, [1950] 1 All E.R. 405; *Re Dulles' Settlement Trusts, Dulles v. Vidler*, [1950] 2 All E.R. 1013.

As to bankruptcy jurisdiction and acts of bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 250 et seq.; and for cases see 4 DIGEST (Repl.) 11 et seq. For the Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321 et seq.

B Cases referred to:

(1) *Re Pearson, Ex parte Pearson*, [1892] 2 Q.B. 263; 61 L.J.Q.B. 585; 67 L.T. 367; 40 W.R. 532; 8 T.L.R. 622; 36 Sol. Jo. 573; 9 Morr. 185, C.A.; 4 Digest (Repl.) 25, 210.

(2) *Re Crispin, Ex parte Crispin* (1873), 8 Ch. App. 371; 42 L.J. Bey. 65; 28 L.T. 483; 37 J.P. 391; 21 W.R. 491, L.C. & L.J.; 4 Digest (Repl.) 24, 202.

(3) *Re Savers, Ex parte Blain* (1879), 12 Ch.D. 522; 41 L.T. 46; 28 W.R. 334, C.A.; 4 Digest (Repl.) 24, 203.

(4) *Re Myer, Ex parte Pascal* (1876), 1 Ch.D. 509; 45 L.J. Bey. 81; 34 L.T. 10; 24 W.R. 263, C.A.; 4 Digest (Repl.) 25, 214.

D Appeal from a decision of the Court of Appeal (SIR NATHANIEL LINDLEY, M.R., RIGBY and VAUGHAN WILLIAMS, L.JJ.) reported sub nom. *Re A. B. & Co.*, [1900] 1 Q.B. 541, affirming a decision of Mr. LINKLATER, Registrar in Bankruptcy.

The case raised the question whether the English High Court of Justice had jurisdiction under the Bankruptcy Act, 1883, to make a receiving order against a foreigner, resident out of the jurisdiction, who carried on business, contracted debts, and had assets within the jurisdiction, and had committed an act of bankruptcy outside the jurisdiction, and had given notice of suspension of payment to creditors within the jurisdiction, but had never come within it himself. The Court of Appeal held that the case was governed by *Re Pearson* (1), and that the court had no jurisdiction. The petitioning creditors appealed.

F *Sir R. Reid, Q.C.*, *H. Reed, Q.C.*, and *Muir Mackenzie* appeared for the appellants. *C. A. Russell, Q.C.*, *Danckwerts, Q.C.*, and *Carrington* for the respondents.

Their Lordships took time for consideration.

Dec. 14, 1900. The following opinions were read.

G **THE EARL OF HALSBURY, L.C.**—In this case the broad question arises whether a foreigner who has never been in this country, and has himself personally done no act within the jurisdiction of the Bankruptcy Court of this country, can be made bankrupt by reason of his having traded through an agent in this country and having done an act in his own which, if he had done it here, would undoubtedly be an act of bankruptcy.

H The facts which raise the question may be shortly stated. The Charles A. Vogeler Co., at the time of an assignment executed by them on Dec. 18, 1899, were carrying on business, and had for many years carried on business, at 45, Farringdon Road, in London, on a large scale, as wholesale manufacturers of drugs and patent medicines. They had at the said premises a manufactory of wholesale drugs and a large establishment, and they did a large trade in the United Kingdom in the manufacture and sale of such wholesale drugs and medicines. The said establishment and manufactory in London were under the charge and control of a Mr. William Edwin Godden, who was styled European manager of the debtors, and held a power of attorney from them. The debtors consisted of two persons, named Christian Devries and Munnie A. Devries, who were not and are not British subjects, but were and are citizens of the United States of America. They carried on business at other places besides London—namely, at Baltimore, in America, and in Paris and Sydney and elsewhere. On Dec. 18, 1899, the two Devries executed a deed of assignment of all their real and personal property, wheresoever situate, to and in favour of one

Henry S. Dulancy as trustee. At the date of the execution of the said deed they were resident in Baltimore, and the said trustee under the said deed was the manager of the debtors' business in Baltimore.

The question is not a new one, and I think that it has been uniformly decided that under such circumstances our bankruptcy law does not apply. The question has no doubt been argued that the earlier decisions under the Act of 1869 are no longer decisive of the question, since the Act of 1883 uses different language, and, in fact, makes a different provision, from that which was involved in the earlier statute. I think that the whole question must turn upon the language of the two statutes. I am by no means prepared to say that it might not be a reasonable thing to apply the English law of bankruptcy to a trader who, though himself personally abroad, exercised a trade through the instrumentality of an agent, and possessed assets in this country capable of being reached by bankruptcy administration. But a court of law has nothing to do with the reasonableness or unreasonableness of a provision, except so far as it may help them in interpreting what the legislature has said. And although I think that it might be very plausibly contended that if a trader chose by agent to come and engage in trade he ought to be made responsible, when he is unable to pay his debts, to the ordinary administration of the English law, since he had both property to be administered and had carried on his trading adventure in this country, on the other hand it must be admitted that bankruptcy and its incidents are intended to operate upon all the property that a defaulting debtor possesses, and, further, that the debtor himself is intended to be subject to an alteration of status by the fact of adjudication. As I have said, however, I do not think that it is the function of a court of law to choose between the alternatives presented by such considerations. If the law has intended, and has expressed its intentions, that a foreigner may be made a bankrupt under the circumstances of this case, no court has any jurisdiction to disregard what the legislature has enacted. And if on the other hand it is manifest that the language of the statute does not reach the case supposed, no court has jurisdiction to enlarge the ambit of English legislation beyond what the legislature has permitted.

I think the judgments of JAMES and MELLISH, L.JJ., lay down a broad substantial rule in dealing with such questions which I should be sorry to see departed from. English legislation is primarily territorial, and it is no departure from that principle to say that a foreigner coming to this country and trading here, and here committing an act of bankruptcy, is subject to our laws and to all the incidents which those laws enact in such a case: while he is here, while he is trading, even if not actually domiciled, he is liable to be made a bankrupt like a native citizen. And so an Englishman by reason of his nationality is subject to the laws of his Sovereign wherever he may be. But the territoriality, so to speak, of the bankruptcy law is by necessary inference imported into both of the Acts to which I have referred by the generality of their phrases. The words "debtor" and "creditor" certainly cannot be sufficient to give jurisdiction to the English Court of Bankruptcy, because if unlimited they would give jurisdiction all over the world in respect of debts, petitions, or acts of bankruptcy committed anywhere, and it is a familiar maxim of the law, *extra territorium jus dicenti paretur non impune*. When once it is admitted that a limit must be placed upon those words, it must follow that the limit must be "debtor" and "creditor" respectively who are subject to the jurisdiction of the English bankruptcy law. And this is not an assuming of the question or a mere inverting of the proposition, because if one sees what jurisdiction is expressly created it will be seen that the limitation to the English bankruptcy jurisdiction is necessarily local. It does not include Great Britain. It is limited in its terms to England, and I think that it would be impossible to suppose that, if the legislature had intended so broad a jurisdiction as is contended for here, it would not have conferred it by express enactment.

The whole argument, I think, depended upon the generality of the word "debtor." I will deal hereafter with the question of whether the Bankruptcy Act of 1883 has

A made any difference in this respect. But s. 6 of the Act of 1869 came under review before LORD SELWYN, L.C., and MELLISH, L.J., in *Re Crispin, Ex parte Crispin* (2) in 1873, and in that judgment I find that those very learned judges were of opinion (8 Ch. App. at pp. 379, 380):

B "that a foreigner not domiciled in England, and not carrying on trade in England, who quits England without having committed an act of bankruptcy, cannot be made a bankrupt upon an alleged act of bankruptcy committed out of England. We think that the legislature cannot have intended to enact that if a foreigner who is not subject to the laws of England does something in his own country which may be perfectly lawful and innocent by the laws of that country, the effect should be that his property should be vested in a trustee in England for the benefit of his creditors."

Their Lordships then considered (*ibid.*, at p. 380) the effect of particular acts which were made acts of bankruptcy when committed out of England.

D "The first is 'that the debtor has, in England or elsewhere, made a conveyance or assignment of his property to a trustee for the benefit of his creditors generally.' This seems clearly intended to relate to a conveyance which is to operate according to English law, which a conveyance executed by a domiciled Englishman, although out of England, may do; but a conveyance executed by a domiciled foreigner in his own country must necessarily operate according to the foreign law, and we think that it was never intended that such a conveyance should be an act of bankruptcy. The second is 'that the debtor has in England, or elsewhere made a fraudulent conveyance, etc., of his property or any part thereof.' This clearly means, and has always been interpreted as meaning, fraudulent by the law of England, and therefore, cannot properly apply to a conveyance which is executed in, and is to operate according to the law of, a foreign country."

F The whole of the reasoning of the learned judges in that case seems to me so cogent that, if the case was to be decided upon the Act of 1869, I confess that I should not have been able to entertain a doubt on the subject. But the facts in *Ex parte Crispin* (2) raised a different question; it might be said that the opinions, however strongly expressed in that case, were not necessary for its decision, since it turned upon the fact that no act of bankruptcy had been committed in this country. G However, the question in debate came before a court consisting of JAMES, BRETT, and COTTON, L.JJ., in *Re Sawers, Ex parte Blain* (3) and upon principles which, I think, were established by *Ex parte Crispin* (2), they held, in terms, that an act of bankruptcy must be a personal act or default, and cannot be committed through an agent nor by a firm as such; and that the English statute could only affect English subjects or foreigners who come, either permanently or temporarily, within the H allegiance of the English Crown. I do not think anything can be gained by referring further to *Ex parte Blain* (3). I entirely agree with the reasoning of all the three learned judges who constituted the court, and it only remains to consider whether the Act of 1883 has made any difference in the law.

I That exact question came before the Court of Appeal in *Re Pearson, Ex parte Pearson* (1) and LORD ESHER, M.R., and FRY and LOPES, L.JJ., decided, without any doubt, that upon the question now under debate the Act of 1883 had made no difference. The whole argument there turned on s. 6 (1) (d), but the court pointed out (I think with irresistible force) that s. 4, which enacted what acts were to be acts of bankruptcy, used the word "debtor," and the same argument, which was decisive on the earlier Act, appears to me to be decisive here. The word is general; some limitation must be placed upon it, and sub-s. (1) (d) of s. 6 has no relation to, and cannot give any artificial meaning to, the word "debtor" in s. 4. As LORD ESHER pointed out, s. 4 states affirmatively what are to be acts of bankruptcy. Section 6 is a negative section, and does not in any way affect the construction of

s. 4. FRY, L.J., points out that the word "debtor" in sub-s. (1) (g) of s. 4 does not mean a debtor all the world over, but that it means only a debtor who is subject to the law of England, and that you must find such a debtor before an act of bankruptcy can be committed. And he goes on to add what in my view is perfectly well founded, that the decision in *Ex parte Blain* (3) was based, not on the particular words of the bankruptcy statute then in force, but upon general principles applicable to the construction of all statutes. It would, I think, be a serious thing to overrule so strong a body of judicial authority dealing with this very question. These decisions have been given many years ago, and in my view it is impossible without express legislation on the subject to lay down any other rule than is deducible from all these various decisions, and in view of the opinion which I entertain upon that subject, I move your Lordships that this appeal be dismissed with costs.

LORD MACNAGHTEN.—I have had the advantage of reading the opinion which has just been delivered by the Lord Chancellor, and that which is about to be delivered by LORD DAVEY, and I concur with them both, and have nothing to add.

LORD DAVEY.—The respondents are citizens of the United States domiciled and residing in the State of Maryland, but for some years they have carried on business and had an office in this country. The appellants are creditors of the respondents, and have sued in the Court of Bankruptcy for a receiving order against them. The learned judges in the Court of Appeal have held that the case was covered by authority binding upon them, and confirmed the order of the registrar dismissing the application. I agree with the learned judges in thinking that if *Pearson's Case* (1) is rightly decided, the case is concluded against the appellants.

In the view which I take of the law, it is essential to consider whether the alleged act of bankruptcy was committed in this country or abroad. The facts are these: On Dec. 18, 1899, the respondents executed an assignment of all their property to one Dulaney, in trust for their creditors. Dulaney on the following day wrote to Geddes, the manager in this country of the respondents' business, instructing him not to pay the creditors of the respondents whose debts were incurred before Dec. 18, and these instructions were communicated to one or more of the creditors. It was argued that this was a notice by the respondents to their creditors that they had suspended, or were about to suspend, payment of their debts within the meaning of s. 4 (1) (h) of the Bankruptcy Act, 1883. I am not of that opinion; I think that there is no evidence of any direct authority from the respondents to give those instructions or to give any notice to the effect alleged, and that the instructions given by Dulaney must be taken to have been given by him as assignee of the business and property, and not as agent for the respondents. The only act which can be relied on as an act of bankruptcy is the assignment, which was executed in Baltimore, and was intended to have effect according to the law of Maryland and not that of this country.

What is the law applicable to this state of facts? The Lord Chancellor has referred to *Ex parte Crispin* (2), decided by LORD SELBORNE, L.C., and MELLISH, L.J., in 1873. I will not trouble your Lordships by reading again the passages from the judgment of the court delivered by the Lord Justice, which have already been read. It was there laid down that a foreigner trading in England is subject to the bankruptcy law, but that it is the act of bankruptcy which gives the court jurisdiction, and that in the case of a foreigner that act of bankruptcy must be committed in this country, or be an act intended to operate according to the law of this country. It was contended that the Lord Justice's observations were not applicable to the case of a foreigner carrying on trade in England. I do not think so. It was not necessary to deal with that case for the purpose of the decision, and the Lord Justice's remarks are not pointed to it. But I think that the principle enunciated so clearly and fully in his judgment is equally applicable whether the foreigner be brought within the reach of the bankruptcy law by his residence in this country or from the fact of his trading here. In *Re Myer, Ex parte Pascal* (4) it was decided by

A the Court of Appeal (JAMES, MILLISH, and BAGGALLAY, L.J.J.) affirmatively, that a
debtor summons may be taken out against a foreigner who is at the time in England
although the debt was contracted abroad.

In *Ex parte Blain* (3), decided in 1879, also under the Act of 1869, it was held that
the Court of Bankruptcy has no jurisdiction to make an adjudication against a
foreigner domiciled and resident abroad who has never been in England, but is a
B member of an English firm which has traded and contracted debts in England.
The act of bankruptcy relied on was the levy of an execution by writ of *fi. fa.* on the
goods of the firm. It was held that this was not an act of bankruptcy by the foreign
partners of the firm, for that a firm as such cannot commit an act of bankruptcy,
and such an act must be the personal act or personal default of the person who is to
be made a bankrupt. I have some doubt whether the foreigners might not have been
C held responsible for the default of their partners in the course of carrying on the
business. But, whether that be so or not, my doubt does not affect the case before
your Lordships. BRETT, L.J., repeated (12 Ch.D. at p. 530) what had been decided
in *Ex parte Crispin* (2):

D "It is the act of bankruptcy which gives the Bankruptcy Court jurisdiction,
and unless that act be committed in England, if the debtor is a foreigner and
not domiciled in England, the English court has no jurisdiction over him."

Such was the state of the law before the Act of 1883 was passed. It is contended
that there is something in that act which has altered the law as laid down in the
cases to which I have referred, and what is chiefly relied on is s. 6. That section
E provides that a creditor shall not be entitled to present a bankruptcy petition against
a debtor, unless (inter alia) (d) the debtor is domiciled in England, or within a
year before the date of the presentation of the petition has ordinarily resided or had
a dwelling house or place of business in England. It was argued that this was
equivalent to an enactment that the court shall have jurisdiction over a foreigner
who within a year has had a place of business in England. The first observation
F that occurs to one on this provision is that it is negative and restrictive. It says,
what are the conditions in the absence of which the court cannot exercise its juris-
diction, but does not confer any new or increased jurisdiction. But, further,
assuming (as I think is the fact) that the Court has a limited jurisdiction over
foreigners residing abroad but trading in this country, there is no provision in
the Act which purports to alter or has the effect of altering the law as to the con-
G ditions on which or the limits within which that jurisdiction should be exercised.

If, therefore (as I also think), one of the conditions and limitations on the exer-
cise of bankruptcy jurisdiction against a foreigner domiciled and resident abroad
is that the act relied on as an act of bankruptcy must have been done by the bank-
rupt within the jurisdiction, or at any rate (which is sufficient for the present
purpose) if the execution of an assignment of his property by a foreign debtor in
his own country is not an act of bankruptcy within the meaning of the statute—
H if that be so, I say, the jurisdiction has never arisen. This was the substance of
the decision of the Court of Appeal in *Pearson's Case* (1), although the details were
different. I think that case rightly decided on the authorities, and the Court of
Appeal also right in thinking that it governed the present case. It is, in my opinion,
too late for this House to reverse such a uniform course of decision even if your
I Lordships were disposed to do so. I am, therefore, of opinion that the appeal
should be dismissed with costs.

LORD JAMES OF HEREFORD concurred.

LORD BRAMPTON. The sole question involved in this case is whether the
High Court of Justice in Bankruptcy, in granting, at the instance and on the petition
of the appellant, a receiving order against the respondents, acted without jurisdiction.

The respondent company, consisting only of two American subjects named

Dexnes, were traders at Baltimore, U.S., where they resided. Through Mr. Geddes, A
 their manager, they carried on a branch of that business in England, but neither
 of them had ever been personally present in England, and they were not subjects of
 Her Majesty the Queen. To this branch establishment the appellant, on the order
 of Geddes, supplied goods in respect of which the respondents became indebted to
 him to the amount of £4,000. In December, 1899, the respondents in Baltimore
 executed a deed of assignment of all their property to a Mr. Dulaney, their manager B
 there, in trust, to apply the proceeds thereof to the payment of all their debts, and,
 at the instance of Dulaney, Geddes gave to the appellant a notice of suspension of
 payment. Both the assignment and notice were treated by the appellant as acts
 of bankruptcy, and in respect of them it was that the petition for the receiving order
 was presented and granted. After discussion, however, before the registrar in bank-
 ruptcy, it was subsequently discharged. The Court of Appeal upheld the decision of C
 the registrar. The appellant, being dissatisfied, has appealed to your Lordships.

It seems to me that, unless your Lordships are prepared to overrule the three
 cases chiefly relied upon for the respondents, *Ex parte Crispin* (2), decided by LORD
 SELBORNE and MELLISH, L.J.; *Re Sawers, Ex parte Blain* (3), by JAMES, BRETT, and
 COTTON, L.JJ.; and *Ex parte Pearson* (1), by LORD ESHER, M.R., and FRY and LOPES,
 L.JJ., this case is concluded by them in favour of the respondents. It is quite true D
 that the first two of these cases were decided upon the Bankruptcy Act, 1869, but
 I do not think that the value of them is at all affected by the Bankruptcy Act, 1883.
Ex Parte Pearson, decided upon that Act, practically held that it is not.

In dealing with this case, the one fact never to be lost sight of is that neither of
 the respondents was ever personally in England, and therefore never within the
 jurisdiction of the High Court of Bankruptcy. It follows that neither was ever in E
 a position to commit within that jurisdiction an act of bankruptcy. It is true that
 through their agent, Geddes, they traded in England; in the course of that trading
 became indebted in England, and were possessed of goods which were within the
 jurisdiction, and they might be sued to judgment, and execution might be levied
 upon such goods, as was pointed out by JAMES, L.J., in *Blain's Case* (3) but to make F
 a foreigner subject to the bankruptcy law of England two things are essential, both
 of which are absent in this case—namely, that the person sought to be made liable
 to that law should have been in England, and there committed an act of bankruptcy.
 There is great force and truth in the language of JAMES, L.J. (12 Ch.D. at p. 526), that

“the whole question is governed by the broad, general, universal principle that
 English legislation, unless the contrary is expressly enacted, or so plainly G
 implied as to make it the duty of an English court to give effect to an English
 statute, is applicable only to English subjects, or to foreigners who by coming
 into this country, whether for a long or a short time, have made themselves
 during that time subject to English jurisdiction.”

Later on he added (*ibid.*, at p. 527):

“It is not consistent with ordinary principles of justice or the comity of
 nations that the legislature of one country should call on the subject of another
 country to appear before its tribunals when he has never been within their
 jurisdiction.” H

One passage in the judgment of MELLISH, L.J., in *Crispin's Case* (2) seems peculiarly I
 applicable to the alleged act of bankruptcy by the execution of the assignment of
 the respondents' goods at Baltimore. He says (8 Ch. App. at p. 380):

“We think that the legislature cannot have intended to enact that if a foreigner
 who is not subject to the laws of England does something in his own country
 which may be perfectly lawful and innocent by the laws of that country, the
 effect should be that his property should be vested in a trustee in England for
 the benefit of his creditors.”

A With the law so clearly stated as it was in *Crispin's Case* (2) and *Blain's Case* (3) if the legislature had in the Act of 1883 intended to make any alteration in it as regarded foreigners, I cannot doubt that it would have done so in unambiguous language. Its silence in regard to the matter satisfies me that it had no such intention, and that it at least recognised and was content with the law as so laid down.

B Before I conclude I desire to say one word about ss. 4 and 6 in the Act of 1883, which, it has been suggested, effect an alteration as regards any debtor having a place of business in England. Section 4 simply enumerates the cases in which "a debtor" commits an act of bankruptcy. Section 6 provides that a creditor shall not be entitled to present a bankruptcy petition against a debtor unless (d) the debtor is domiciled in England, or within a year has ordinarily visited or had a dwelling house or place of business in England. But this provision has obviously
C no application unless "a debtor" has first committed an act of bankruptcy. MELLISH, L.J., in *Crispin's Case* (2) distinctly stated that the word "debtor" in the Bankruptcy Act, 1869, must be construed to mean "debtor" properly subject to the laws of England. If the word "debtor" is to be similarly construed in the Act of 1883 as the court ruled—and, as I think, rightly—in *Pearson's Case* (1), the respondents never having been in England at all, were never subject to the bankruptcy laws of England. Section 4 had no application to them, and s. 6 is unimportant to the question before this House. I think that the judgment of the Court of Appeal affirming the order of the registrar is right, and that this appeal should be dismissed with costs.

E **LORD ROBERTSON** concurred.

Appeal dismissed.

Solicitors: *Bentwich, Watkin-Williams & Gray; J. Arscott Bartrum.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

G **GOLDSMITHS' COMPANY v. WEST METROPOLITAN RAIL. CO.**

[COURT OF APPEAL (Sir Richard Henn Collins, M.R., and Mathew, L.J.), October 28, 1903]

H [Reported [1904] 1 K.B. 1; 72 L.J.K.B. 931; 89 L.T. 428; 68 J.P. 41; 52 W.R. 21; 20 T.L.R. 7; 48 Sol. Jo. 13]

Statutory Powers - Expiration—"Three years from passing of Act."

Section 29 of the West Metropolitan Railway Act, 1899 [repealed], provided: "The powers of the company for the compulsory purchase of lands for the purpose of this Act shall cease after the expiration of three years from the passing of this Act." The Act received the Royal Assent on Aug. 9, 1899.

I **Held:** the company's compulsory purchase powers did not expire until midnight on Aug. 9, 1902.

Notes. Considered: *Governors of Queen Anne's Bounty v. Tithe Redemption Commission*, [1938] 4 All E.R. 368. Applied: *Stewart v. Chapman*, [1951] 2 All E.R. 613. Referred to: *Brakspear v. Barten*, [1924] 2 K.B. 88.

As to the duration of statutes, see 36 HALSEBURY'S LAWS (3rd Edn.) 421-422; and for cases see 42 DIGEST 686-687.

Cases referred to:

- (1) *Russell v. Ledsam* (1845), 14 M. & W. 574; 14 L.J.Ex. 353; 5 L.T.O.S. 495; 9 Jur. 557; 153 E.R. 604; affirmed sub nom. *Ledsham v. Russell* (1847), 16 M. & W. 633, Ex. Ch.; (1848), 1 H.L.Cas. 687, H.L.; 42 Digest 950, 235.
- (2) *Re North, Ex parte Hasluck* (1895), 72 L.T. 468; 11 T.L.R. 304; affirmed, [1895] 2 Q.B. 261; 64 L.J.Q.B. 694; 59 J.P. 724; 11 T.L.R. 417; 39 Sol. Jo. 560; 2 Mans. 326; 14 R. 436; sub nom. *Re North, Ex parte Parkinson*, 72 L.T. 854, C.A.; 42 Digest 946, 189.
- (3) *Lester v. Garland* (1808), 15 Ves. 248; 33 E.R. 748; 42 Digest 947, 203.

Also referred to in argument:

- Tomlinson v. Bullock* (1879), 4 Q.B.D. 230; 48 L.J.M.C. 95; 40 L.T. 459; 43 J.P. 508; 27 W.R. 552, D.C.; 42 Digest 686, 996.
- Re Daltell, Ex parte Rashleigh* (1875), 2 Ch.D. 9; 45 L.J.Bey. 29; 34 L.T. 193; 24 W.R. 495, C.A.; 42 Digest 685, 995.
- Re Railway Sleepers Supply Co.* (1885), 29 Ch.D. 204; 54 L.J.Ch. 720; 52 L.T. 731; 33 W.R. 595; 1 T.L.R. 399; 42 Digest 949, 228.
- Williams v. Nash* (1859), 28 Beav. 93; 28 L.J.Ch. 886; 33 L.T.O.S. 377; 5 Jur.N.S. 696; 54 E.R. 301; 42 Digest 948, 215.
- South Staffordshire Tramways Co. v. Sickness and Accident Assurance Association*, [1891] 1 Q.B. 402; 60 L.J.Q.B. 47; 63 L.T. 807; 55 J.P. 168; 7 T.L.R. 14, D.C.; on appeal, [1891] 1 Q.B. 406, C.A.; 42 Digest 955, 278.

Appeal from an order of WALTON, J., upon a preliminary point of law in an action brought by the plaintiffs, the owners of certain land, against the defendant railway company in which they sought an injunction to restrain the defendants from acting upon a notice to treat which they had served on the plaintiffs under the provisions of the Lands Clauses Consolidation Act, 1845, and for a declaration that the notice was not served in time since the compulsory purchase powers of the defendants under s. 29 of the West Metropolitan Railway Act, 1899, had expired.

The West Metropolitan Railway Act, 1899, provided, by s. 2, that the Lands Clauses Acts and the Railways Clauses Consolidation Act, 1845, should be incorporated and form part of the Act, and the Act received the Royal Assent on Aug. 9, 1899.

On Aug. 9, 1902, the railway company served on the plaintiffs notice to treat for the compulsory purchase of land belonging to the plaintiffs at Acton. Upon an application by the plaintiffs for an interim injunction until the trial of the action, it was agreed that, pending the trial of other points raised in the action, the preliminary question should be decided whether or not the notice to treat had been served within the time limited by s. 29. On this preliminary question WALTON, J., held that the notice had been served with the time limited by the Act, and to that extent was a valid notice to treat and the plaintiffs appealed.

Rowlatt (*Micklethwait* with him) for the plaintiffs.

Mulligan, K.C. (*A. F. C. Luxmoore* with him) for the defendants.

SIR RICHARD HENN COLLINS, M.R.—I am of opinion that this appeal fails. No doubt the distinction is a fine one between the creation of a term, which is always taken to include the day on which the term is created, and the limitation of a certain time for the doing of a certain act; but I think that the distinction, though a fine one, is very well established, and, particularly, by the more recent authorities. The principle was laid down by PARKE, B., in *Russell v. Ledsam* (1). I will only read a passage of the report, where he says (14 M. & W. at pp. 581, 582):

“The next question arises on a point reserved at the trial, on the evidence in support of the seventh plea. That plea was, that the second or renewed letters patent were granted after the expiration of the term of fourteen years granted by the first letters patent; the replication took issue on that allegation; and

A the proof was, that the original letters patent were dated on Feb. 26, 1825, the second on Feb. 26, 1839; and the question is, whether the day of the date of the first letters patent was inclusive or exclusive. The usual course in recent times has been to construe the day exclusively, whenever anything was to be done in a certain time after a given event or date; and consequently the time for enrolling a specification within the six months given by the proviso is reckoned exclusively of the day of the date."

B Section 29, which we have to construe, provides that the powers of the company for the compulsory purchase of lands for the purposes of this Act "shall cease after the expiration of three years from the passing of this Act." That is to say, a time is limited for the doing of a certain act—namely, serving a notice to treat; and the time begins from—that is to say, expires three years from—the passing of the Act. The Act was passed on Aug. 9, 1899. It seems to me that, on the current of modern authorities, no distinction is to be made between the "passing of the Act" and any other given date from which the period in question is to begin. Here the period begins from the passing of the Act, and the whole of the day on which it was passed is excluded in the calculation of the time, which is a time limited in favour of the railway company for giving their notices to treat. They are, therefore, entitled to three years, beginning after the day when the Act was passed, for serving their notices. I may add that in *Re North, Ex parte Hasluck* (2), RIGBY, L.J., seems to go even beyond that position. He seems to have been of opinion that the question of whether the day on which the act is done is to be included or excluded must depend on whether it is to the benefit or disadvantage of the person primarily interested. However, without going that length, I merely refer to it as showing how far the learned judge thought the modern trend of authorities had extended the view. But, however that may be, it seems to me that the authorities themselves do carry us to the full extent of the position which WALTON, J., has taken in this case. I think, therefore, that this appeal must be dismissed.

F **MATHEW, L.J.**—I think that the true principle is to be found in *Lester v. Garland* (3). There SIR WILLIAM GRANT broke away from the line of cases of which he, very wisely, did not approve. The principle was again indicated in *Russell v. Ledsam* (1) and there are a number of subsequent cases to the same effect, that where a time is given by an Act of Parliament for the doing of a certain act the full period indicated by the statute shall be available. Let us turn to this clause which prescribes the time within which notices to treat may validly be given. It provides that the powers of the company for giving notices to treat for the compulsory purchase of land for the purposes of the Act shall cease "after the expiration of three years from the passing of this Act." The obvious interpretation of that is, three years from Aug. 9, 1899. The powers which were conceded by the Act of Parliament were to last for three full years from the passing of the statute. For these reasons it seems to me that the judgment of WALTON, J., was quite correct.

Appeal dismissed.

Solicitors: *Freshfields & Williams; Biggs-Roche, Sawyer & Co.*

I [Reported by F. MANLEY SMITH, Esq., Barrister-at-Law.]

ROSENBAUM v. BELSON

[CHANCERY DIVISION (Buckley, J.), May 16, 17, 1900]

[Reported [1900] 2 Ch. 267; 69 L.J.Ch. 569; 82 L.T. 658; 48 W.R. 522;
44 Sol. Jo. 485]*Estate Agent—Authority—Authority to make binding contract to sell—Execution of written contract by agent where needed.*

An authority given to an estate agent to sell property *prima facie* implies an authority to effect a sale binding in law, and includes an authority to execute an agreement on behalf of the principal where the law requires a contract in writing.

Chadburn v. Moore (1) (1892), 61 L.J.Ch. 674, distinguished.

Notes. Considered: *Keen v. Mear*, [1920] All E.R. Rep. 147. Distinguished: *Lewcock v. Bromley* (1920), 127 L.T. 116.

As to implied authority of agent, and contracts made by agent, see 1 HALSBURY'S LAWS (3rd Edn.) 164 et seq., 215 et seq.; and for cases, see 1 DIGEST (Repl.) 333, 429 et seq.

Cases referred to:

- (1) *Chadburn v. Moore* (1892), 61 L.J.Ch. 674; 67 L.T. 257; 41 W.R. 39; 36 Sol. Jo. 666; 1 Digest (Repl.) 432, 882.
- (2) *Hamer v. Sharp* (1874), L.R. 19 Eq. 108; 44 L.J.Ch. 53; 31 L.T. 643; 23 W.R. 158; 1 Digest (Repl.) 432, 881.
- (3) *Godwin v. Brind* (1868) L.R. 5 C.P. 299, n.; 39 L.J.C.P. 112, n.; 17 W.R. 29; sub nom. *Goodwin v. Brind*, 20 L.T. 849; 1 Digest (Repl.) 432, 880.
- (4) *Prior v. Moore* (1887), 3 T.L.R. 624; 1 Digest (Repl.) 433, 885.
- (5) *Saunders v. Dence* (1885), 52 L.T. 644; 29 Sol. Jo. 356; 40 Digest (Repl.) 11, 8.

Action by the plaintiff purchaser for specific performance of a contract to sell certain leasehold houses. The question of law involved was the authority of an agent for sale to sign the vendor's name to a contract.

The defendant L. Belson was the owner of six houses at Stepney, held upon leases, subject to certain mortgages. Being desirous of realising the property, he applied to Messrs. Dickson and Newman, estate agents, and on Dec. 4, 1899, he handed to them the following memorandum:

"Wellesley Street, Stepney Green.—Ground rent, £17 10s.—Mortgage £740, reduced to £610.—£800.—Please sell for me my houses, 75, 77, 79, 79A, 81, 83, Wellesley Street, Stepney Green; and I agree to pay you by way of commission the sum of 2½ per cent. on the purchase price accepted.—L. Belson."

The estate agents procured an offer, which was subsequently increased to £785, and thereupon the defendant wrote to them as follows:

"To Dickson and Newman, 143, Commercial Street, E.—Dear Sirs.—75 to 83, Wellesley Street.—I hereby agree to accept your client's (Mr. Rosenbaum's) offer of £785 for the above property.—Yours faithfully, L. Belson."

On Dec. 11, 1899, Messrs. Dickson and Newman received, and signed a receipt for, £78 10s., the deposit, and an agreement was signed in the following terms:

"It is hereby agreed between Messrs. Dickson and Newman, as agents on behalf of the vendor, Mr. L. Belson, and Mr. S. Rosenbaum, of 5, Bell Lane, Spitalfields, that this 11th day of December, 1899, the said S. Rosenbaum has become the purchaser of the leasehold property (24 years) known and situate

A at (75-83) Wellesley Street, Stepney Green, for the sum of seven hundred and eighty-five pounds (£785), and that he has paid to the said Dickson and Newman the sum of seventy-eight pounds ten shillings as a deposit and in part payment of the said purchase money. As witness our hands this 11th day of December, 1899. This contract is made subject to the particulars given by vendor being correct.

B Witness.

Dickson and Newman.
S. Rosenbaum.

C The defendant repudiated the contract, alleging that his authority to the estate agents was only to sell if they could get for him a clear £180 after paying off the balance of the mortgage, viz., £640, and that he was an illiterate man, and did not know what he was signing. The plaintiff thereupon brought this action for specific performance of the contract of Dec. 11, 1899.

W. A. Jolly for the plaintiff.

John Montefiore and W. S. M. Knight for the defendant.

Cur. adv. vult.

D May 17, 1900. **BUCKLEY, J.**—This is an action for specific performance of an agreement, dated Dec. 11, 1899, by which Messrs. Dickson and Newman, who were expressed to act as agents for the defendant as vendor, agreed with the plaintiff for the sale of certain leasehold property at Stepney for the sum of £785. It was signed by Messrs. Dickson and Newman. The defence is that Messrs. Dickson and Newman had no authority to enter into that agreement, or to sign the memorandum in writing of that date, and the Statute of Frauds is pleaded.

E The defendant was called, but his evidence was substantially directed to show, if possible, that his authority to Dickson and Newman was only an authority to sell if they got him from the sale a clear sum of £180, after paying off the mortgage and paying expenses, and that he is an illiterate person and did not know the contents of the documents he signed. After his evidence was concluded the

F defendant's counsel intimated, wisely as I think, that he did not rely upon this point as to the £180, and that he rested his case upon absence of authority in the agent to sign the memorandum of December 11, 1899, citing for that purpose *Chadburn v. Moore* (1). The defendant's pretended ignorance of the contents of the documents did not impress me. He can read figures, and I believe he can read more than that. I think he knew quite well the effect of the documents.

G The contract relied upon being here signed by an agent, the plaintiff must no doubt make out that the act done by the agent was within his authority as agent.

The defendant's counsel went so far as to contend that an agent for sale has not authority to sign a contract unless express authority to sign a contract, as distinguished from authority to sell, is proved. In my opinion, this is not the law. The authority in the present case is in the terms: "Please sell for me my houses,

H and I agree to pay you a commission on the purchase price accepted." This is an authority to sell. A sale *prima facie* means a sale effectual in point of law, including the execution of a contract where the law requires a contract in writing. I do not find anything in the circumstances of this case which induces me to say that the word "sell" here means less than this. The authorities upon the point are but few. In *Hamer v. Sharp* (2) the authority was in the words:

I "I request you to procure a purchaser . . . and to insert particulars . . . in your monthly circular till further notice."

In *Godwin v. Brind* (3) the advertisement intimated that, "to treat and view" applications were to be made to a certain person. In *Chadburn v. Moore* (1) the instructions were not in writing, but the learned judge found that the agent was authorised to find a purchaser for the houses and to negotiate a sale. In *Prior v. Moore* (4) the owner instructed an estate agent to put the property on his books

as for sale, and informed him of the lowest price he would accept. In these cases it was held that the agent was not authorised to sign a contract. A

None of these, in my judgment, covers the present case. In *Hamer v. Sharp* (2) HALL, V.-C., says (L.R. 19 Eq. at pp. 112, 113):

"This estate agent must have known that if this property had been offered for sale by public auction there would have been no conditions to guard the vendor against being subject to certain expenses, and to prevent the contract becoming abortive by reason of a purchaser requiring a strictly marketable title. Could he suppose that he was invested with authority to sign a contract without considering what it should contain as regards title? As an intelligent and well-informed person he could not suppose that he was properly discharging his duty to his principal when he signed the contract which he signed: such a contract was not one within the scope of his authority to sign. If he had a right to enter into any contract at all, it was one of a different description, and on that ground alone—this being a bill for specific performance, and the court having a discretion—I hold that the alleged contract, if it be a contract, is not one which the court will decree to be carried into effect."

It is noticeable that the Vice-Chancellor does not say that the agent has no right to enter into a contract at all, and he dismissed the bill, not on the ground that he had no right to enter into a contract, but on the ground that he had no right to enter into such a contract as he had entered into, and that, the bill being for specific performance, the court in its discretion would not enforce the contract being such as it was in that case. D

In *Saunders v. Dence* (5) FIELD, J., distinguished *Hamer v. Sharp*, saying (52 L.T. at p. 646): E

"All that HALL, V.-C., in that case decided, as I understand it, was that if you go to an estate agent and tell him you have a property to sell, and that you want a purchaser, and you tell him what you have made up your mind shall be the price, and to a certain extent what shall be the conditions, and you instruct him to try and find a purchaser, that is not sufficient under those circumstances to authorise the agent to make a contract without any conditions whatever with regard to the title." F

I have been unable to find any case in which it has been held that instructions given by A. B. to sell for him his house and an agreement to pay so much on the purchase price accepted is not an authority to make a binding contract, including an authority to sign an agreement. It is not here alleged that the contract signed is not a reasonable and proper contract having regard to the nature of the property. But, beyond these considerations as to the general law, I find as a fact in this case that on Dec. 7, 1899, the defendant was told that Dickson and Newman would sign a contract in exchange for the payment of the deposit, and that he assented to that. They thus had, in addition to the letter of Dec. 4, 1899, a verbal authority to sign a contract. In my opinion, therefore, the plaintiff succeeds, and I give judgment for specific performance with costs. G H

Solicitors: *Brighten & Lemon; John Brockett Sorrell.*

[Reported by A. L. MORRIS, Esq., Barrister-at-Law.] I

McQUIRE v. WESTERN MORNING NEWS CO.

COURT OF APPEAL (Sir Richard Henn Collins, M.R., Stirling and Mathew, L.J.J.),
B April 30, May 11, 1903]

Reported [1903] 2 K.B. 100; 72 L.J.K.B. 612; 88 L.T. 757; 51 W.R. 689;
 19 T.L.R. 471]

Libel—Fair comment—Matter of public interest—Burden on plaintiff to show unfairness—Question whether comment unfair for judge.

C Where a criticism is admitted to be on a matter of public interest it is for the plaintiff in a libel action to show that it travels beyond the limit of fair criticism. It is for the judge to say whether it is reasonably capable of being so interpreted. If it is not, there is no question for the jury, and the judge may enter judgment for the defendant.

D *Libel—Fair comment—Dramatic criticism—Need to be honest and relevant.*

To be fair comment on a public dramatic performance the comment must be honest, relevant, and such that it can fairly be called criticism.

E **Notes.** Considered: *Joynt v. Cycle Trade Publishing Co.*, [1904] 2 K.B. 292; *Homing Pigeon Publishing Co. v. Racing Pigeon Publishing Co.* (1913), 29 T.L.R. 389. Approved: *Sutherland v. Stopes*, [1924] All E.R. Rep. 19. Applied: *Kemsley v. Foot*, [1951] 1 All E.R. 331. Referred to: *Plymouth Mutual Co-op. and Industrial Soc. v. Traders' Publishing Association*, [1906] 1 K.B. 403; *Thomas v. Bradbury, Agnew & Co., Ltd.*, [1904-7] All E.R. Rep. 220; *Walker v. Hodgson*, 1909 1 K.B. 239; *Lyon and Lyon v. Daily Telegraph, Ltd.*, [1943] 2 All E.R. 316; *Turner v. Metro-Goldwyn-Mayer Pictures, Ltd.*, [1950] 1 All E.R. 449.

F As to the defence of fair comment, see 24 HALSBURY'S LAWS (3rd Edn.) 70 et seq.; and for cases see 32 DIGEST 141 et seq.

Cases referred to:

- (1) *Carr v. Hood* (1808), 1 Camp. 335, n.; 32 Digest 147, 1779.
- (2) *Merivale v. Carson* (1887), 20 Q.B.D. 275; 58 L.T. 331; 52 J.P. 261; 36 W.R. 231; 4 T.L.R. 125, C.A.; 32 Digest 152, 1837.
- G** (3) *Wason v. Waller* (1868), L.R. 4 Q.B. 73; 8 B. & S. 671; 38 L.J.Q.B. 34; 19 L.T. 409; 33 J.P. 149; 17 W.R. 169; 32 Digest 144, 1754.
- (4) *Henwood v. Harrison* (1872), L.R. 7 C.P. 606; 41 L.J.C.P. 206; 26 L.T. 938; 20 W.R. 1000; 32 Digest 142, 1734.
- (5) *Campbell v. Spaldiswoode* (1863), 3 B. & S. 769; 3 F. & F. 421; 2 New Rep. 20; 32 L.J.Q.B. 185; 8 L.T. 201; 27 J.P. 501; 9 Jur.N.S. 1069; 11 W.R. 569; 122 E.R. 288; 32 Digest 149, 1802.
- H** (6) *Huntley v. Ward* (1859), 6 C.B.N.S. 514; 33 L.T.O.S. 137; 6 Jur.N.S. 18; 141 E.R. 557; 32 Digest 134, 1644.
- (7) *Warren v. Warren* (1834), 1 C.M. & R. 250; 4 Tyr. 850; 3 L.J.Ex. 294; 149 E.R. 1073; 32 Digest 84, 1150.

Also referred to in argument:

- I** *South Helton Coal Co. v. North Eastern News Association*, [1894] 1 Q.B. 133; 63 L.J.Q.B. 293; 69 L.T. 844; 58 J.P. 196; 42 W.R. 322; 10 T.L.R. 110; 9 R. 240, C.A.; 32 Digest 148, 1795.

Application by the defendants for judgment or a new trial in an action tried before RIDLEY, J., with a jury.

The action was brought in respect of an alleged libel which was published by the defendant in their newspaper, the "Western Morning News," on June 25, 1901.

The plaintiff, who was an actor and a theatrical manager, had produced at the Theatre Royal, Plymouth, a musical play written and composed by himself, entitled "The Major." The alleged libel was the following criticism, which appeared the next day in the defendants' newspaper:

"A three-act musical absurdity entitled 'The Major,' written and composed by T. C. McQuire, was presented last evening before a full house by the author's company. It cannot be said that many left the building with the satisfaction of having seen anything like the standard of play which is generally to be witnessed at the Theatre Royal. Although it may be described as a play, 'The Major' is composed of nothing but nonsense of a not very humorous character, whilst the music is far from attractive. This comedy would be very much improved had it a substantial plot and were a good deal of the sorry stuff taken out of it, which lowers both the players and the play. No doubt the actors and actresses are well suited to the piece, which gives excellent scope for music-hall artists to display their talent. Among Mr. McQuire's company there is not one good actor or actress, and, with the exception of Mr. Ernest Braine, not one of them can be said to have a voice for singing. The introduction of common, not to say vulgar, songs does not tend to improve the character of the performance, and the dancing, which forms a prominent feature, is carried out with very little gracefulness."

The defendants pleaded that this was a fair and bona fide criticism on a matter of public interest.

At the trial of the action the jury found a verdict for the plaintiff for £100 damages, and judgment was entered accordingly. The defendants applied for judgment or a new trial.

Duke, K.C., and J. A. Hawke for the defendants.

Clavell Salter for the plaintiff.

Cur adv. vult.

May 11, 1903. **SIR RICHARD HENN COLLINS, M.R.**, read the following judgment:—This is an application by the defendants for a new trial or judgment in an action for libel tried before RIDLEY, J. The plaintiff is an author and actor, and the action is founded upon a notice which appeared in the defendants' newspaper of a musical play written and composed by the plaintiff and produced by a company under his management at the principal theatre in Plymouth. The plaintiff himself acted a part in the play.

It appears on the face of the statement of claim that the notice complained of was a dramatic criticism of a play publicly acted; and, therefore, it could not be, and was not, contended for the plaintiff that there was any libel unless the criticism exceeded the bounds of "fair comment." It was not suggested that there was any evidence of actual malice, there were no personal imputations, nor could any statement of fact be impugned. The innuendo set out in the claim does not charge any misstatement of fact, but confines itself to matters of opinion only. It is as follows:

"By the said words the defendants meant and were understood to mean and the meaning of the said words is that the said play was dull, vulgar, and degrading, that the members of the plaintiff's company were incompetent as actors, singers, and dancers, that they were music-hall artists, and that the plaintiff was himself incompetent both as an actor and composer as aforesaid."

The plaintiff, however, contended that the notice, though comment, was not "fair comment"; and the jury apparently adopted this view, and found for the plaintiff, with £100 damages. The defendants challenge the verdict on the ground of misdirection, and also as being against the weight of evidence; but they rested their case mainly on the ground that on the facts admitted and proved it was

A important for the court itself, notwithstanding the verdict of the jury, to enter judgment for the defendants.

This raises a very important question as to what are the limits of "fair comment" on a literary work, and as to what are the respective provinces of the judge and jury with respect thereto. One thing, however, is perfectly clear, and that is that the jury have no right to substitute their own opinion of the literary merits of the work for that of the critic, or to try the "fairness" of the criticism by any such standard. "Fair," therefore, in this collocation certainly does not mean that which the ordinary reasonable man, "the man on the Clapham omnibus," as LORD BOWEN phrased it, the juryman common or special, would think a correct appreciation of the work; and it is of the highest importance to the community that the critic should be saved from any such possibility.

C In principle, therefore, there would be nothing to leave to the jury unless there was some element in the criticism which might support an inference of unfairness in some other sense. No doubt this element might be, and has been, described in various ways and different instances of it given; but, broadly, I think counsel for the defendant is right in contending that, in the case of a literary work at all events, it is something that passes out of the domain of criticism itself. Criticism cannot be used as a cloak for mere invective, nor for personal imputations not arising out of the subject-matter or not based on fact. As LORD ELLENBOROUGH said in *Carr v. Hood* (1) (1 Camp. at p. 358):

E "If the commentator does not step aside from the work or introduce fiction for the purpose of condemnation he exercises a fair and legitimate right. In the present case had the party writing the criticism followed the plaintiff into domestic life for the purpose of slander that would have been libellous."

And in another passage (*ibid.* at pp. 357, 358):

F "Show me an attack on the moral character of this plaintiff or any attack upon his character unconnected with his authorship, and I shall be as ready as any judge who ever sate here to protect him."

In *Merivale v. Carson* (2) BOWEN, L.J., says (20 Q.B.D. at p. 284):

G "In the case of literary criticism it is not easy to conceive what would be outside that region [i.e., of fair comment] unless the writer went out of his way to make a personal attack on the character of the author of the work which he was criticising. In such a case the writer would be going beyond the limits of criticism altogether, and therefore beyond the limits of fair criticism. . . . Still, there is another class of cases in which, as it seems to me, the writer would be travelling out of the region of fair criticism, I mean if he imputes to the author that he has written something which in fact he has not written. That would be a misdescription of the work."

H I think "fair" embraces the meaning of honest and also of relevancy. The view expressed must be honest and must be such as can fairly be called criticism. I am aware that the word "moderate" has been used in this connection with reference to comment on the conduct of a public man; see *Wason v. Walter* (3); but I think it is only used to express the idea that invective is not criticism. It certainly cannot mean moderate in the sense that that which is deemed by a jury, in the case of a literary criticism, extravagant and the outcome of prejudice on the part of an honest writer is necessarily beyond the limit of fair comment: see *Merivale v. Carson* (2). No doubt in most cases of this class there are expressions in the impugned document capable of being interpreted as falling outside the limit of honest criticism, and therefore it is proper to leave the question to the jury, and in all cases where there may be a doubt it may be convenient to take the opinion of a jury. But it is always for the judge to say whether the document is capable in law of being a libel.

It is, however, for the plaintiff, who rests his claim upon a document which on his own statement purports to be a criticism of a matter of public interest, to show that it is a libel, i.e., that it travels beyond the limit of fair criticism; and therefore it must be for the judge to say whether it is reasonably capable of being so interpreted. If it is not, there is no question for the jury, and it would be competent for him to give judgment for the defendant. In *Henwood v. Harrison* (4) the action was against the Queen's printer, who, under the direction of the Lords of the Admiralty, had printed a Blue-book containing a letter defamatory of the plaintiff and had sold copies of the same in ordinary course. The defence was that the letter was a fair comment on a matter of public importance. It was admitted that the defendant acted bona fide and without malice. BRETT, J., nonsuited the plaintiff, and the Court of Common Pleas, GROVE, J., dissenting, upheld the nonsuit. WILLES, J., who delivered the judgment of the majority, says (L.R. 7 C.P. at p. 628):

"In actions of libel, as in other cases where questions of fact, when they arise, are to be decided by the jury, it is for the court first to determine whether there is any evidence upon which a rational verdict for the affirmant can be found."

In that case, as in this, actual malice was not suggested, but the plaintiff nevertheless insisted that there was a question for the jury, and the ground of the nonsuit, which was upheld, was that the publication was "in the nature of fair criticism of a proposal affecting a matter of great national importance."

That case, therefore, in its actual decision is directly in point. The decision, so far as I know, has never been questioned, though exception has been taken to the use of the word "privilege" to describe the public right of fair comment, and some eminent judges have preferred not to use a word which, according to its technical etymology, denotes the special right of an individual, as extending to cover the common rights of the whole community at large. In *Merivale v. Carson* (2) BOWEN, L.J., treats this difference of view as one rather concerned with the "metaphysical exposition" of the origin of the right itself than with the limits of its exercise, and he adds (20 Q.B.D. at p. 283):

"But the question is rather academical than practical, for I do not think it would make any substantial difference in the present case which view was the right one."

Indeed, since the time of LORD ELLENBOROUGH, there does not seem to have been any difference as to the extent and limits of the right itself in the case of literary criticism, and it was more commonly than not treated as resting on the principle explained by WILLES, J., in *Henwood v. Harrison* (4), which was decided in 1872, after *Campbell v. Spottiswoode* (5), decided in 1863, until *Merivale v. Carson* (2), decided in 1887: see, for instance, *Wason v. Walter* (3), decided in 1868. It certainly does not seem that the learned judge who suggested the later exposition of the right intended in any way to abridge the right of the critic as measured by the doctrine of "privileged occasion," or to interfere with the respective provinces of judge and jury in questions of libel.

I think these considerations throw some light on the genesis and meaning of the word "fair" in the expression "fair comment," which is not of merely recent origin and co-existed with the view that the doctrine of "privileged occasion" applied to such cases. The comment, in order to be within the protection of the privilege, had to be fair, i.e., not such as to disclose in itself actual malice. It also had to be relevant; otherwise it never was within it, and the judge could hold as a matter of law that the privilege did not extend to it: *Huntley v. Ward* (6); *Warren v. Warren* (7), and in such case the only defence was truth. These factors were, I think, intended to be covered compendiously by the epithet "fair." In other words, it was intended to exclude those elements which took the comment

A out of, or prevented it from falling within, the privilege of the occasion. The result is that the question of "fair comment" is no more exclusively for the jury in one class of the nature of the right than in the other. In my opinion, there is in this case, in the language of WILLES, J., above cited, no evidence on which a rational verdict for the plaintiff can be founded, and the defendants are therefore entitled to have judgment entered for them.

B In this view it is not necessary to consider the grounds on which a new trial is asked for; but if there was any evidence fit to be considered by a jury, I am clearly of opinion that the verdict was against the weight of evidence. Further, as to misdirection, I think that, though at the outset of his summing-up the learned judge correctly laid down the law as to the extent of the defendants' right of criticism, the later part of his summing-up may have helped the jury to apply the standard of their own taste to the appreciation of the thing criticised, and to measure the rights of the critic accordingly. We have had excerpts from the play, including the songs and the stage directions, read to us; and I think it right to say that, in my opinion, it would be matter of regret for all well-wishers of the stage if an honest critic were debarred from commenting in the sense of this criticism on such a production.

D **STIRLING** and **MATHEW, L.JJ.**, concurred.

Appeal allowed.

Solicitors: *Law & Worssam*, for *Bond & Pearce*, Plymouth; *Crowders, Vizard & Oldham*, for *Rooker, Matthews & Co.*, Plymouth.

E [Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.]

F

G ATTORNEY-GENERAL (ON THE RELATION OF BROMLEY RURAL DISTRICT COUNCIL) v. COPELAND

COURT OF APPEAL (Sir Richard Henn Collins, M.R., Romer and Mathew, L.JJ.),
March 5, 1902]

[Reported [1902] 1 K.B. 690; 71 L.J.K.B. 472; 86 L.T. 486;
66 J.P. 420; 50 W.R. 490; 18 T.L.R. 394]

H Highway—Drain—Discharge of surface water from highway on land of adjoining owner—Drain having no proper outlet—Presumption of legal origin.

I Surface water collecting at a certain point on a highway was received in a catch-pit, from which it was carried through the hedge by the roadside by means of a pipe and discharged on the surface of the adjoining land. The pipe had no proper outlet. This system had lasted as long as living memory. The defendant, having purchased the adjoining land, stopped up the pipe. On a claim by the Attorney-General on the relation of the highway authority for an injunction to restrain him from doing so,

Held: the user of the pipe having been established for many years, a legal origin ought to be presumed for it; the fact that the pipe had no proper outlet on the defendant's land did not prevent its being a drain within s. 67 of the Highway Act, 1835; and, therefore, the plaintiff was entitled to succeed.

Decision of LORD ALVERSTONE, C.J. [1901] 2 K.B. 101, reversed.

Notes. The Highway Act, 1835, s. 67, has been replaced by the Highways Act, 1959, s. 103 (1), (2).

Considered: *Thomas v. Gower R.D.C.*, [1922] 2 K.B. 76.

As to powers of highway authority, see 19 HALSBURY'S LAWS (3rd Edn.) 120, 121; and for cases see 41 DIGEST 46, 47. For the Highways Act, 1959, s. 103, see 39 HALSBURY'S STATUTES (2nd Edn.) 520.

Case referred to:

(1) *Croft v. Rickmansworth Highway Board* (1888), 39 Ch.D. 272; 58 L.J.Ch. 14; 60 L.T. 34; 4 T.L.R. 706, C.A.; 41 Digest 46, 334.

Appeal by the plaintiffs from a decision of LORD ALVERSTONE, C.J., reported [1901] 2 K.B. 101.

The plaintiffs, the local authority in whom were vested the powers and duties of the surveyor of highways under the Highway Act, 1835, s. 67, claimed an injunction to restrain the defendant, who was the owner of a piece of land adjoining a highway in the plaintiffs' district, from stopping up a pipe by which the surface water collecting on the highway was discharged on his land. The facts are set out in the judgment of SIR RICHARD HENN COLLINS, M.R.

The Highway Act, 1835, s. 67, provides:

"The said surveyor, district surveyor, or assistant surveyor shall have power to make, scour, cleanse, and keep open all ditches, gutters, drains, or water-courses, . . . in and through any lands or grounds adjoining or lying near to any highway upon paying the owner or occupier of such lands or grounds, provided they are not waste or common, for the damages which he shall sustain thereby. . . ."

Bray, K.C., and *Clarke Williams* for the plaintiffs.

G. B. Rashleigh (Dickens, K.C., with him) for defendant.

SIR RICHARD HENN COLLINS, M.R.—The ground of these proceedings instituted by the Attorney-General on the relation of the Bromley Rural District Council is that the defendant has stopped up a pipe or drain, and has thereby caused water to accumulate on a highway. LORD ALVERSTONE, C.J., at the trial, gave judgment for the defendant on the ground that this pipe was not a drain within the meaning of sect. 67 of the Highway Act, 1835, in respect of which the local authority could acquire the right they claimed to have. It was proved that this pipe—or drain, as I will call it for the present purpose—has existed for as long as living memory will go, and, therefore, it must have existed before the plaintiffs came into existence. The powers and duties of the old surveyor of highways have in recent times, so far at least as the present matter is concerned, been vested in the local authority. Where there has been a long established user, it is the duty of the court to try and find a legal origin in order to explain the existence of the user. But it was said that this drain, having no proper outlet, did not come within the words of the statute, and the Lord Chief Justice has so held. The road rises to the north and to the south of this drain, and the formation of the ground is such that water running down the slopes would be impounded at a certain point unless some means were provided for carrying it away. A catch-pit was, therefore, made on the west side of the road, and water running into it was drained away to another catch-pit on the east side, from which a pipe 6ft. long was put through the hedge by the road side, and this pipe discharged the water from the catch-pits on to the defendant's land on the other side of the hedge. That arrangement has existed, as I have said, for as long as living memory will go. It is quite compatible with the evidence that a ditch had once existed on the defendant's land by which the water from the pipe would have been carried away. I can see no reason why this arrangement should not be held to be a drain within s. 67. The user has been continuous for many years, and a legal origin ought to be presumed for it.

A I think that this arrangement is a drain within the section, and that the appeal ought, therefore, to be allowed. I wish to add that *Croft v. Rickmansworth Highway Board* (1) does not touch the point here because there the question was entirely confined to the consideration of a dumb well, excluding anything of the nature of a pipe to discharge the water as in the present case.

B ROMER, L.J. I am of the same opinion. There are three alternatives in this case. First, there might have been a natural drain carrying the water across the defendant's land, and the pipe may have been put there merely in order to assist the natural flow of water. If that were so the defendant would have no right to stop the water. Secondly, the work done by the surveyor of the highway in 1868 may have been done in the pursuance of some legal right outside his statutory powers. Thirdly, the lapse of time would justify us in making some assumptions. This pipe, though small in itself, is part of a system of drainage, and may have been put down under the powers given by the Highway Act, 1835, and I think that we ought to assume that it was legally done under the Act, either with the consent of the defendant's predecessor or on the payment of compensation. It is argued that this could not have been done because the pipe has no proper outlet. But what is a proper outlet? The water has been discharged in this way since 1868. No one knows exactly what was the previous state of affairs, and how can anyone say that there never has been a proper outlet? I think that the plaintiffs have established their right to this drain and their right to have it kept clear, and, therefore, that the appeal ought to be allowed.

E MATHEW, L.J.—I am of the same opinion. It is clear that for a long time there must have been some means for preventing the water from accumulating at this point in the road. Under the Highway Act, 1835, s. 67, the surveyor had power to make necessary drains on payment of compensation. There is no evidence of any compensation ever having been paid, but it is quite possible that the landowner waived his claim. The present arrangement has existed since 1868. I think that we are bound to uphold what has been done on the assumption that it was legally done.

Appeal allowed.

Solicitors: *May, Sykes & Co.; Arthur Pearce.*

[*Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.*]

HARRISON v. KIRK

[HOUSE OF LORDS (The Earl of Halsbury, L.C., Lord Shand, Lord Davey and Lord Robertson), November 9, 10, 1903]

[Reported [1904] A.C. 1; 73 L.J.P.C. 35; 89 L.T. 566]

Administration of Estates—Administration action—Fund in court available for payment of debts—Right of creditor to share—Time expired for creditors coming in—Imposition of terms.

Where in an administration action there are general assets in court available for the payment of debts, a creditor is entitled to come in and share in those assets at any time, even though the date fixed for creditors coming in has expired, subject to such terms as to costs, etc., as the court thinks fit to impose.

In an administration suit the primary decree was made in July, 1888. A mortgagee of a portion of the real estate proved his debt against the realty alone in February, 1889, when it was believed by all parties that the proceeds of the sale of the realty would be sufficient to pay off the mortgage. A sale of the real estate was ordered and a receiver was appointed. The security became depreciated by circumstances beyond the control of the mortgagee, and proved insufficient for the payment of the incumbrance. Some unsecured creditors had proved against the personal estate, but there was a sum in court more than sufficient to pay their debts. In June, 1902, the mortgagee applied for leave to prove against the residuary personal estate.

Held: as there were funds still in court he was entitled to do so, so long as the rights of the other creditors who had already proved were not affected.

Notes. Considered: *Minister of Health v. Simpson*, [1950] 2 All E.R. 1137. Referred to: *Re Gess*, *Gess v. Royal Exchange Assurance*, [1942] 2 Ch. 37.

As to the right of a creditor as against a legatee and as to the right of a creditor against a fund in court, see 16 HALSBURY'S LAWS (3rd Edn.) 336, paras. 651, 652. For cases on claims by creditors under an administration by the court, see 21 DIGEST (Repl.) 853 et seq.

Cases referred to:

- (1) *Re McMurdo*, *Penfield v. McMurdo*, [1902] 2 Ch. 684; 71 L.J.Ch. 691; 86 L.T. 814; 50 W.R. 644; 46 Sol. Jo. 550, C.A.; 24 Digest (Repl.) 884, 8825.
- (2) *Gillespie v. Alexander* (1827), 3 Russ. 130; 38 E.R. 525, L.C.; 23 Digest (Repl.) 441, 5112.
- (3) *Ridgway v. Newstead* (1861), 2 Giff. 492; 4 L.T. 6; 6 Jur.N.S. 1185; 9 W.R. 31; affirmed, 3 De G.F. & J. 474; 30 L.J.Ch. 889; 4 L.T. 492; 7 Jur.N.S. 451; 9 W.R. 401; 45 E.R. 962, L.C.; 23 Digest (Repl.) 441, 5116.

Also referred to in argument:

- Re Gale*, *Blake v. Gale* (1883), 22 Ch.D. 820; 53 L.J.Ch. 694; 48 L.T. 101; 31 W.R. 538; 24 Digest (Repl.) 720, 7073.
- Montefiore v. Browne* (1858), 7 H.L.Cas. 241; 4 Jur.N.S. 1201; 11 E.R. 96, H.L.; 35 Digest 467, 2033.
- Greig v. Somerville* (1830), 1 Russ. & M. 338; 39 E.R. 131, L.C.; 23 Digest (Repl.) 441, 5113.
- Brown v. Lake* (1847), 1 De G. & Sm. 144; 63 E.R. 1008; 24 Digest (Repl.) 884, 8832.
- Re Metcalfe*, *Hicks v. May* (1879), 13 Ch.D. 236; 49 L.J.Ch. 192; 42 L.T. 383; 41 L.T. 572; 28 W.R. 499, C.A.; 24 Digest (Repl.) 853, 8494.

Appeal from a decision of the Court of Appeal in Ireland (LORD ASHBOURNE, L.C., FITZGIBBON and HOLMES, L.JJ.), dated July 9, 1902, and reported sub nom. *Beattie v. Corder*, [1903] 1 I.R. 1, reversing a decision of PORTER, M.R., dated

A June 21, 1902, made in a suit for the administration of the estate of Richard Davis Harrison, deceased.

The appellant (the residuary legatee) in person argued that the court below had decided the case on the authority of *Re McMurdo* (1) which was a case of an insolvent estate, and was not applicable to the present case. The present case was not a case of an absolute legal right on the part of the mortgagee to come in and prove at this stage of the proceedings, but was a matter of indulgence, and the special circumstances of the case took away his equity, as the estate had been injured by the fact of his not coming in earlier.

Hilding, K.C., S. Roman, K.C., and W. M. Whitaker (both of the Irish Bar), for the respondent, the mortgagee, were not called upon to address the House.

C THE EARL OF HALSBURY, L.C.—Whatever sympathy we may feel for the appellant, I am afraid that it is impossible, without reversing the principles on which the administration of the Court of Chancery has ever been exercised, to suggest any doubt as to the proper decision of this case. There is no doubt about the existence of the debt, or about the existence of a fund in court; and I have inquired with some interest as to what authority there is for saying that the Court of Chancery, or any other court, under those circumstances, can refuse to recognise the right of a person who is entitled to have his debt paid out of a particular estate. It is a totally different position where the money has been distributed to legatees or to claimants, and the question is about following the money and endeavouring to get back that which has been already distributed. That case may raise questions of considerable difficulty, but no such question is raised here. The money is still there to be distributed to the persons who are entitled to have it, and the respondent here is a person who has established his right to that money. I seek in vain for any principle that would justify the court in saying that he is not to have it because, when originally the distribution of assets was being settled, he thought that his security was enough. It turns out that it is not enough. The answer made to his claim to have his debt paid is: "You made a mistake when you originally thought that the security was enough, because now it is not enough; and therefore, because you abstained from claiming against the general assets, you are not to have your debt paid at all." That seems to me to be a most monstrous conclusion for any court to arrive at, and I am happy to see, after a review of all the authorities on the subject, that from a very early period any such proposition receives no countenance whatever from the practice of the Court of Chancery; the practice seems to have been absolutely the other way. I therefore move your Lordships that this appeal be dismissed with costs.

LORD SHAND.—I am of the same opinion. No question is here raised with other creditors of the deceased testator. It is admitted that the right of those creditors to the payment of their debts is not interfered with, and will receive effect notwithstanding the claim now made. In a question with the residuary legatee and devisee only, it seems to be clear that the respondent, the mortgagee, has done nothing expressly or by implication to preclude him from claiming the right to payment in full of the debt due to him from the testator's personal estate. He has merely delayed making his claim for reasons which he explains, and they seem to be quite reasonable in themselves, but he has not done anything restricting his full right as a creditor. That being so, and as there is a fund in court, part of the testator's estate, and so liable for his debts, I think that the decision of the Court of Appeal, which is supported by a body of authority extending over a long period of time, is right, and should be affirmed.

LORD DAVEY.—The Master of the Rolls in the present case said that he did not consider that he was coerced to grant the application of the mortgagee to obtain the benefit of the administration suit, and that, not being coerced, he should decline

to grant it. The view expressed by him in that language seems to me to rest upon a fundamental misapprehension of the character of an administration suit, and of the jurisdiction of the Court of Chancery in administering assets in such a suit.

There is no doubt that the Court of Chancery did exercise the right of restraining an action at law upon certain grounds; and there is no doubt that when the court had taken into its own hands the administration of an estate, it did restrain creditors from pursuing their legal remedy as against the executors. But let us consider upon what principle that was done. It was done upon the principle that the court had taken to itself the administration of the estate, and, as it precluded the creditors from asserting their legal remedies, it provided other means for those creditors to obtain payment of their debts, and the court was bound to see that the creditors whom it restrained from pursuing their legal remedies were not deprived of the means of having the assets of the testator applied to the payment of their debts. It is an entire fallacy, but at the same time a very common one, to suppose that because the debt had to be proved, or the payment of the debt had to be enforced through the medium of the Court of Chancery, it became an equitable demand, and ceased to be a legal demand. Its character was not altered one whit; it remained a legal demand, and the right of the creditor who came in to prove under an administration decree remained a legal right, and the debt which was recoverable was a legal debt. The only difference made was in the remedy by which the debt could be recovered. That being so, the Court of Chancery usually fixed a time within which the creditors could come in and prove their debts; and obvious convenience rendered that necessary, because otherwise the administration would have been hung up for ever. No doubt, as has been pointed out, the language in which the time was fixed was somewhat peremptory. It told people that they would be excluded from the benefit of the decree if they did not come in within the time. But it has long been settled, and I should have thought that every Chancery practitioner would have recognised it, that the language so used was in *terrorem* only, and that the effect of it was merely this and nothing more, that any creditor who did not come in and prove his debt before the day fixed ran the risk of some of the assets having been administered and disposed of by the court in payment of other creditors, and in that way the fund for the payment of his debt might be imperilled, or, if the estate was insolvent, he might lose a portion of the dividend which he would otherwise have received.

That this is so I think is plain from the language of LORD ELDON, L.C., in *Gillespie v. Alexander* (2) (3 Russ. at p. 136):

“Although the language of the decree, where an account of debts is directed is, that those who do not come in shall be excluded from the benefit of the decree; yet the course is to permit a creditor, he paying the costs of the proceedings, to prove his debt as long as there happens to be a residuary fund in court or in the hands of the executor, and to pay him out of that residue.”

So far as my experience of the Court of Chancery while it existed, and of the practice of the Chancery Division since the Judicature Act, goes, that rule has been invariably acted upon, and I do not hesitate to adopt the expression which is said to have been used by one of the learned judges, that it is the ordinary rule. Of course, in admitting creditors to come in at any time to take the benefit of the decree, the court is entitled to impose, and does impose, certain conditions, not affecting the legal right of the creditor, but affecting the mode in which he shall pursue his remedy. For instance, they require a creditor to pay the costs of the application which have been occasioned through his delay in coming in, and they do not allow the proof by a creditor at that late period of the proceedings to alter or affect what has been done as regards the payment of assets which have been already distributed. Conditions of that kind are usually imposed upon the persons coming in at a late hour.

A Here a distinction must be drawn; the appellant, in his very able argument, did not always bear in mind the distinction between the case where there is still remaining in court a residue, or a fund legally available for the payment of debts, and the case where the whole of the estate has been distributed, and it is necessary, in order to obtain payment, for the creditor to get back from legatees or others who have been paid what has been paid to them. In the first case the creditor is merely exercising a legal right; in the other case he is exercising an equitable right which is given him by the equitable doctrine of the Court of Chancery, because he has no legal right against the legatees; his only legal right is against the executor. But the Court of Chancery, in order to do justice and to avoid the evil of allowing one man to retain what is really legally applicable to the payment of another man, devised a remedy by which where the estate has been distributed, either out of court or in court, without regard to the rights of a creditor, it has allowed the creditor to recover back what has been paid to the beneficiaries or the next of kin who derive title from the deceased testator or intestate. In that case no doubt equitable defences may be made to the claim.

B If authority were wanted, I think that this distinction is carefully pointed out in *Ridgway v. Newstead* (3) by STUART, V.-C. In that case there was a fund in court, but it was insufficient for the payment of the creditors who desired to prove, and there were also sums standing to the credit of infant legatees. Stuart, V.-C., at once and without question admitted the right of the creditor to come in and take the benefit of the decree, and prove as regards the residuary estate which still remained in court; but, as regards the right which he claimed to obtain payment out of sums which had been carried to the credit of and appropriated for the payment of the legacies of certain infant legatees, he disallowed the claim on the ground that there was an equitable defence in the laches, or acquiescence, or conduct of that kind. What he said was this (2 Giff. at p. 501):

"I think the plaintiffs have established their right against the general assets of the testator standing in court to the credit of the cause of *Fox v. Newstead*. But as to the claim against the other legatees, who have been in part paid, and towards whose legacy an appropriation has been made out of the fund paid into court by the executors under the Trustees Relief Act, I feel the greatest doubt and difficulty."

Then he discusses that point, and comes to this conclusion (*ibid.* at p. 503):

G "I have always understood that the right of a creditor to make legatees refund may be affected by the course of conduct of that creditor—that he may pursue such a course, by laches or acquiescence or otherwise, as to make it highly inequitable for the court to allow him to assert any right as against the legatees. At the same time, the case on this particular question has been argued with much less research than I could have wished. But if I am to decide it now, my opinion is that the creditor, under the circumstances, is not entitled, as against these legatees, to make them refund or pay any part of his debt. As to the general assets, a different principle applies, because the general assets could not have been distributed sooner. I think the plaintiffs have made a clear case to those assets which have been obtained under the decree of the court within the last three years."

I I will not trouble your Lordships with reading authorities, because I think that the judgment of STUART, V.-C., puts the difference between the two cases in a most marked manner. It would be, to my mind, almost an absurdity if the Court of Chancery, which, in order to prevent money being paid to one person which properly belongs to another, has devised a form of action by which money may be recovered back from the legatee, should refuse to allow the creditor in the present case the benefit of the suit, when there is a fund in court available for his

payment, and put him to the expense and trouble of pursuing his remedy against the residuary legatee and the other legatees when they are paid. That is an absurdity which cannot, I think, be credited to either the Chancery Division or any division of the courts in Ireland or in this country. Therefore, as the result of the principles upon which the Court of Chancery acted in administration suits, which principles are still binding upon the Chancery Division of the High Court, and also as the result of the authorities, my opinion is that where there are general assets applicable to the payment of a creditor's debt in court, no authority has been or can be quoted in which the court has refused to allow a legal creditor to come in and share in those assets which still remain, subject, of course, to conditions and terms such as those to which I have already referred. The only way in which a creditor with a legal right of action making that application can be met is by showing that he has in some way either released or abandoned his claim against the personal property or general estate of the testator.

I think that the appellant was disposed to put his case as high as that, but I do not think it necessary to do more than express my entire concurrence in what has been said by the Lord Chancellor, that there is not a shadow of proof that the creditor has done anything whatever which is evidence of a release, abandonment, or waiver of his claim against the general estate of the mortgagor. What he has done is this—being of opinion that the mortgaged estate would prove sufficient for the discharge of the claims upon it, he did not think it necessary—perhaps it would have been thought harsh if he had done it under the circumstances—to prove against the general estate of the testator; and he allowed, at his own peril, the general estate of the testator to be partially administered up to the point of the second further consideration. But afterwards, finding from the proceedings in the Land Court that he was not likely to be paid in full out of the proceeds of the mortgaged estate, he then determined to make his claim against the general estate. I can see nothing which amounts to a release or abandonment of his claim, and, that being so, I am of opinion that the Court of Appeal was right in admitting the claim, and, that the terms which they imposed as the condition of admitting the claim are at least not too favourable to the claimant. The appellant in his argument rather wished to take into account what he thought had been the misconduct of the gentleman who was formerly a trustee of the real owner of the mortgage, not in his character of mortgagee, but in his character of solicitor for some parties having adverse rights; but I need scarcely say that any consideration of that kind would be totally irrelevant. The court has considered those questions, and they are not before your Lordships, and any question of that kind is perfectly irrelevant so far as it affects the right of the real owner of the mortgage, the present respondent. I am, therefore, of opinion that the appeal should be dismissed.

LORD ROBERTSON.—I own to a strong antecedent reluctance to accept the conclusion that in the distribution of extant assets of a deceased person a residuary legatee is to be preferred to an unpaid creditor. I was prepared, however, to adopt a more sophisticated opinion, had it been shown that by some clearly established system of practice the Irish courts had become disabled from rendering this very elementary justice. But an examination of the authorities, and the weighty opinion of LORD DAVEY, convince me that the judgment appealed from is right according to the Chancery practice, as well as on a more elementary comparison of the rights of parties. When all is said about the conduct of the creditor, it comes to no more than that the residuary legatee is naturally disappointed that the creditor finds it necessary to enforce the personal obligation in order to get payment of his debt. I am glad to find that there is no authority for holding that the institution of an administration suit reduces the right of a creditor on a mortgage to a more or less precarious appeal for a share in residue dependent on good conduct. My view of the case is exactly expressed by HOLMES, L.J., in the last paragraph of his judgment. He says ([1903] 1 I.R. at p. 16):

A "It would appear to me that, subject to the rights of the other creditors, it would be a matter of course to allow the applicant to prove as against the residuary legatee, because the latter can get nothing until the debts are paid. Our order will not affect any of the creditors who have already proved, or any costs that have been already increased: it will only affect the interest of the residuary legatee, and the simple question seems to me to be whether the testator's estate is to pay his debts. Apart altogether from any cases that have been quoted, I think that no court which administers equity or justice would prevent a creditor under such circumstances from coming in to prove."

Appeal dismissed.

C Solicitors: *Denton, Hall & Burgin*, for *V. B. Dillon & Co.*, Dublin; *Arber & Lewis*, for *G. A. Howe*, Dublin.

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

D

R. v. BIRMINGHAM COUNTY COURT JUDGE AND OTHERS.
E Ex parte BIRMINGHAM INDUSTRIAL LOAN AND DEPOSIT CO., LTD.

[KING'S BENCH DIVISION (Lord Alverstone, C.J., Darling and Channell, JJ.), June 23, 1902]

[*Reported* [1902] 2 K.B. 283; 71 L.J.K.B. 881; 87 L.T. 296;
51 W.R. 75; 18 T.L.R. 698]

F *Execution—Committal for judgment debt—Joint judgment against three defendants—Committal order against one defendant—Issue of judgment summons against other defendant.*

G In a county court action on a joint and several promissory note the plaintiffs obtained a joint judgment against all three defendants. On default in payment of the judgment debt the plaintiffs issued a judgment summons against all three defendants, but, as the addresses of two of them were unknown, the summons was served on one defendant only and against him a committal order was made in respect of the sum in default, the order being suspended during payment of specified monthly instalments. Subsequently, the plaintiffs ascertained the address of another of the defendants and applied for leave to issue a fresh judgment summons against him. The county court judge refused the application on the ground that he had no jurisdiction to issue a judgment summons against a defendant while there existed against his co-defendant a committal order to which no return had been made.

H **Held:** where there was a joint judgment against joint defendants a county court judge had jurisdiction, exercisable in his discretion, to issue judgment summonses against each co-defendant and, therefore, while the existence of the committal order was a factor to be considered by the judge in exercising his discretion to issue the summons, the fact that a committal order was in force against one defendant did not prevent the issue of a judgment summons against his co-defendant.

I **Notes.** As to judgment summonses see now the County Court Rules, 1936, ord. 25, r. 33.

As to committal for non-payment of judgment debts, see 2 HALSBURY'S LAWS (3rd Edn.) 639 et seq.; and for cases see 5 DIGEST (Repl.) 1105 et seq.

Cases referred to in argument:

Clarke v. Clement and English (1796), 6 Term. Rep. 525; 101 E.R. 653; 21 Digest (Repl.) 506, 43.

Kendall v. Hamilton (1879), 4 App. Cas. 504; 48 L.J.Q.B. 705; 41 L.T. 418; 28 W.R. 97, H.L.; 26 Digest (Repl.) 209, 1602.

Rule Nisi for a writ of mandamus calling on His Honour JUDGE WHITEHORSE (the judge of the Birmingham County Court), the registrar of the county court, and one Hugh Dryhurst (a joint defendant with persons named Simcox and Price in an action in the county court) to show cause why a writ of mandamus should not issue directing the judge or the registrar to hear and determine the matter of an application by the Birmingham Industrial Loan and Deposit Co., Ltd. (plaintiffs in the action), for leave to issue a judgment summons against Dryhurst for the recovery by them of the balance due for debt and costs under the judgment in the action.

On June 16, 1899, a summons was issued by the County Court of Warwickshire held at Birmingham, at the instance of the Birmingham Industrial Loan and Deposit Co., Ltd., against three persons—Dryhurst, Simcox, and Price—for the sum of £7, being the balance due upon a joint and several promissory note signed by those three persons. On Aug. 1, 1899, the plaintiffs obtained judgment on the note jointly against Dryhurst, Simcox, and Price for the sum of £7 and £2, being the costs of the judgment, and the defendants were ordered to pay the judgment debt and costs by instalments of 10s. 6d. per week, as provided by s. 105 of the County Courts Act, 1888.

On Dec. 11, 1901, the sum of £2 12s. 6d. being then remaining due under the judgment, a judgment summons for that amount was issued against all three defendants, Dryhurst, Simcox, and Price, returnable on Jan. 24, 1902. Dryhurst and Simcox were not served with the judgment summons, as their addresses were not then known, and only the defendant Price was served with the summons. The plaintiffs did not ask for an adjournment of the summons to serve the other two defendants, but took the ordinary committal order against the defendant served, Price. A committal order was made against Price for the above sum of £2 12s. 6d. and costs, but the warrant was suspended so long as instalments of 4s. a month were paid by Price, and, as was stated by the learned judge in his judgment, no warrant was issued against Price, nor would be issued so long as he paid the instalment fixed by the committal order.

After Jan. 24, 1902, the plaintiffs ascertained the address of Dryhurst, one of the defendants, and on Feb. 3 they applied to the registrar of the county court for leave to issue a judgment summons against Dryhurst for the balance of the debt and costs then due. The registrar refused to issue a summons against Dryhurst on the ground that a committal order for the amount was then in force against the defendant Price. The plaintiffs then applied to the judge of the county court for an order directing the registrar to give leave to issue a fresh judgment summons against the defendant Dryhurst. The judge refused the application on the grounds that no return had been made to the committal order against the defendant Price; that the committal order was in the nature of an unexecuted execution, and that until there was a return to the committal order separate execution could not issue against the other co-defendants. The plaintiffs then obtained the above rule.

Bonsey (H. Sutton with him) for the county court judge.
Cracroft for the plaintiffs.

LORD ALVERSTONE, C.J.—In this case a rule was obtained, which we think has been drawn up in quite the proper form, calling upon the judge to show cause why the judge or registrar should not proceed to hear and determine the matter of an application by the plaintiffs in the action for leave to issue a judgment summons

A against the defendant Dryhurst. I think, for reasons which I will explain, that that rule is in the proper form, and that it would be wrong to make the rule absolute, as counsel for the plaintiffs asks, in a different form—namely, calling upon the judge to issue the summons.

B No doubt for some purposes these committal orders are executions—that is to say, they are the means whereby plaintiffs obtain payment of a debt. They are a modified form of *ex. ca.*—that is to say, instead of the defendant, who is shown to have means, being ordered to pay or being sent to prison, as he used to be in former times, he is ordered to pay and the committal order does not go unless he makes default. In this case there were three defendants, and undoubtedly to a certain extent the difficulty has arisen by the plaintiffs having issued their judgment summons properly against the three, and, being unable to serve the two, taking C the order against the one that was served. If the analogy of the old law applicable to writs of *fi. fa.* applies, it could probably be successfully argued that, as there was no return to the writ of execution, no further execution could be issued until there had been a return; but it seems to us, with regard to this modern practice, that the analogy in the considerations which gave rise to these kinds of rules do not apply. This is a new kind of jurisdiction. The county court judge has to consider D what the means of the defendant are. *Prima facie*, apparently, the money is paid into court, and I should think that this practice is framed on the hypothesis that the money is paid into court, and that the judge would have an opportunity of knowing what has been received. Counsel for the plaintiffs is well founded in saying that, unless there is a rule of law which prevents the plaintiffs from getting the proper remedy against the other two defendants, or unless their conduct precludes them from so E doing, they ought to be entitled to pursue the same remedies against the other two defendants. I think, however, that it is quite impossible for us to say that the county court judge must issue the summons. For instance, it might turn out that the whole or a very large portion of the amount ordered to be paid by one of the defendants had been paid into court, and I think it would be quite wrong for us to say that, simply because there has been a judgment against two joint F defendants, the county court judge would have no discretion in the matter.

We think it is open to the county court judge, when such an application as this is made before him, to have before him the same kind of information as that which is by the rules required to be given to him where judgment summonses are issued after a certain date, or against persons who do not reside within a certain G district. Therefore, we think it may be quite open to the county court judge to satisfy himself by requiring the plaintiffs, by affidavit or otherwise, to satisfy him as to what has happened to the order which was made against the other defendant. We think, therefore, that the rule should be made absolute to the judge or registrar to hear and determine the application for the judgment summons. Upon that application he can require such information with regard to the order made H against the defendant Price or such other information as he thinks right. We think upon the point taken that the learned county court judge had no jurisdiction to hear and determine the application because there had been an order made against Price, he went too far, and he ought only to have treated it as a matter which he ought to consider when considering the question as to whether he would allow the summons to go. As it has been arranged that the plaintiffs should pay the costs of I this application in any event, we make no order as to costs, but make the rule absolute.

DARLING and CHANNELL, JJ., concurred.

Rule absolute.

Solicitors: A. H. Arnould & Son, for Bickley & Lynex, Birmingham; The Treasury Solicitor.

[Reported by W. W. ORE, Esq., Barrister-at-Law.]

R. v. LYNCH

[KING'S BENCH DIVISION (Lord Alverstone, C.J., Wills and Channell, JJ.), January 21, 22, 23, 1903]

[Reported [1903] 1 K.B. 444; 72 L.J.K.B. 167; 88 L.T. 26; 67 J.P. 41; 51 W.R. 619; 19 T.L.R. 163; 20 Cox, C.C. 468]

Criminal Law—Treason—Adhering to Sovereign's enemies—Commission of overt acts abroad—Naturalisation as citizen of country at war with Great Britain—Oath of allegiance to that country and declaration of willingness to fight for it.

A British subject who renounces his allegiance and procures his naturalisation as a citizen of a country which is at war with the British Crown, takes an oath of allegiance to that country, and makes a declaration of his willingness to take up arms for it, is guilty of an act of high treason by adherence to the Sovereign's enemies, and, it being based on this criminal act, the naturalisation itself is illegal and of no effect. A person cannot become naturalised in a State with which his country is at war.

The crime of treason by adherence to the enemies of the Sovereign may be committed either within or without Great Britain.

Criminal Law—Indictment—Quashing—Treason—Motion in arrest of judgment—Writ of error.

The court will not quash an indictment for a crime of enormity, such as high treason, on motion to quash. Objection to such an indictment must be taken on motion in arrest of judgment or by writ of error.

Notes. Considered: *R. v. Casement*, [1917] 1 K.B. 98; *R. v. Middlesex Regiment (Commanding Officer) 30th Battalion, Ex parte Freyberger*, [1917] 2 K.B. 129; *Fasbender v. A.-G.*, [1922] 1 Ch. 232. Referred to: *Tingley v. Müller*, [1916-17] All E.R. Rep. 470; *Re Chamberlain's Settlement*, [1921] 2 Ch. 533; *Fasbender v. A.-G.*, *Kramer v. A.-G.*, [1922] 2 Ch. 850; *R. v. Home Secretary, Ex parte L.*, [1945] K.B. 7; *Lowenthal v. A.-G.*, [1948] 1 All E.R. 295.

As to high treason, see 10 HALSBURY'S LAWS (3rd Edn.) 555-568, and for cases see 15 DIGEST (Repl.) 766 et seq. For present law as to naturalisation see 1 HALSBURY'S LAWS (3rd Edn.) 552 & British Nationality Act, 1948 (28 HALSBURY'S STATUTES (2nd Edn.) 137).

Cases referred to in argument:

R. v. Wheatley (1761), 2 Burr. 1125; 1 Wm. Bl. 273; 97 E.R. 746; 15 Digest (Repl.) 1160, 11,699

R. v. Johnson (1752), 1 Wils. 325; 95 E.R. 643; 14 Digest (Repl.) 281, 2529.

R. v. Heame (1864), 4 B. & S. 947; 3 New Rep. 466; 33 L.J.M.C. 115; 9 L.T. 719; 28 J.P. 500; 10 Jur.N.S. 724; 12 W.R. 417; 9 Cox, C.C. 433; 122 E.R. 714; 14 Digest (Repl.) 281, 2533.

R. v. Sheares (1798), 27 State Tr. 255; 15 Digest (Repl.) 769, *4819.

Abley v. Dale (1851), 11 C.B. 378; 2 L.M. & P. 433; 20 L.J.C.P. 233; 15 J.P. 757; 15 Jur. 1012; 138 E.R. 519; 43 Digest 449, 771.

Janson v. Driefontein Consolidated Mines, Ltd., ante p. 426; [1902] A.C. 484; 71 L.J.K.B. 857; 87 L.T. 372; 51 W.R. 142; 18 T.L.R. 796; 7 Com. Cas. 268, H.L.; 2 Digest (Repl.) 218, 308.

Esposito v. Bowden (1857), 7 E. & B. 763; 8 State Tr.N.S. 807; 27 L.J.Q.B. 17; 29 L.T.O.S. 295; 3 Jur.N.S. 1209; 5 W.R. 732; 119 E.R. 1430, Ex.Ch.; 2 Digest (Repl.) 251, 524.

R. v. Vaughan (1696), 13 State Tr. 485; Fost. 220; 2 Salk. 634; Holt, K.B. 689; 90 E.R. 1280; 15 Digest (Repl.) 870, 8387.

- A** *Macleay v. R.* (1868), 1 L.R. 3 H.L. 306, H.L.; 14 Digest (Repl.) 123, 856.
R. v. Maclane (1797), 26 State Tr. 721; 15 Digest (Repl.) 769, *4821.
R. v. Smith O'Brien (1848), 7 State Tr. N.S. 1; 3 Cox, C.C. 360; 15 Digest (Repl.) 773, *4850.
R. v. Cranburne (1696), 13 State Tr. 223.
R. v. Macdonald (1747), Fost. 59; 18 State Tr. 857; 15 Digest (Repl.) 766, 7049.
- B** *R. v. Weldon* (1795), 26 State Tr. 225; 14 Digest (Repl.) 272, *1525.
Duquet v. Rhinelanders (1808), 1 Joh. Cas. 360; 2 Joh. Cas. 476; 1 Caine's Cases 25.
Jackson v. New York Insurance Co., 2 Joh. Cas. 191.
Talbot v. Janson (1795), 3 Dallas Rep. 133.
- C** *The Santissima Trinidad* (1822), 7 Wheat. 283; 20 Supreme Ct. R. U.S. 283.

Trial at Bar on the indictment of the prisoner, Arthur Lynch, otherwise Arthur Alfred Lynch, for high treason.

- The indictment alleged that the prisoner, while an open and public war was being prosecuted and carried on by the government of the South African Republic, and the burghers and men of the South African Republic, against Queen Victoria and her subjects, the said government, burghers, and men being enemies of the Queen, being a subject of Queen Victoria, adhered to, aided, and comforted the government of the South African Republic at Pretoria, in the territory of the South African Republic, beyond the seas without the realm of England. The overt acts alleged were that he made a declaration of his willingness to take up arms for the Republic, took an oath of allegiance to the Republic, an oath as colonel of the Irish Corps in the military service of the Republic, and an oath as special justice of the peace to the Irish Corps; that he departed from Pretoria with intent to join the enemy in the British colony of Natal; that he published at Johannesburg, in the South African Republic, an address to Irishmen, calling upon Irishmen to take up arms for the Republic; that he assisted officers of the South African Republic at an inquiry held at Vereeniging in the South African Republic; that at Johannesburg, also in the South African Republic, he recruited men for the military service of the Republic, and procured horses, harness, and waggons for the same service; and that he consulted with certain officers of the South African Republic to levy war against Queen Victoria in the South African Republic. The second count alleged as overt acts of treason: Commanding the Irish Brigade in the British colony of Natal in parts beyond the seas, without the realm of England, composing and sending for publication the address to Irishmen alleged in the first count, levying war in the said colony, and consulting in the said colony with enemies to levy war against Queen Victoria and her subjects. The third and fourth counts alleged the same acts as adhering to the government of the Orange Free State. The indictment having been read by the King's Coroner,

- H** *Horace Arory, K.C.*, for the prisoner.—I move to quash the indictment on the ground that it does not disclose any offence under the Treason Act, 1351.

The Attorney-General (Sir Robert Finlay, K.C.), the Solicitor-General (Sir Edward Carson, K.C.), Henry Sulton, C. W. Mathews, Guy Stephenson, and Graham Campbell for the Crown.—An indictment for high treason should not be quashed on motion. The proper course is to allow the prisoner to move in arrest of judgment

- I** or by writ of error.

LORD ALVERSTONE, C.J.—If the objection taken by counsel for the prisoner could be fairly described as an objection founded upon a relic of barbarous times, which has been swept away by modern legislation and procedure in the favour of the prisoner, I should be very loth to interfere, but, in my opinion, that is not a correct view of the objection. It is perfectly true that proceedings for treason have been less frequently before the courts during the last one hundred years than on previous occasions, but that observation in no way lessens the weight of the

authorities to which our attention has been called, assuming that they are founded on reason and justice, and are not contrary to what has been described by counsel, very properly, as the tendency in modern times to do everything in favour of the accused, either by statutory provision, or by remodelling or modifying the procedure of the court. But, in my opinion, there is at the root of the objection taken by the Attorney-General, very sound sense. The procedure to quash an indictment taken at the present stage, it is true, is on the present occasion heard by three judges, but under ordinary circumstances it could not be decided with the same authority, and with the same consideration as if the point were raised in the way pointed out by the Attorney-General. Nor are the remedies of the prisoner taking objection so sufficient or ample if the point must be summarily determined, and I must say I think that the statement of law in 1 East, P.C., p. 110, shows that an objection to an indictment ought to be seriously considered by the court in the interests of justice and the prisoner. The reason why I refer to this authority is that counsel for the prisoner, in his reply, argued that the view taken therein was inconsistent with the Treason Act, 1695, s. 9 [repealed by Treason Act, 1945]. But the passage referred to deals with the very section of the statute, and the practice as it then existed, in view of that section as well as previous decisions. In any view, it must be for the discretion of the court whether they will entertain such an objection at the present stage, and, as has been properly pointed out by the Attorney-General, the prisoner is not deprived of the opportunity of raising the point in the most formal way, and of taking it before a tribunal of greater authority than the judges who now preside—it may be, according to the mode of procedure adopted, of carrying the case to the highest Court of Appeal. Under the circumstances I am clearly of opinion, without knowing more about the point which counsel for the prisoner raised than I gathered from the few words of the indictment which he read, that this is not a motion which we ought to entertain on the trial at the present stage.

WILLS and CHANNELL, JJ., concurred.

The prisoner having pleaded "Not Guilty," the trial proceeded, and the following facts were proved. The prisoner, a British subject born in Australia, was a journalist by profession. War broke out between the South African Republic and the Orange Free State and the British Empire on Oct. 11, 1899. In January, 1900, the prisoner went to Pretoria, having entered into contracts with the "Journal de Paris" and certain English and American newspapers to act as war correspondent for such newspapers. He had also an introduction from persons in Paris to Colonel Villebois de Mareuil, a French officer in the military service of the South African Republic. On arriving at Pretoria the prisoner applied to the government of the South African Republic for letters of naturalisation, and, in order to procure himself to be naturalised, made a declaration that he was willing to take up arms in the service of the Republic and took an oath of allegiance to the Republic. He was appointed to the command of a body of men raised for the military service of the Republic, called the 2nd Irish Brigade, assumed command of that brigade, and took an active part in hostilities with the British forces, both in the territory of the Republic and in the colony of Natal. The prisoner also wrote and published an address, calling upon Irishmen to take up arms for the Republic, became a member of the Council of War of the South African Republic, and took part in a military court of inquiry into the conduct of persons alleged to be British spies. On the conclusion of the case for the Crown,

Shee, K.C., Horace Avory, K.C., Biron, and Dwyer, for the prisoner.—There is no case to go to the jury. The prisoner having become a naturalised citizen of the South African Republic cannot be guilty of high treason if he adhered to that government. He had ceased to be a British subject by virtue of the Naturalisation Act, 1870, s. 6, [repealed by British Nationality and Status of Aliens Act, 1914],

A which provides that a British subject who becomes naturalised in a foreign State shall from and after the time of his having become so naturalised in such State be deemed to have ceased to be a British subject and be regarded as an alien. There is no limitation that the provision shall only apply to naturalisation in time of peace, and, applying the rule of construction laid down in *Abley v. Dale* (11 C.B. at p. 301) that plain and unambiguous words are to be construed in their ordinary sense, it is clear that a British subject may cease to be a British subject and become an alien at any time.

B *The Attorney-General for the Crown.*—The Naturalisation Act, 1870, has no application to an action which in itself would be a crime. Two of the overt acts, the declaration of willingness to take up arms and taking the oath of allegiance to the South African Republic, were committed by the prisoner before he was naturalised, if he ever was naturalised. A state of war puts an end to all non-hostile relations between the subjects of enemy States: *HALL'S INTERNATIONAL LAW* (4th Edn.), part 3, ch. 1, p. 405. The whole transaction between the prisoner and the South African Republic was entirely void. It was a contract with the enemy State that a British subject will join it in making war on his own country, and was a void and criminal transaction.

D **LORD ALVERSTONE, C.J.**—We have none of us any doubt whatever on this point. Having regard to the nature of these proceedings, their serious character, and the novelty of the subject, we thought it better that the point should be argued out before we expressed any decision.

E The indictment which is for aiding and comforting the government of the South African Republic and the government of the Orange Free State, alleges altogether some fifteen overt acts; but for the purpose of this argument it is important to draw the distinction between the two first overt acts that are alleged—a declaration, to the terms of which I will refer, and an oath of allegiance to the government of the South African Republic, which are admitted, except upon the point whether they preceded the naturalisation which Colonel Lynch is supposed to have obtained. The other acts, which may shortly be summarised as taking part in deliberate acts of warfare against the British forces, need not be discussed in detail, because they are all acts, for this purpose, of the same character—namely, acts of warfare or in aid of warfare against the forces of the Crown after the period when it is said Colonel Lynch obtained naturalisation. It is not disputed by his counsel that but for the Act of 1870 this case must have gone to the jury. The prisoner's leading counsel, with frankness, began his argument by stating that he could not contend that before the Act of 1870 what was charged in this indictment would not be a crime according to the law of England; nor did he contend that it is not a crime at the present time and according to the law of England, except in so far that he contends that s. 6 of the Act of 1870 prevents a man who has obtained naturalisation from being charged any longer with the act as an unlawful act. I will read the two sections of the Act in order that my statement of my view of the law may be complete in itself. Section 6, so far as it is material, is as follows:

I “Any British subject who has at any time before or may at any time after the passing of this Act when in any foreign State and not under any disability voluntarily become naturalised in such State shall from and after the time of his so having become naturalised in such foreign State be deemed to have ceased to be a British subject, and be regarded as an alien.”

Section 15 provides:

“Where any British subject has in pursuance of this Act become an alien, he shall not hereby be discharged from any liability in respect of any acts done before the date of his so having become an alien.”

Counsel contends that, having regard to the general considerations which he enlarged upon at great length with reference to the motive and object of this legislation, that this Act contemplates a person being naturalised during war, and contemplates protection from the consequences of illegal acts, which acts were done by the subject before naturalisation. A

It cannot be seriously contended that the two first material acts here charged were not done before naturalisation; they are the basis of naturalisation; and without them naturalisation could not have been obtained at all. The first act is that the prisoner made and signed this declaration: B

"I, the undersigned, Arthur Alfred Lynch, up to the present time an Irishman (British subject), born at Australia, inhabitant in the South African Republic since five days, hereby declare my willingness to take up arms for this Republic in order to maintain and defend its independence, which now is, or in the future may be, threatened, and, therefore, desire to take the oath of allegiance as a full burgher in the South African Republic. Signed at Pretoria on the 18th January, 1900," C

and witnessed or registered by a field cornet. It is upon the evidence, which if I am right in the view I take of the law, on that date—Jan. 18—war was being waged between the Boer forces and the British forces, war having been declared in the previous month of October. The other document is the oath of allegiance to the South African Republic, which was taken in order to obtain letters of naturalisation. D

I am quite clearly of opinion that s. 6 in no way justifies the argument that a person is excused from the consequences of being naturalised; it only deals with what is to happen to a person after he has been naturalised; and, if it was a crime at the time of the passing of this Act to become naturalised under the circumstances under which this prisoner did become naturalised, there is nothing whatever in this section which relieves him from the consequences of that act or make it otherwise than a criminal act. It follows from that that the very language of s. 15 leaves such a person liable to the consequences of the act which he has committed, and in respect of which he ex hypothesi is charged. The declaration which enabled him to get enfranchised, and the taking of the oath of allegiance to the King's enemies were acts which cannot, in my opinion, be regarded as being other than acts which are fit to be considered by the jury as overt acts of treason, notwithstanding what had happened on Jan. 18. There is, in my opinion, nothing in the Act of 1870 that can justify the contention that an act of treason can give any rights to any person whatever. If an act of treason was to be allowed by the law of England to give rights to a person, it must be found in clear and explicit language, and not be a construction put upon general language framed with another intent, and designed to serve another different and most useful purpose. A declaration of war prevents subjects from making arrangements with the King's enemies when such arrangements constitute crimes against the law of the country to which they owe allegiance. E
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Many more reasons might be given for the decision at which I and my brethren have arrived, but I have felt it right simply to express, in the plainest language I can use, the main grounds upon which I come to the conclusion that the Act of 1870 affords no defence, and has for the purpose of this trial, no bearing upon any one of the overt acts which are alleged in the indictment. I

WILLS, J.—I am of the same opinion. I think that it is impossible to contend that the two acts which preceded the letters of naturalisation were not such acts as are fit to be submitted to the jury as evidence of treason committed. There certainly is nothing in the Act of 1870 which could make the letters of naturalisation, supposing they were valid, cover those two transactions. It seems to me, with regard to the rest of the case, sufficient to put my opinion into one sentence, which is that I have never been able from the beginning of this long argument to comprehend how it could possibly be that an act of treason should give rights of any sort—civil

A rights or rights in the nature of an exemption from criminal responsibility to the person who has been guilty of them. These preliminary acts having been done in furtherance of the process of getting letters of naturalisation, being themselves criminal and treasonable, are evidence of treason. It appears to me to be impossible that any such exemption as is contended for can be claimed in virtue of the subsequent grant of the letters of naturalisation. I am never disposed to put too much stress upon the consequences of legal argument, but I would point out that if the argument on behalf of the prisoner be sound, a regiment, a battalion, or a division of an army might, by each person accepting individually a letter of naturalisation from the enemy, desert in the hour of battle, and yet no man be subject to the penalties of treason. It seems to me so extravagant a conclusion that it affords an additional argument for saying that the foundation of the argument upon which it is founded cannot possibly be sound.

CHANNELL, J.—I am of the same opinion. It seems to me to be an extremely plain case. The only real question before us is the construction of s. 6 of the Naturalisation Act, 1870, and admitting the proposition that it is right for the court to look at the words of an Act of Parliament and to attribute to them their ordinary meaning, it seems to me that there is not a word in the section that can possibly bear the interpretation that is sought to be put upon it. The Act is not dealing with the circumstances under which naturalisation may be legal or may be illegal; it is dealing with the consequences of naturalisation. It is assumed throughout the section, both in the words we have been considering and also in the proviso which follows upon it, that naturalisation exists and is not in itself unlawful. Then it says that where naturalisation in a foreign State has taken place or may take place, it shall have certain consequences; it does not make naturalisation under the particular circumstances more legal or more illegal than it was before. It is agreed that before then naturalisation with a foreign State with which we were at peace was perfectly legal, but with an enemy it was obviously illegal and a clear case of treason. There are no words in this Act of Parliament to affect it in the least. The result is, therefore, so far as the first overt act was concerned, it was an act of treason. That being so, that settles all questions without any reference to s. 15 of the Act. This was, in my view, one transaction, a declaration made for the purposes of naturalisation, followed by naturalisation on the same day, so that might fairly be treated as one transaction, and, therefore, it does not seem to me that s. 15 helps the case very much. The subsequent acts stand no doubt upon a different footing, but I am quite prepared to adopt everything said by my Lord on that branch of the case, and I do not think it necessary to say anything further on it.

The trial was continued, the prisoner being found guilty and sentenced to death.*

H Solicitors : *Solicitor to the Treasury*; *Charles Russell & Co.*

[*Reported by A. A. BETHUNE, ESQ., Barrister-at-Law.*]

*The sentence was commuted to penal servitude for life, but after one year Lynch was released and later was pardoned.

DUKE OF BEDFORD *v.* ELLIS AND OTHERS

[HOUSE OF LORDS (The Earl of Halsbury, L.C., Lord Macnaghten, Lord Morris and Killanin, Lord Shand and Lord Brampton), May 8, 10, August 6, December 10, 1900]

[Reported [1901] A.C. 1; 70 L.J.Ch. 102; 83 L.T. 686; 17 T.L.R. 139]

Practice—Parties—Representative parties—“Persons having same interest in one cause or matter”—Need to prove beneficial proprietary right in subject-matter of claim—Assertion of violation of statutory right—R.S.C. Ord. 16, r. 9.

By R.S.C., Ord 16, r. 9: “Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued . . . on behalf or for the benefit of all persons so interested.”

Persons may sue in a representative capacity under this rule if they and the class they represent have a common interest, e.g., the assertion of a right alleged to have been created in the class by statute, and a common grievance, e.g., that that right has been violated, and all seek the same remedy which is beneficial to them all. It is not necessary that the class represented should assert some beneficial proprietary right in the subject-matter of the claim.

Temperton v. Russell (1), [1893] 1 Q.B. 435, overruled.

Notes. Considered: *West v. Sackville*, [1903] 2 Ch. 378; *Chapman v. Michaelson*, [1909] 1 Ch. 238; *Markt v. Knight Steamship Co.*, *Sale and Frazer v. Knight Steamship Co.*, [1910] 2 K.B. 1021. Referred to: *Taff Vale Rail. Co. v. Amalgamated Society of Railway Servants*, [1901] A.C. 426; *Crosfield v. Manchester Ship Canal Co.* (1904), 90 L.T. 557; *Janson v. Property Insurance* (1913), 30 T.L.R. 49; *Vacher v. London Society of Compositors*, [1911-13] All E.R. Rep. 242; *Guaranty Trust Co. of New York v. Hannay*, [1914-15] All E.R. Rep. 24; *Mercantile Marine Service Association v. Toms*, [1914-15] All E.R. Rep. 1147; *Churchill v. Whetnall*, *Aberconway v. Whetnall* (1918), 119 L.T. 34; *Esquimalt and Nanaimo Rail. Co. v. Wilson*, [1918-19] All E.R. Rep. 836; *Hardie and Lane v. Chiltern* (1927), 96 L.J.K.B. 773; *Smith v. Cardiff Corpn.*, [1953] 2 All E.R. 1373; *J. Bollinger v. Costa Brava Wine Co., Ltd.*, [1961] 1 All E.R. 561.

As to representative, and joinder of, parties, see 30 HALSBURY'S LAWS (3rd Edn.) 315-318, and for cases see DIGEST (Practice) 399-403, 407-413, 415-422.

Cases referred to:

- (1) *Temperton v. Russell*, [1893] 1 Q.B. 435; 62 L.J.Q.B. 300; 68 L.T. 425; 57 J.P. 518; 41 W.R. 321; 9 T.L.R. 304; 37 Sol. Jo. 303; 4 R. 302, C.A.; Digest Practice 416, 1132.
- (2) *Chaytor v. Trinity College, Cambridge* (1796), 3 Anst. 841.
- (3) *Gray v. Chaplin* (1826), 2 Sim. & St. 207; 2 Russ. 126; 38 E.R. 283, L.C.; 21 Digest (Repl.) 437, 1453.
- (4) *Warrick v. Queen's College, Oxford* (1871), 6 Ch. App. 716; 40 L.J.Ch. 780; 25 L.T. 254; 19 W.R. 1098, L.C.; 11 Digest (Repl.) 16, 179.
- (5) *Adair v. New River Co.* (1805), 11 Ves. 429; 32 E.R. 1153, L.C.; 30 Digest (Repl.) 341, 32.
- (6) *Cockburn v. Thompson* (1809), 16 Ves. 321; 33 E.R. 1005, L.C.; 24 Digest (Repl.) 818, 8086.
- (7) *Sandes v. Wildsmith*, [1893] 1 Q.B. 771; 62 L.J.Q.B. 404; 69 L.T. 387; Digest (Practice) 402, 1033.

Also referred to in argument:

Weale v. West Middlesex Waterworks Co. (1820), 1 Jac. & W. 358; 37 E.R. 412, L.C.; 42 Digest 748, 1720.

- A** *Stodd v. Lawson*, [1898] 2 Q.B. 44; 67 L.J.Q.B. 718; 78 L.T. 729; 14 T.L.R. 421; 46 W.R. 626, C.A.; 9 Digest (Repl.) 540, 3549.
- Dewling v. Lloyd* (1855), 3 Drew. 227; 3 Eq. Rep. 737; 24 L.J.Ch. 679; 25 L.T.O.S. 62; 1 Jur.N.S. 769; 3 W.R. 364; 61 E.R. 890; 9 Digest (Repl.) 56, 175.
- Re Islington Market Bill* (1835), 3 Cl. & Fin. 513; 12 M. & W. 20, n.; 6 E.R. 1530; 33 Digest 552, 352.
- B** *Ineson v. Moore* (1669), 1 Ld. Raym. 486; Carth. 451; Comb. 480; 1 Com. 58; Holt, K.B. 10; 1 Salk. 15; Willes, 74, n.; 91 E.R. 1224; sub nom. *Jeveson v. Moor*, 12 Mod. Rep. 262; 26 Digest (Repl.) 312, 590.
- A. G. v. Dean and Canons of Windsor* (1858), 24 Beav. 679; 27 L.J.Ch. 320; 32 L.T.O.S. 55; 22 J.P. 592; 4 Jur.N.S. 818; 6 W.R. 220; 53 E.R. 520; on appeal (1860), 8 H.L.Cas. 369; 30 L.J.Ch. 529; 2 L.T. 578; 24 J.P. 467; 6 Jur.N.S. 833; 8 W.R. 477; 11 E.R. 472, H.L.; 22 Digest (Repl.) 176, 1603.
- C** *Ashby v. White* (1703), 2 Ld. Raym. 938; Holt, K.B. 524; 6 Mod. Rep. 45; 1 Salk. 19; 3 Salk. 17; 92 E.R. 126; reversed (1704), 1 Bro. Parl. Cas. 62; 14 State Tr. 695; 1 E.R. 417, H.L.; 33 Digest 549, 317.
- A.-G. v. Great Eastern Rail. Co.* (1879), 11 Ch.D. 449; 48 L.J.Ch. 428; 40 L.T. 265; 27 W.R. 769, C.A.; affirmed (1880), 5 App. Cas. 473; 49 L.J.Ch. 545; 42 L.T. 810; 44 J.P. 648; 28 W.R. 769, H.L.; 42 Digest 606, 70.
- Smurthwaite v. Hannay*, [1894] A.C. 494; 63 L.J.Q.B. 737; 71 L.T. 157; 43 W.R. 113; 10 T.L.R. 649; 7 Asp. M.L.C. 485; 6 R. 299, H.L.; 41 Digest 537, 3643.
- Moxley v. Alston* (1847), 1 Ph. 790; 4 Ry. & Can. Cas. 636; 16 L.J.Ch. 217; 9 L.T.O.S. 97; 11 Jur. 315; 41 E.R. 833, L.C.; 9 Digest (Repl.) 715, 4740.

E **Appeal** from a decision of the Court of Appeal (SIR NATHANIEL LINDLEY, M.R., and RIGBY, L.J., VAUGHAN WILLIAMS, L.J., dissenting), reported [1899] 1 Ch. 494, reversing a decision of ROMER, J., in an action brought by the respondents against the appellant in respect of the management of Covent Garden Market, of which he was owner.

F *Levett, Q.C.*, and *Danckwerts, Q.C.*, for the appellant.
Asquith, Q.C., and *J. T. Prior* for the respondents.

Their Lordships took time for consideration.

Dec. 10, 1900. The following opinions were read.

G **THE EARL OF HALSBURY, L.C.**—In this case I feel some difficulty as to the judgment that I ought to pronounce. It is not a judgment upon the merits of the case, but it is in an interlocutory proceeding alleging that the action is improperly constituted, and insisting upon the necessity of selecting some one or more plaintiffs who shall represent the same rights. I have read the opinion about to be delivered by LORD BRAMPTON, and I agree with it, but I have great difficulty in arguing the question upon an interlocutory proceeding, for this reason. It appears to me that one of the questions which will undoubtedly arise in the course of the case will be the question of what rights, if any, exist among the different members of the class—those persons who are put together here as plaintiffs, and I have found myself in the difficulty that, if I gave all the reasons for which I agree with LORD BRAMPTON, it appears to me that it would be impossible for me afterwards to take a different view when the question comes to be tried at the hearing of the cause. I think that it might prejudice some of the questions which are to be argued before your Lordships and have not yet been argued, and I might find extreme difficulty myself in deciding what I should say to your Lordships now to avoid prejudicing those questions which have not been argued yet. The result is that, while I content myself with saying that I agree with LORD BRAMPTON in differing from what has been done in the court below, I do not propose to give any reasons for my adherence to his view.

LORD MACNAGHTEN.—The action in which this application was made relates to the right of accommodation in Covent Garden Market. The market belongs to the Duke of Bedford, but it is regulated by the provisions of the Covent Garden Improvement and Regulation Act, 1828 (9 Geo. 4, c. cxliii). The Act is concerned with the persons who come to the market to buy or to sell. No toll is payable by those who buy unless the articles bought are again sold within the market or exposed for sale there. The persons who come to sell have to pay rent and toll. They are divided into two classes—those who sell their own produce, and those who are dealers in the market, or middlemen. For some reason or other the Act purports to confer certain advantages and certain preferential rights on the persons who come to sell their own produce. It may be that at the time when the Act was passed market gardeners in the county of Middlesex were not without influence in the electorate. It may be that in those days protection was not such an odious thing as it is now in the eyes of some people who worship political economy. Whatever the reason may have been, it cannot be denied that the Act apparently does give a preference to those who are described as growers of fruit, flowers, vegetables, roots, or herbs.

Several people come forward as plaintiffs. They allege that they are growers within the meaning of the Act. They claim to be entitled under the Act to certain advantages and preferential rights. They say that the duke, who is lord of the market, persistently ignores their rights and favours the middlemen, from whom he is authorised to exact higher tolls. They sue on behalf of themselves and all other the growers of fruit, vegetables, roots, or herbs within the meaning of the Act. They seek a declaration as to the true construction of the Act, an injunction to restrain the infringement of their alleged statutory rights, and an account of the moneys by which, as they allege, they have been severally overcharged. The duke has applied by summons to stay the action on two grounds, which were mixed up in the argument but ought, I think, to be kept separate and distinct. The principal ground is that the plaintiffs are not entitled to sue in a representative character in defence of their alleged statutory rights. The other ground, which is a matter of very slight moment, is that they cannot join as co-plaintiffs in respect of their several grievances. The whole dispute in the present case has arisen from confusing these two matters. They have really nothing to do with each other. If the persons named as plaintiffs are members of a class having a common interest, and if the alleged rights of the class are being denied or ignored, it does not matter in the least that the nominal plaintiffs may have been wronged or inconvenienced in their individual capacity. They are none the better for that and none the worse. They would be competent representatives of the class if they had never been near the duke; they are not incompetent because they have been turned out of the market. In considering whether a representative action is maintainable you have to consider what is common to the class, not what differentiates the cases of individual members.

ROMER, J., acceded to the defendant's application, influenced, or rather, I should say, compelled, by an expression in the judgment of the Court of Appeal in *Temperton v. Russell* (1), which has found its way into recent books of practice as a compendious and authoritative statement of the law. In *Temperton v. Russell* (1) the court was composed of LORD ESHER, M.R., and LINDLEY and BOWEN, L.JJ. The judgment of the court was delivered by LINDLEY, L.J. His Lordship is represented as saying that Ord. 16, r. 9, which provides for persons suing or being sued as representing a class,

“only extends to persons who have or claim some beneficial proprietary right which they are asserting or defending.”

It cannot be said that the plaintiffs in this case are asserting any beneficial proprietary right. If that be a condition of suing in a representative character the plaintiffs are out of court. But it seems to me that there is no reason whatever for so restricting the rule, which was only meant to apply the practice of the Court

A at Chancery to all Divisions of the High Court. The old rule in the Court of Chancery was very simple and perfectly well understood. Under the old practice the court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you never could "come at justice," to use an expression in one of the older cases, if everybody interested was made a party the rule was not allowed
B to stand in the way.

It was originally a rule of convenience; for the sake of convenience it was relaxed. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent. To limit the rule to persons having a beneficial proprietary interest would be opposed to precedent, and not, I think, in accordance with common
C sense. Take the case of a creditor's suit, which, perhaps, was the earliest instance of plaintiffs being allowed to sue in a representative character. It can hardly be suggested that a creditor has a proprietary interest in the real or personal estate of his deceased debtor. Take another case, which was common enough in former times: *Chaytor v. Trinity College, Cambridge* (2). One parishioner would sue on behalf of himself and all the other parishioners to establish a modus in lieu of tithes.
D There was no beneficial proprietary interest there. The choice lay between two evils, and the plaintiff, suing in a representative character, insisted on choosing the lesser of the two. Again, in *Gray v. Chaplin* (3), two shareholders of a navigation were held justified in suing on behalf of themselves and all other the shareholders except the defendants, in order to enforce their alleged statutory rights under an Act of Parliament. The equity in that particular case happened to be very shadowy, and the receiver appointed by the Vice-Chancellor was afterwards discharged by Lord
E ELDON; but it was not suggested in the argument before his Lordship that the Vice-Chancellor had been in error in holding the suit as regards the plaintiffs properly constituted. There are plenty of other cases which show that, in order to justify a person suing in a representative character, it is quite enough that he has a common interest with those whom he claims to represent. In *Warrick v. Queen's College, Oxford* (4) the question was whether persons with titles diverse in origin and rights in some respects distinct, could be combined as plaintiffs in a suit to redress a grievance common to all.

No such question can arise here. All growers have the same rights. They all rely on one and the same Act of Parliament as their common charter. I do not
G think it necessary to say anything more upon this point. I have only said so much because I find that the learned lord justice, who dissented from his colleagues, still maintains a position which LINDLEY, L.J., abandoned, if, indeed, he ever took it up, which for my part I very much doubt. VAUGHAN WILLIAMS, L.J., puts the successful argument, or the argument intended to be successful, in the mouth of the defendant. It seems to rest on two main grounds—(i) that the special rights apparently conferred upon the growers are public rights—a proposition which I confess that I do not
H understand; and (ii) that those special rights confer on the growers no right of property whatever—a proposition which I suppose everybody would concede. It is rather a pity when a case like *Temperton v. Russell* (1) finds its way into the reports. The attempt made there to invest the defendants with a representative character was absurd on the face of it. When a judge comes to deal with a case of that sort, and
I tries to deal with it seriously, as if there was something in it, he is very apt, I think, to express himself unguardedly, and so it happens sometimes, as it happened, I suppose, in *Temperton v. Russell* (1), that what was only meant for an illustration is taken for a definite and exhaustive statement of law.

There is one point—a point of no practical importance—on which I venture respectfully to differ from the Court of Appeal. I doubt whether it is accurate to say that in the case of representative suits we have advanced a long way since the days of Lord ELDON. It is of course not necessary nowadays to go to a court of law in order to establish legal rights. But in all other respects I think the rule as to

representative suits remains very much as it was 100 years ago. From the time it was first established it has been recognised as a simple rule resting merely upon convenience. It is impossible, I think, to read such judgments as those delivered by LORD ELDON in *Adair v. New River Plate Co.* (5), in 1805, and in *Cockburn v. Thompson* (6), in 1809, without seeing that LORD ELDON took as broad and liberal a view on this subject as anybody could desire. He said in the latter case :

"The strict rule was that all persons materially interested in the subject of the suit, however numerous, ought to be parties . . . but that, being a general rule established for the convenient administration of justice, must not be adhered to in cases to which, consistently with practical convenience, it is incapable of application."

He added: "It was better to go as far as possible towards justice than to deny it altogether." He laid out of consideration the case of persons suing on behalf of themselves and all others "for in a sense," he said, "they are before the court." As regards defendants, if you cannot make everybody interested a party you must bring so many that it can be said they will fairly and honestly try the right. I do not think that we have advanced much beyond that in the last 100 years, and I do not think that it is necessary to go further, at any rate for the purposes of this suit.

It would be highly improper at this stage of the proceedings to say anything which might prejudice the construction of the Act of 1828. That is a matter for the hearing. But, out of respect for the arguments of counsel, I will venture to make one or two general observations. It was said that the growers are so fluctuating and indefinite a body that it is impossible to tell who is or who is not a grower, especially in these modern times when there are such improved facilities for carriage of goods. I cannot say that I am much impressed with that difficulty. It seems to me that the description of the persons apparently intended to be favoured by the Act is sufficient for all practical purposes. It may be difficult or impossible to compile a catalogue of growers. But there cannot, I think, be much difficulty in determining whether a particular person who claims a preferential right to a vacant stand in the market is a grower or not. Then it was urged that after all it is for the duke to regulate his own market. The Act, it was said, is merely an enabling Act; the growers have no rights whatever. Well, that is the very question to be determined at the hearing. And how can it be determined if the growers are not allowed to sue in a body? The learned counsel for the Duke of Bedford asserted that the duke was master of the situation, and might do what he liked with his own. It may be so. All I would say is that I am not at present convinced by their able and earnest arguments that the expectations apparently held out to growers by this Act of Parliament are wholly illusory, and that the duke, who is empowered by the Act to make rules, orders, and bye-laws, "not being repugnant" as the Act says, "to the laws of this realm or to the provisions of this Act," is at liberty to disregard and ignore those provisions at his own will and pleasure.

One word as to the Attorney-General, without whose presence the learned judges of the Court of Appeal thought the action ought not to proceed. The Attorney-General has been or will be made a party in obedience to the order of the Court of Appeal. From that part of the order there is no appeal. Speaking, however, for myself, I cannot see what the Attorney-General has to do with the matter. The plaintiffs do not want him; still less does the defendant. The learned counsel on both sides professed to be unable to explain this part of the order of the Court of Appeal. What is the Attorney-General to do when he comes? Is he to support the growers, or is he merely to look on and see fair play? And who is to pay his costs? That may be an interesting question some day. No one has suggested that the people who come to buy will be injured by competition between the growers and the middlemen, or that the rights of the public are in any way imperilled by this action. It might have been proper to have had the middlemen represented if the duke himself had not espoused their cause.

A So much for the principal question. The other point put forward is one of very small importance. If the main point goes against the defendant I do not suppose that he would care to succeed on the other and minor point. He would gain nothing by success. He would only lose to some extent security for his costs. The joinder of the individual plaintiffs in one action cannot embarrass or delay the trial. The language of Ord. 16, r. 1, is very wide. It must cover the case of several creditors joining as co-plaintiffs in a creditor's action. Their debts are separate, and just as much or just as little "a series of transactions" as the separate grievances of which the growers in this action complain. Assuming that the defendant has rejected the claims of the several plaintiffs on the ground that according to the true construction of the Act growers have no preferential claims to which he is bound to give effect, it appears to me that you have a series of transactions where, if the plaintiffs sued separately, a common question of law would arise. Whether I am right in this or not, it seems to me that the question, if it be a question, ought not to be disposed of adversely to the plaintiffs at this stage of the action. On these grounds I think that the appeal ought to be dismissed with costs.

D **LORD MORRIS AND KILLANIN.**—I am of opinion that this appeal should be dismissed. The action is brought by the plaintiffs asserting a common right as growers of fruit, etc., within the meaning of the Covent Garden Improvement and Regulation Act, 1828. The action is a representative one alleging a common interest—namely, the assertion of a right alleged to be created in the class by Act of Parliament. The appellant succeeded in obtaining an order from ROMER, J., that the action should be stayed. ROMER, J., was unable to come to the conclusion that the growers as a class had any proprietary rights in respect of the market. What they alleged that they had was a preferential right over the rest of the public; that should, in my opinion, be inquired into at a hearing in the ordinary way, when, if they cannot establish such preferential rights as a class, they will be defeated. If they have such a right, some of the class are entitled to sue on behalf of themselves and others. I entirely concur in the opinion of LORD MACNAGHTEN, which deals very fully and conclusively with the right to sue in that character. I do not at all mean to prejudge the question whether the plaintiffs may not fail on the hearing of the cause on a fuller consideration of the Act considered in relation to the evidence that may be adduced. I conceive and foresee considerable difficulty in the way of the plaintiffs in being able to define what was the status or class of a "grower" in the year 1829, and in applying such a description to present times, and also whether the preference conferred was not given to sales of the articles specified, and not to the grower of them, and whether there is granted anything beyond a permission to the Duke of Bedford and his heirs to let. These and other questions will be dealt with on the hearing. I merely decide that, in my opinion, the appellant cannot get rid of the action by the short cut resorted to.

H **LORD SHAND.**—The rule of court (Ord. 16, r. 9), the effect of which is the subject of controversy between the parties in this case, is in these terms :

"Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued . . . in such cause or matter on behalf or for the benefit of all persons so interested."

I I am of opinion, with the majority of the Court of Appeal, that the rule applies to this case, and that the appeal should, therefore, be dismissed. The rule has been framed and adopted for a useful and important object—the saving of the multiplication of actions, with the attendant costs, in cases where one action would serve to determine the rights of a number of persons in a question with another party called as defendant. A series of different actions one after another by different plaintiffs is to be no longer necessary in cases where numerous persons have "the same interest in one cause or matter," for in such cases "one or more of such

persons may sue on behalf or for the benefit of all persons so interested." The rule is obviously one of advantage, not only to plaintiffs, but to defendants also, in the way of saving multiplication of suits, and it is of much importance to note—as observed by LORD MACNAGHTEN—that it only applies the practice of the Court of Chancery to all Divisions of the High Court. A

Have not, then, the plaintiffs stated a case in which they have all "the same interest" in the cause or matter, or in each of the different matters which are the subject of the action? It seems to me, on examination of the claims, and of the plaintiffs' statements in support of these claims, that they have stated such a case. In order to show that this is so, I do not think it necessary to go into much detail. The original right to the market was conferred by letters patent on the Earl of Bedford many years ago, and was the subject of an Act of 53 Geo. 3. In 1828 the Covent Garden Improvement and Regulation Act, the provisions of which are founded on by the plaintiffs, was passed. That statute recognises and specifies various classes of permanent stands in the market under the different heads of "Casual Cart Stands," "Yearly Cart Stands," and "Yearly Pitching Stands," and by its enactments confers important and valuable privileges as to the use of such stands on a class of persons designated as "the growers of fruit, flowers, vegetables, roots, or herbs," at certain rates scheduled in the Act. These privileges, which are not said to have been abrogated, appear to entitle such growers to rights of priority in the occupation of the stands for the purposes of their business, and that at the rates there specified. It is alleged in the record by the plaintiffs (i) that they are growers of fruit, flowers, vegetables, roots, or herbs, within the meaning of the statute; (ii) that the defendant, the present Duke of Bedford, refuses to give them and other "growers" the privileges of the occupation of the various classes of stalls to which they have right under the statute; and (iii) that when they do get such occupation the rates charged exceed those allowed by the statute. B C D E

For the purposes of the present preliminary point of procedure only, these statements must be taken to be true, and on this assumption the question raised is: Does the rule of court apply to the action? At the trial questions may arise whether the plaintiffs are within the meaning of the statute "growers of fruit, flowers, vegetables, roots, or herbs" as they allege. The statute was passed long before railways were used, and when the carriage of flowers, fruit, and vegetable produce in quantities to market was made by carts and waggons, but the plaintiffs, who allege that they are such "growers" as the statute describes, are each, according to the statement, in the occupation of land in the county of Middlesex, and have been frequenters of the market for business purposes, and there is no reason to doubt the title of each to sue on his own account. Then all the plaintiffs make the same claims to the exercise of the same rights and privileges, which the appellant refuses to recognise; and all of them rest their claims on the same ground—viz., the statutory provision of privileges in their favour as growers such as they describe themselves as being. This is, I think, apparent from the plaintiffs' statements in regard to the "casual cart stands," the "yearly cart stands," and the "yearly pitching stands," and the tolls exacted by the defendant for the use of them. The plaintiffs in their character of "growers" claim statutory and preferential rights to the use of these stands, and allege that the defendant refuses to give them such preferential use, and F G H

"makes it a practice either to refuse to growers the use of such stands, or by filling such stands with others than growers to prevent growers from having the use of such stands, with the result that growers have to go to other parts of the market, or to places outside the market, or to the public streets, where, the restrictions contained in the said Act not being applicable, the defendant charges higher rates than would have to be paid under the Act, and with the further result of injury to growers in their trade." I

These statements seem to me to amount clearly to an averment not only of the existence of preferential rights, and of the same, or substantially the same, preferen-

A and rights in all the plaintiffs, but to a charge against the appellant that he violates these rights, or refuses to give effect to them; and it follows that the plaintiffs have the same interest in the cause or matter of the complaint. There is no difference in their claims. They all ask the same remedy, which it is unnecessary to specify further than to say that they all claim a declaratory decree by the court which shall give effect to their statutory privileges—the same in the case of each of them—as

B growers of fruit, flowers, and vegetables, and an injunction to restrain the appellant from doing any act contrary to such declaratory decree. There is thus one cause or matter only in which all the plaintiffs have an interest; and other growers have the same interest in it as disclosed in the record, that matter being the disregard by the defendant of their statutory privileges, for which accordingly one and the same remedy in the form of the different heads of claim is asked. To that case the rule in

C question seems to me in its terms directly to apply, and, accordingly, the objection to the competency of the action is, I think, unfounded.

There is one head of the claim which is, no doubt, in a different position, and there was not much said as to it in the appellant's argument—I mean a claim by each of the plaintiffs for repayment to him of alleged excessive charges for six years for market accommodation. This is a subsidiary matter, and it is not a claim made

D “on behalf of all other growers of fruit, flowers,” etc., to which alone the appellant's objection to the representative character of the action applies. The real cause or matter in dispute, and raised by the statement of claim, is the nature and extent of the plaintiffs' privileges in the use of the market stands, and to the effect of determining this the action is competent. This being so, it will be found convenient to both parties to have the subsidiary matter of excessive charges made against each

E plaintiff determined in the same cause, and I do not see any ground for holding that it is incompetent to do so.

The judgment of ROMER, J., proceeds on the view that the plaintiffs in any action seeking the benefit of the rule in question must allege and possess some “proprietary” right which it is their joint object to vindicate. This is clear throughout his Lordship's judgment, which is founded on what was said by LINDLEY, L.J., in

F *Temperton v. Russell* (1). At the beginning of his judgment ROMER, J., says expressly that, as pointed out in *Temperton v. Russell* (1), the rule

“only extends to cases where the class have or claim some beneficial proprietary right which is being asserted or defended. I have therefore to consider whether the growers in question as a class have or claim a beneficial proprietary right

G under the above Act which is being asserted in this action. I am unable to come to the conclusion that the growers as a class have any proprietary rights in respect of the market.”

His judgment proceeds on the ground that the absence of “proprietary” rights excludes the application of the rule. In effect it appears to me that the judgment of

H VAUGHAN WILLIAMS, L.J., is founded on the same view, for he observes that the plaintiffs allege that the Act gives them “certain preferential rights constituting some sort of proprietary interest in them,” and holds that this is not given by the statute. But if his Lordship proceeded on the view of the absence of an interest in common in the plaintiffs I cannot agree with him, and the judgment of LORD HATHERLEY, L.C., in *Warrick v. Queen's College, Oxford* (4) is, I think, a direct authority on the

I point contrary to the view of the lord justice. *Temperton v. Russell* (1) was not a case founded on any alleged right claimed by the plaintiff, such as the plaintiffs here allege. The action was one of tort, and officers of a number of trades unions or societies sued as defendants by one plaintiff were charged with maliciously procuring workmen to break their contracts with the plaintiff, with enticing workmen from his employment, and with intimidating workmen in his service, and the defendants were sued “not only on their own behalf, but as representing all the members” of their various societies. The court refused to allow these last words to remain in the claim to the effect of making the action a representative one as

regards the defence. It is true that in that case *LINDLEY, L.J.*, used the expression on which *ROMER, J.*, proceeded in his judgment in this case, that the rule in question only extends to cases where the class have or claim some beneficial "proprietary" right which is being asserted or defended. A

In my judgment, this expression unduly limits the application of the rule, and was unnecessary for the decision of the case of tort then under the consideration of the court, and *LINDLEY, L.J.*, evidently did not contemplate that the rule would not include such a case as the present, for his Lordship has held in his judgment that the rule does apply in this case. There is no such word as "proprietary" in the rule, and no good reason, in my opinion, for holding that word by implication to be a part of the rule. The sole test to be applied is that of "the same interest" in one cause or matter. The order, in my opinion, applies equally to the case such as occurs here, where the plaintiffs seek to enforce a disputed personal right or rights common to all of them by gaining, or indicating possession of, a valuable privilege, as it does when, being in possession of a privilege, the plaintiffs seek to enforce a possessory right in a question with a trespasser or a third party in some way injuring their possession itself by opposition to its exercise. B C

LORD BRAMPTON.—Under the Covent Garden Improvement and Regulation Act, 1828, the area of Covent Garden Market, as described in the preamble of the Act, was re-arranged according to a plan therein referred to, and the several portions were appropriated as directed by the Act, and sets of stands were marked out or erected for the accommodation of carts, etc., bringing fruit, flowers, vegetables, roots, or herbs to the market, and for the reception, exposure for sale, and sale of such fruit, etc. D E

For the purposes of the present question it will not be necessary to refer in detail to more than three of such sets of stands—namely, those described in the Act and indicated on the plan respectively by the letters, B, C, F, and G. B signifies what are in the Act called "the Casual Cart Stands," C "the Yearly Cart Stands," and F and G "the Yearly Pitching Stands." The uses to which each set of stands was exclusively appropriated are mentioned and described in s. 7 of the Act. B was exclusively appropriated to the reception of waggons and carts in which fruit, etc., shall be brought to the market for sale, and for the exposing to sale and selling such fruit, etc., on the stand to which it shall be brought; it being further enacted that the growers of fruit, etc., shall be deemed to be the persons having the preferable right to resort to such stands. C shall be exclusively appropriated to the reception of waggons and carts of or belonging to growers of fruits, etc., and to the exposing for sale and selling the fruits, etc., grown or raised by such growers, and be let by the owners of the market by the year or for any shorter period at such yearly or other rents, etc., as are mentioned in the schedule; and the person to whom any such stand shall be let shall be deemed to be the holder thereof, and the person having the preferable right to resort thereto. F and G shall be exclusively appropriated to exposing to sell and selling fruit, etc., and may be let by the owners of the market exclusively to growers of fruit, etc., by the year, or for any shorter period; and the person to whom any such stand shall be let shall be deemed to be the holder thereof and the person having the preferable right to resort thereto. The use of each of these stands is subject to the rents, tolls, or sums of money mentioned in the schedule to the Act. Each of the respondents, who are the plaintiffs in the action, alleges that he is a grower of fruit, flowers, vegetables, roots, and herbs within the meaning of the Act, and a frequenter of the market for the sale thereof, and as such they sue in this action on behalf of themselves severally and all others the growers of fruit, etc. F G H I

It is essential to the right understanding of the question—namely, whether as the record now stands, all the six plaintiffs are, according to the practice and procedure of the court, entitled to sue in one action, not only in respect of their own separate and several alleged causes of action, but also on behalf of all other growers

A of fruit, etc., by reason of the alleged illegal conduct of the defendant in non-compliance with any of the provisions of the Act—that I should state what are the several grievances complained of in the claim. I shall then be in a condition to point out—first, the objections which I think exist to allowing all these six plaintiffs to sue together and join in this action, and then the reasons why I think that the representative right of the six plaintiffs to sue on behalf of other growers not parties

B to the record ought to be limited, and to what extent. The first seven clauses of the statement of claim are merely introductory averments. The charging part of the claim commences with para. 8, which is nothing more than a general complaint that the defendant does not in his management of the market comply with the provisions of the Act, and in particular with reference to the Casual Cart Stands B, the Yearly Cart Stands C, and the Yearly Pitching Stands F and G, and the tolls

C exacted by the defendant for the use of those stands. Paragraph 9 submits that the defendant has not the right to admit others to the use of the casual cart stands so long as growers present themselves and require the use thereof, but that he makes it a practice either to refuse the use of such stands, or, by filling them with others than growers, prevents growers from having the use of them, with the result that they have to go to other places where they have to pay higher rates. In neither

D of these two paras. 8 and 9, is any cause of action stated to exist in any one of the plaintiffs in respect of the casual cart stands, nor is it alleged that the plaintiffs jointly, or either of them individually, ever sustained any damage by such alleged misconduct.

Paragraph 10 complains that each of the four plaintiffs, Ellis, Gray, Miller, and

E Ashby, has applied to the defendant for a tenancy of a yearly cart stand, and in each case a tenancy has been refused, no objection being made to either as a proper tenant. It then alleges habitual misconduct of a similar character towards growers generally, naming none, with similar resulting damages, and avers that the defendant has stated his practice to be not to let such stands. I will assume for the purposes of this case that this paragraph does not state a cause of action in each

F of these four respondents, but, as I read the paragraph, it is in each a separate cause of action, and not a joint cause of action in the four. Paragraph 11 sets forth a similar character of grievance with reference to applications by the remaining two of the plaintiffs, Pullinger and Peacock, for tenancies of yearly pitching stands, averring that it is the practice of the defendant to refuse such tenancies, and by such refusals, and filling up the stands with others than growers, he interferes with

G the preferential right of growers with similar prejudicial results. In the case of these last two plaintiffs also the causes of action are several and not joint. Then follow seven paragraphs (12, 13, 14, 15, 16, 17, 18), the 12th stating generally that unlawful and excessive tolls beyond those in the schedule have been charged—and to each of the plaintiffs—but it is not alleged that such excesses have been made in respect of their positions as growers. Each of the remaining six clauses of the set

H is devoted to a separate series of alleged illegal overcharges made on each of the six plaintiffs, and claims for repayment; but those are purely separate charges not affecting anybody except the individual overcharged, and with them neither of the other plaintiffs nor the other growers have anything to do. Paragraph 19, the last, discloses no cause of action in any one of the plaintiffs, but alleges general misconduct and mismanagement when the market is full, and that traders are compelled

I to expose their goods on places where charges are not so reasonable as on the stands to which they allege that they are entitled.

The claims in the first five paragraphs are for declarations as to what the defendant is not entitled to do in respect of each of the matters above referred to, in the sixth for injunctions, and in the seventh for an account of the sums alleged to have been charged to and paid by each of the plaintiffs for six years past, in excess of, or other than the sums which the appellant was entitled to charge, and for repayment thereof to each of the plaintiffs. I cannot bring my mind to doubt that, if the plaintiffs are entitled to prosecute this claim in its entirety, the defence will

be fraught with a great deal of undesirable embarrassment. On the other hand, I think that to set it aside altogether would be to defeat the well-established procedure of the Court of Chancery under which plaintiffs suing to uphold a legal right by a suit in equity might sue on behalf not only of themselves, but also of all others having a community of interest in the upholding of that right, and would defeat also the objects contemplated by the rules referred to, made since the Judicature Act with a view to harmonise the proceedings and allow of representative actions in both Divisions of the High Court of Justice. For this reason it is that I find myself unable altogether to agree in the judgment either of ROMER, J., or of the Court of Appeal.

Before proceeding to deal with more debatable matters I will at once express my opinion that the right of the plaintiffs to sue on behalf of other growers as well as for themselves does not depend upon the question whether such other growers have proprietary rights in respect of the market, for if they have as a class any beneficial rights or interests in the market, though not strictly of a proprietary character, they may well be represented by those suing to obtain redress in respect of their individual grievances, provided that there is community of interest in one right. I would here observe that I fail to see the utility or necessity of making the Attorney-General a party to the proceedings, for the growers, although no doubt they form an important class of traders attending the market, do not represent the public.

I come now to the serious question whether all these plaintiffs are rightly joined in this action. As a fundamental rule of practice and of pleading, two or more different plaintiffs, each having a separate and different cause of action, cannot be joined in the same action. To cite authority for this proposition seems superfluous. I may, however, mention *Saudes v. Wildsmith* (7) as an illustration. Under this rule no two of the plaintiffs in this case could have been joined in this action, for the grievance of each as alleged is separate and distinct, and no joint cause of action is disclosed. Another rule of practice and pleading would, before the Judicature Act, have prevented a plaintiff from suing in the common law courts as representing anybody except himself, unless he were already a legal representative of another—e.g., an executor, public officer of a bank, etc., having special authority by law to sue on behalf of another or others. It was otherwise, however, in the Court of Chancery, as stated by SIR NATHANIEL LINDLEY, M.R., in giving judgment in this case in the Court of Appeal. Since the Judicature Act, however, two rules of the Supreme Court—Ord. 16, rr. 1, 9—have been made, apparently with a view to assimilate the practice of the common law with the rules of equity. The rules are as follows: Rule 1:

“All persons may be joined in one action as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate actions any common question of law or fact would arise . . .”

Rule 9:

“Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the court or a judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested.”

But it must be observed, according to my view, that neither the rule of equity nor the rules which I have just mentioned authorise the joinder in the same action of two or more plaintiffs suing in respect of different causes of action, nor the suing by any plaintiff on behalf of another person as well as himself except in respect of the one and the same interest in the cause or matter for which he is himself suing.

Let me now apply what I have said to the several plaintiffs and matters of complaint in the present case. As regards the first claim for a declaration as to

A the casual cart stands, though general non-compliance with the Act is alleged, no specific cause of action is stated or suggested in any one of the plaintiffs in respect of them. As regards claim No. 2, relating to the yearly cart stands, the four plaintiffs, Ellis, Gray, Miller, and Ashby, have undoubtedly stated separate causes of action in respect of which they have jointly claimed a declaration; they have also claimed injunctions and separate accounts, and repayment of excessive charges.

B They clearly are rightly joined. The same common question would have arisen if they had brought separate actions. They are also entitled to sue on behalf of all other growers having the same interest in one cause or matter—that is to say, the preferential rights which they claim to be accepted as tenants of yearly cart stands as described in s. 7 of the Act. As regards claim No. 3 to a declaration touching the yearly pitching stands, I think that the plaintiffs Pullinger and Peacock are with regard to those stands precisely in the same position as the other four plaintiffs with regard to the yearly cart stands. Their claims and the cause of action on which they are suing are not the same as those of the other four plaintiffs, and had they brought separate actions the same common questions would not arise, for the two sets of plaintiffs sue, in respect not of the same, but of different claims—that is, preferential rights to the occupation of different stands, and the obligations upon the defendant as to the letting of them are not couched in the same language. As to the “yearly cart stands,” the words relied on as making it obligatory to let are “shall be let,” but there are no words expressive of any obligation to let to a grower, and the preferable right to resort to the stand is given, not “to growers,” but to “the holder of the stand,” while as to the yearly pitching stands the words are “may be let,” and it is expressly directed that if let it shall be “to growers.”

E As a test whether these several claims are substantially different, I would ask, assume a judgment to be recovered by any of the plaintiffs against the defendant in respect of the “yearly cart stands,” and subsequently an action to be brought by the same plaintiffs against the defendant in respect of the “casual cart stands,” could the defendant plead judgment recovered? I do not think that any one could be found who would answer in the affirmative. This seems to me to prove to demonstration that the rights and causes of action are different. I think, for the reasons which I have expressed, that the rights of Ellis, Gray, Miller, and Ashby are different, and relate to other stands than those as to which Pullinger and Peacock claim to be entitled to tenancies, and that they ought not to be joined in one action, and that the claim ought to be amended by striking out all relating to one of these two sets of plaintiffs, and also to the casual cart stands, but that the claim ought not to be set aside altogether. I think, moreover, that the interests of the growers would be equally well settled by leaving as plaintiffs only one set, as I have suggested, and certainly the embarrassment would be reduced to a minimum. Unless such an amendment is made I think that the judgment of the Court of Appeal should be reversed.

G

Appeal dismissed.

H Solicitors: *R. S. Taylor, Son & Humbert; H. B. Bell.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

WRIGHT v. CARTER AND OTHERS

[COURT OF APPEAL (Vaughan Williams, Stirling and Cozens-Hardy, L.J.J.), October 28, 30, 31, November 1, 3, 4, 5, 1902]

[Reported [1903] 1 Ch. 27; 72 L.J.Ch. 138; 87 L.T. 624; 51 W.R. 196; 19 T.L.R. 29]

Solicitor—Duty to client—Gift by client to solicitor—Sale of property by client to solicitor—Presumption of undue influence—Rebuttal—Competent and independent advice to client—Duty of independent solicitor—Fairness of price on sale.

Transactions wherein a gift is made by a client to his solicitor are scrutinised by the court with the utmost jealousy. Before such a transaction can be upheld the court must be satisfied that the gift is an act of rational consideration and pure volition on the part of the client and quite uninfluenced. The court, in dealing with such a transaction, starts with the presumption that undue influence exists on the part of the solicitor and throws on him the burden of satisfying the court that the gift was uninfluenced by his position as solicitor. This presumption is not entirely irrebuttable, but it is one which is extremely difficult to rebut. To uphold a gift by client to solicitor the donor must have competent and independent advice in conferring the gift. The court must look at all the circumstances of the case, and, although the introduction of an independent solicitor to advise the client is a highly important element, it does not conclude the case: the court still requires to be satisfied that the influence arising from the relationship of solicitor and client can no longer be supposed to exist. The independent solicitor does not discharge his duty by satisfying himself simply that the donor understands and wishes to carry out the transaction. He must be fully informed of all the circumstances relating to the transaction and must satisfy himself that the gift is one which it is right and proper for the donor to make under all the circumstances in which the transaction is taking place and whether the donor's circumstances are such that a prudent man in his position would make the gift.

In the case of a sale of property by a client to his solicitor the client must be fully informed regarding all material matters. He must have competent advice, and the price which is given for the property must be a fair one. The onus of proving that these conditions have been satisfied lies on the solicitor.

Circumstances in which deeds containing provisions for a gift to a solicitor by his client and the sale of property were set aside as avoided by reason of non-compliance with the requirements set out above.

Rule laid down by LORD ELDON in *Hatch v. Hatch* (1) (1804), 9 Ves. at p. 296, applied.

Notes. Referred to: *Allison v. Clayhills*, [1904-07] All E.R. Rep. 500; *Re Coomber*, *Coomber v. Coomber* (1911), 80 L.J.Ch. 399; *McMaster v. Byrne*, [1952] 1 All E.R. 1362.

As to transactions between solicitor and client, see 36 HALSBURY'S LAWS (3rd Edn.) 85 et seq., and for cases see 42 DIGEST 76 et seq.

Cases referred to:

- (1) *Hatch v. Hatch* (1804), 9 Ves. 292; 1 Smith, K.B. 226; 32 E.R. 615, L.C.; 42 Digest 77, 687.
- (2) *Holman v. Loynes* (1854), 4 De G.M. & G. 270; 2 Eq. Rep. 715; 23 L.J.Ch. 529; 22 L.T.O.S. 296; 18 Jur. 839; 2 W.R. 205; 43 E.R. 510, L.C. & L.J.; 42 Digest 83, 745.
- (3) *Edwards v. Megrick* (1842), 2 Haro 60; 12 L.J.Ch. 49; 6 Jur. 924; 67 E.R. 25; 42 Digest 82, 738.

- (4) *Hagmann v. Bailey* (1897), 14 Ves. 273; 33 E.R. 526; 40 Digest (Repl.) 600, 1035.
- (5) *Mitchell v. Hampry* (1881), 8 Q.B.D. 587; 50 L.J.Q.B. 460; 45 L.T. 694; 29 W.R. 558, C.A.; 12 Digest (Repl.) 121, 720.
- (6) *Liles v. Terry*, [1895] 2 Q.B. 679; 65 L.J.Q.B. 34; 73 L.T. 428; 44 W.R. 116; 12 T.L.R. 26; 40 Sol. Jo. 53, C.A.; 42 Digest 78, 698.
- (7) *Powell v. Powell*, [1900] 1 Ch. 243; 69 L.J.Ch. 164; 82 L.T. 84; 44 Sol. Jo. 134; 42 Digest 78, 701.
- (8) *Tompson v. Judge* (1855), 3 Drew. 306; 3 Eq. Rep. 850; 24 L.J.Ch. 785; 25 L.T.O.S. 233; 1 Jur.N.S. 583; 3 W.R. 561; 61 E.R. 920; 42 Digest 77, 689.
- (9) *Burton v. Willis*, [1900] 2 Ch. 121; 82 L.T. 729, C.A.; 69 L.J.Ch. 609; 16 T.L.R. 602; affirmed sub nom. *Willis v. Burton*, post, p. 876; [1902] A.C. 271; 71 L.J.Ch. 609; 86 L.T. 805; 18 T.L.R. 602, H.L.; 42 Digest 78, 699.

Also referred to in argument:

- McPherson v. Watt* (1877), 3 App. Cas. 254, H.L.; 42 Digest 82, 734.
- Hankridge v. Browne* (1881), 18 Ch.D. 188; 50 L.J.Ch. 522; 44 L.T. 705; 29 W.R. 782; 12 Digest (Repl.) 115, 678.
- Rhodes v. Bate* (1866), 1 Ch. App. 252; 13 L.T. 778; 12 Jur.N.S. 178; 14 W.R. 292, L.J.J.; 42 Digest 78, 700.
- Montesquieu v. Pandys* (1811), 18 Ves. 302; 34 E.R. 331, L.C.; 42 Digest 84, 781.
- Walker v. Smith* (1861), 29 Beav. 394; 54 E.R. 680; 42 Digest 89, 808.
- Re Holmes' Estate*, *Woodward v. Humpage* (1861), 3 Giff. 337; 5 L.T. 378; 8 Jur.N.S. 252; 66 E.R. 439; 42 Digest 77, 690.
- Allcard v. Skinner* (1887), 36 Ch.D. 145; 56 L.J.Ch. 1052; 57 L.T. 61; 36 W.R. 251; 3 T.L.R. 751, C.A.; 12 Digest (Repl.) 112, 659.
- Smith v. Kay* (1859), 7 H.L.Cas. 750; 30 L.J.Ch. 45; 11 E.R. 299, H.L.; 12 Digest (Repl.) 124, 746.
- Re Haslam and Hier-Evans*, [1902] 1 Ch. 765; 71 L.J.Ch. 374; 86 L.T. 663; 50 W.R. 444; 18 T.L.R. 461; 46 Sol. Jo. 381, C.A.; 42 Digest 76, 672.
- Cockburn v. Edwards* (1881), 18 Ch.D. 449; 51 L.J.Ch. 46; 45 L.T. 500; 30 W.R. 446, C.A.; 42 Digest 87, 787.
- Pisani v. A.-G. for Gibraltar* (1874), L.R. 5 P.C. 516; 30 L.T. 729, P.C.; 42 Digest 82, 733.
- Bridgman v. Green* (1757), 2 Ves. Sen. 627; Wilm. 58; 28 E.R. 399, L.C.; 35 Digest 81, 781.

Appeal by the plaintiff from a decision of KEKEWICH, J.

The plaintiff, Charles Ichabod Wright, was, until the year 1898, the senior partner in a banking business at Nottingham. By an agreement, dated May 27, 1898, the firm sold the assets and goodwill of the business, subject to the liabilities thereof, to the Capital and Counties Bank for £10,000, it being agreed that the purchasers were to be at liberty to reject any of the assets which were included in the sale, in the event of their not considering them to be of the value at which they stood in the books of the firm. The assets so rejected were to be realised, and the amount by which, on realisation, they fell short of the value at which they stood in the books of the firm was to be deducted from the purchase money, and if the deficit should exceed the purchase money the partners covenanted to make good the balance. The plaintiff was entitled to two-thirds of the purchase money subject to the above arrangement. The purchasers rejected assets to the nominal value of £350,000, and these assets were still in course of realisation.

At the date of the agreement the plaintiff was the owner of Watcombe Park estate, Torquay, and of a one-third share of Mapperley Hall estate, Nottingham. The former estate was heavily encumbered, his financial affairs were getting into a very complicated state, and he was also apprehensive that he might find himself under a heavy liability to the bank in respect of the rejected assets.

In these circumstances, he consulted the defendant Francis John Carter, a solicitor at Torquay, with reference to his dealings with the Capital and Counties Bank, and from the year 1899 until August, 1901, the defendant Carter acted as the plaintiff's solicitor and confidential adviser in all his affairs, and in particular in realising the assets which the Capital and Counties Bank had rejected.

Early in 1900 the plaintiff contemplated making a voluntary settlement upon himself and his family with a view to preventing the whole of his property from being swept away by the bank; and he was also desirous of conferring some benefit upon the defendant Carter, who had so far received nothing for his services. This scheme was carried out by two indentures, dated May 15, 1900. Both deeds were made between the plaintiff, of the one part, and the defendants, Carter and Nevill Wright (a son of the plaintiff), of the other part. By the first indenture the plaintiff conveyed to the defendants Carter and Nevill Wright all the freehold hereditaments of which he was possessed, subject to the incumbrances thereon, upon trust for the plaintiff for life, and after his death for sale and conversion and investment of the proceeds, and he also thereby assigned to them the benefit of the agreement of May 27, 1898, and all his share in the rejected assets, and the right to receive all moneys payable to him under the agreement or in respect of the rejected assets, upon trust to get in and convert the same and invest the proceeds and pay the income thereof to the plaintiff for life, and after the death of the plaintiff to pay certain sums due from him under previous settlements in favour of his wife and children, and subject thereto upon trust as to nine-twentieths for the defendant Nevill Wright, as to nine-twentieths for the plaintiff's daughter the defendant Blanche Theodosia Wright, and as to the remaining two-twentieths for the defendant Carter. By the second indenture of May 15, 1900, the plaintiff assigned to the defendants Carter and Nevill Wright all the furniture and chattels in and about the two houses Watcombe Park and Mapperly Hall belonging to him, upon trust to allow the plaintiff to enjoy the same during his life, and after his death upon trust for sale and out of the proceeds to pay £500 to Carter and divide the residue equally between the defendants Nevill Wright and Blanche Theodosia Wright. The drafts of the indentures were drawn in the defendant Carter's office, but, in view of the fact that the defendant Carter was to take a benefit thereunder, it was thought advisable that the plaintiff should be represented by an independent solicitor. Accordingly the drafts were handed to the plaintiff in order that he might obtain independent advice. The plaintiff took the drafts of the deeds to the defendant Almy, another solicitor at Torquay, who acted as managing clerk to a firm there of Eastley and Eastley, and under his advice the plaintiff executed the deeds. The defendant Almy had no knowledge of the plaintiff's relations with the defendant Carter nor of the affairs with the Capital and Counties Bank.

In February, 1901, the Capital and Counties Bank commenced proceedings against the plaintiff. The trustees of one of the children's settlements also commenced proceedings against him, claiming £10,000 under a covenant. The plaintiff then, at the suggestion of the defendant Carter, on Mar. 13, 1901, executed another document. This was prepared by another solicitor, the defendant Tarbet. Carter made some alterations in this deed and returned it to Tarbet, and the deed was re-engrossed and re-executed on Mar. 14, 1901. The deed was made between the plaintiff, of the first part, the defendants Nevill Wright and Carter, of the second part, and the defendants Blanche Theodosia Wright, Nevill Wright and Carter (hereinafter called the reversioners), of the third part, and was expressed to be supplemental to the first of the two deeds of May 15, 1900. The effect of this deed was that the trusts of the principal indenture were revoked, and it was thereby witnessed that in consideration of the joint and several covenants of the reversioners hereinafter contained the trustees should stand possessed of the trust premises comprised in the principal indenture, freed and discharged from the trusts in favour of the plaintiff and the reversioners, declared by the

A principal indenture upon trust for the three reversioners in equal shares, and by the said indenture the plaintiff assigned to the defendants Nevill Wright and Carter, first, all real and leasehold hereditaments not comprised in the principal indenture to which he was beneficially entitled; secondly, all money owing upon the security of certain mortgages; thirdly, all the real and leasehold hereditaments comprised in such mortgages; and, fourthly, all personal effects which he might then be or might thereafter become entitled to or acquire upon the trusts declared by the principal indenture and the now stating indenture, and the indenture contained a covenant by the reversioners to pay the plaintiff during his life an annuity of £500 to be increased to £800 in certain events.

By an oversight the second deed of May 15, 1900, which related to the furniture, was not affected by the deed of Mar. 14, 1901. Accordingly, on July 13, 1901, the plaintiff executed a further document expressed to be supplemental to the second deed of May 15, 1900. Under this deed a portion of the furniture was to be purchased by the defendant Blanche Theodosia Wright at a valuation, and the residue was to be sold forthwith and the proceeds applied, first, in paying £200 to the plaintiff in lieu of his life interest in the furniture under the principal indenture, and £425 to the defendant Carter, the balance to be divided equally between the defendants Nevill Wright and Blanche Theodosia Wright. This deed was prepared by independent solicitors, and perused and approved by the defendant Tarbet on behalf of the plaintiff.

Subsequently the plaintiff brought this action against the defendants Carter, Blanche Theodosia Wright, Nevill Wright, Almy, and Tarbet claiming that all the above-mentioned deeds should be set aside and cancelled, that all property passing under the deeds should be re-conveyed, and an injunction against any other dealings with such property. The plaintiff also claimed a receiver, and damages for fraud and fraudulent conspiracy as between the defendants Carter, Almy, and Tarbet. The plaintiff's main ground of action was that he was induced to execute the deeds by the influence of the defendant Carter at the time when the relation of solicitor and client existed between him and the plaintiff, and that the defendants Almy and Tarbet were acting in concert with him. In December, 1901, the action came on for trial before KEKEWICH, J. The defendant Nevill Wright by his pleadings consented to account for all that he had received, and to submit to the cancellation of the deeds, and as trustee submitted to act as the court might direct. In the course of the trial the plaintiff abandoned the charges of fraud against Tarbet and KEKEWICH, J., rejected the charges of fraud against the other defendants. In a considered judgment the learned judge held that, if nothing more had happened, the deeds of May 15, 1900, must have been set aside on the ground that they conferred a benefit on the defendant Carter, and that the plaintiff had not had sufficient competent and independent advice; that the circumstances precluded the possibility of such advice being given; that the deeds of March and July, 1901, could not be treated as a confirmation of the prior transaction, because the plaintiff did not know that it was voidable; but that the plaintiff's right to avoid the deeds of 1900 was gone, not because he had confirmed them, but because he had by the deeds of 1901 abrogated them and agreed that they should be treated as a nullity; and that to allow him now to go back and say that the deeds of 1900 were still operative, and, because originally voidable, ought now to be avoided, would be inconsistent with honesty, which was the basis of equity. Accordingly, the learned judge dismissed the action with costs against all the defendants other than the defendant Nevill Wright. The plaintiff now appealed.

Warrington, K.C., and A. à-Beckett Terrell for the plaintiff.

Badcock, K.C., and Marcy for the defendant Nevill Wright.

Warrington, K.C., and Christopher James for the defendant Carter.

Duke, K.C., and Frank Russell for the defendant Blanche Wright.

Ward Coldridge watched the case on behalf of the defendant Tarbet.

VAUGHAN WILLIAMS, L.J.—In this case it is claimed by the plaintiff that there should be a declaration that two indentures dated May 15, 1900, are not binding upon him and ought to be set aside and cancelled, and that the same may be set aside and cancelled accordingly. Also a declaration that two several indentures dated respectively Mar. 14, 1901, and July 13, 1901, are not binding upon the plaintiff and ought to be set aside and cancelled, and that the same may be set aside and cancelled accordingly. Substantially one has to deal with the two indentures of May 15, 1900, and with the indenture of Mar. 14, 1901. Our decision with regard to those deeds will determine every other matter which has to be determined in this case.

[His Lordship dealt with the facts and continued:] At the time when Mr. Wright gave instructions to Mr. Carter he mentioned that there were two benefits that he proposed to confer upon Mr. Carter. The one benefit was a sum of £500, which, however, was not to be paid to him during the lifetime of Mr. Wright. The other benefit was that Mr. Carter should have two-twentieths of the sum that was realised under the deed which covered the rejected assets and the equities of redemption. Mr. Carter had been working for some years as a member of the firm of Carter and Carter. Nothing had been paid up to this time to Mr. Carter in reference to the work that he had done, and nothing had been paid to the firm. But at the same time it was perfectly obvious that there was a liability by Mr. Wright in respect of the work and labour that had been rendered to him by Messrs. Carter and Carter, and one can quite conceive that he was anxious that these bills should not have to be paid immediately. Thereupon, Mr. Wright telling Mr. Carter that he proposed to exercise his bounty in favour of Mr. Carter in this way, Mr. Carter told him that, having regard to their relations as solicitor and client, a gift by the client to the solicitor could only be supported if it was a gift which conformed with the stringent conditions under which alone such a gift can be supported. He also, I think, in terms informed Mr. Wright that he must have "separate and independent advice," quoting from some handbook which seems to have been circulated among the members of the Incorporated Law Society. He proceeded to take the opinion of a learned counsel in London, and in the result this idea of the settlement and the gifts to Mr. Carter was gone or with. The deeds were actually drafted in the office of Messrs. Carter and Carter. There is an unfortunate mystery about the various steps that were taken here—how it was the opinion was taken, how it was that the deeds were drawn in the office of Messrs. Carter and Carter, and how it was that Messrs. Eastley and Eastley and their clerk Mr. Almy were chosen to be the independent and separate advisers of Mr. Wright. I cannot help thinking that Mr. Carter, in his anxiety to show that he did not choose Mr. Almy as his tool in any way to advise Mr. Wright, was led either to deny or refuse to admit facts which upon further consideration I cannot help thinking he must have recognised as facts himself, and also recognised that it would have been better if he had not allowed his consciousness that he did not in any way employ Mr. Almy as a tool to colour his recollection of the events as they really occurred. I want to say at once here that, so far as I can judge from the evidence, there is nothing in that evidence which suggests either that Mr. Carter employed Mr. Almy as his tool or that Mr. Almy accepted any such position. I think that it is only just to Mr. Carter and to Mr. Almy to say that that is the conclusion to which I have come. In the result Mr. Wright did see Mr. Almy and did have a conversation with him which resulted in Mr. Almy giving him such advice as he thought fit. Mr. Wright brought with him the deeds which had been drafted in Mr. Carter's office, and he brought with him some other documents, some relating to the obligations of Mr. Wright to his family and some relating to the rejected assets. The deeds were prepared and were executed, and those are the deeds which are referred to in the first of these claims as being the two several indentures dated May 15, 1900.

I propose at once to deal with these two deeds. KEREWICH, J., has come to the

A conclusion that these deeds cannot stand, and I agree with KENNEDY, J., that they cannot stand. I want now to express shortly, and I hope clearly, the ground upon which these deeds cannot stand. We have had a very great many authorities cited to us, and I do not at all say that the authorities have not one and all had a direct bearing upon the question which we have to decide. But, in my judgment, I should only be wasting the public time and my own time if I were to go through those authorities at length, and I do not propose to do so. I shall touch more or less upon certain landmarks in the current of authorities, but I shall do no more. I think one may begin with *Hatch v. Hatch* (1) in which LORD ELDON said (9 Ves. at p. 296):

"This case proves the wisdom of the court in saying it is almost impossible in the course of the connection of guardian and ward, attorney and client, trustee and cestui que trust, that a transaction shall stand purporting to be bounty for the execution of antecedent duty. There may not be a more moral act, one that would do more credit to a young man beginning the world, or afford a better omen for the future, than if, a trustee having done his duty, the cestui que trust, taking it into his fair, serious, and well-informed consideration, were to do an act of bounty like this. But the court cannot permit it, except quite satisfied that the act is of that nature for the reason often given; and recollecting that in discussing whether it is an act of rational consideration, an act of pure volition, uninfluenced, that inquiry is so easily baffled in a court of justice, that instead of the spontaneous act of a friend, uninfluenced, it may be the impulse of a mind, misled by undue kindness, or forced by oppression; the difficulty of getting property out of the hands of the guardian or trustee thus increased; and therefore, if the court does not watch these transactions with a jealousy almost invincible, in a great majority of cases it will lend its assistance to fraud; where the connection is not dissolved, the account not settled, everything remaining pressing upon the mind of the party under the care of the guardian or trustee."

I am not at the present moment going to affirm that that judgment of LORD ELDON's stands, having regard to the subsequent authorities, in all its stringency. But, on the other hand, I do not think that the facts of this case require that I should say that the subsequent authorities have altered or modified the view expressed by LORD ELDON in *Hatch v. Hatch* (1). I wish to point out that LORD ELDON was there dealing with the case of a gift, and it is perfectly plain that in the case of a gift the rule applied by the courts of equity is much more stringent, is more absolute, than the rule that is applied in the case of a bargain or a contract. The principle that I understand LORD ELDON to be affirming is this. Wherever you have a fiduciary relation—and I have to deal in this case with the fiduciary relation of solicitor and client—the moment the relation is established there arises a presumption of influence, which presumption will continue as long as the relation continues, or at all events until it can be clearly inferred that that influence had come to an end. I am not saying that that presumption of influence, voiding the gift unless it is displaced, is an irrebuttable presumption. I do not think that the cases go that length, and I do not think that LORD ELDON meant to say that they did. To my mind, all that he meant was that so long as the fiduciary relation continues, so long will it be very difficult to support the gift, and so long will the court refuse to go into nice discussions as to whether the gift was advantageous to the client or not. If you have a gift which manifestly a prudent man would not have given, it shows, in the case of a solicitor or his client, that, notwithstanding the determination of the solicitor in hac re, the influence of the solicitor has not ceased, but has continued. On the other hand, as is mentioned in *Holman v. Logges* (2), the fact that the gift is a trifling gift or is made by a man with so ample a fortune that it must have been trifling to him is a matter which may fairly be taken into consideration in considering whether the influence continues. I mention this because when you come to deal with the later authorities

you find nowhere, so far as I can make out, from beginning to end of the authorities anything that in terms qualifies or disapproves of the judgment of LORD ELDON in *Hatch v. Hatch* (1). You do find, however, later authorities in which, even with regard to a gift, the fact that the donor of the gift had competent and independent advice seems to have been considered as a matter which was material not only in dealing with a bargain, but also in dealing with a gift. I think that in one of the earlier cases the view was taken of the judgment of LORD ELDON in *Hatch v. Hatch* (1) was that the having of independent and competent advice was, according to the judgment of LORD ELDON, immaterial in the case of a gift. But LORD ELDON does not say so; and as I understand his judgment, in a case, at all events, in which there is no continued employment in hac re, such a fact as the having had independent and competent advice would be relevant as going to show that it would be a reasonable and proper inference that the influence of the solicitor had ceased to operate.

Having said this about *Hatch v. Hatch* (1), I think it would be best to say the manner in which I propose to apply LORD ELDON's rule in *Hatch v. Hatch* (1) in the present case. In my judgment, the desire of Mr. Wright to execute these deeds was very much promoted by the pressure which he was undergoing from the Capital and Counties Bank. I think that it is manifest that Mr. Wright at this time was feeling very much the pressure of being short of money, and not only short of money at that moment, but with the prospect of remaining short of money for the rest of his life. Be that as it may, I cannot conceive but that any prudent man, whether he was a professional adviser or otherwise, who was asked by Mr. Wright to advise him whether he should make these two gifts to his solicitor—that is to say, the gift of £500 and the gift of the two-twentieths—would have said at once to him: "I cannot advise you as to that unless I know what your means and what your prospects are. I must know what income you are now receiving, and whether you have any reason to suppose that at the time these gifts are to come into operation it will be larger, and I should for that purpose like to have a list of your property—a full account of the property whatever its nature." Of course in this particular case there would have been included a full account of the rejected assets, and the equities of redemption. I am of opinion from what one knows of the view that was taken at this time of the rejected assets—I hope they may have improved in value since, but I do not know—that a prudent friend or a prudent adviser might very well have said: "Under these circumstances there is no sufficient reason why you should take out of the estate belonging to you which will exist at the moment of your death amounts like these for the benefit of your solicitor." He might also, if he was a professional adviser as Mr. Almy was, have gone on to say: "Not only do I not see any reason why you should make the gift of £500—I, for the moment, leave out the two-twentieths on purpose—to your solicitor, but you cannot afford this, and what are you to get by it? Is it that you hope, if you make the present to an individual partner, that perhaps the firm will not send in their bills and ask for payment for their bills, or is it that you want to offer an inducement to your solicitor to concur"—if that is the right word to use—"in the execution of these deeds because you think that will protect you against the claims of the Capital and Counties Bank, and you think that he is more likely to concur if you put him in a good humour by these postponed presents?" The adviser might well wish to know what was the motive that was actuating Mr. Wright, and he might have added: "I should tell you that neither of these reasons is sufficient. If you give a gift to your solicitor because his firm have an outstanding bill against you that is a very insufficient reason, and such a gift, according to the rule of the court, would never stand. And if you wish to do it in order to induce him to concur in something that is inadvisable, that also is a reason which would invalidate the gift, and I advise you that when you have executed these deeds they are deeds that may be impeached." I am not forgetting that Mr. Almy does mention that, but, unfortunately, he

A I am to say, "But in the circumstances of your case this is not likely to occur"—that is, the deeds are not likely to be impeached.

I have mentioned those matters because the conclusion which I have come to is that, whether or not I am right in supposing that the subsequent authorities would allow evidence to be given of competent and independent advice having been given for the purpose of showing that the influence of the solicitor had ceased and come to an end, that fact is really unimportant in this case because there was not competent and independent advice. I do not mean by that that Mr. Almy was not a good lawyer, and I do not mean by that that Mr. Almy was in any way dishonest. On the contrary, so far as I can judge of the evidence, I think that he intended to do his duty. But I think that he had not the materials to enable him to do his duty. I think that it is perfectly obvious upon his own showing that he was in a state of ignorance as to what was the true financial condition of Mr. Wright, as to how far he was able to meet the claims upon him, and as to how far it was likely that these claims would be pressed. He was in utter ignorance as to the nature and value of the rejected assets; and the fact of the matter was that he was not in a position to do more than ask the questions which he, I rather gather from his own evidence, thought primarily were the only questions that he had to ask: "Do you know what you are doing?"—that is to say, "Do you understand that you are making these reversionary gifts, and are you doing this of your own will and volition?" He did ask those questions. But it seems to me that the asking of those questions and the getting of the answers, even though for the moment Mr. Almy may have had confidence in the correctness of the answers, was not sufficient to constitute "competent and independent advice," and the real fact of the matter is that no one was in a position to give competent advice unless he knew a great deal more of Mr. Wright's affairs than Mr. Almy did. The deeds had been prepared in the offices of Messrs. Carter and Carter, and Mr. Almy began his interview with Mr. Wright upon the assumption that those deeds, including the gifts to Mr. Carter, were deeds that ought to go through and ought to be executed if only he was satisfied that Mr. Wright for whatever reason—good, bad, or indifferent, sound or unsound—wished to execute deeds which he understood included a gift to his solicitor. It does not seem to me that the onus, which clearly is thrown upon the solicitor by *Hatch v. Hatch* (1), has in the slightest degree been satisfied. In my judgment Mr. Carter has failed to satisfy us that these deeds were executed free from any influence of the solicitor. One must not forget that Mr. Carter was advising Mr. Wright in the whole matter, and the very fact that Mr. Carter was a party to this deed would reasonably induce Mr. Wright to suppose that the solicitor whom he trusted so much, and whom he had trusted throughout this affair, approved of what he was doing, and thought it was a reasonable and prudent thing for him to do.

H I said when I was mentioning the gifts that I deliberately left out at the moment the gift of the two-twentieths. I did that because I wanted to mention that I had not forgotten that the gift of the two-twentieths of the realisation of the rejected assets was a gift which, unless we ignore human nature and what goes on in the world, might have this justification—that it was likely to stimulate Mr. Carter to do his best. I am not prepared myself to say that in a case in which there is property to be realised a commission to an agent based upon the sum realised is not generally a wise expenditure. Whether or not that is an expenditure of money which, when made in favour of a solicitor, can be supported is not a matter that I need directly deal with, because I am perfectly clear that the circumstances of this case are such that Mr. Carter has not satisfied the onus which was thrown upon him of showing that his influence did not operate with regard to this gift. I am perfectly clear that the influence need not take the form of a direct persuasion to make the gift. If one had to deal with that question, which I have not, I think it right to say that I can see no evidence to show that

Mr. Carter directly persuaded Mr. Wright to make this present. On the other hand, there is not the faintest evidence that he in any way advised him that it was a gift that there was not the slightest reason for him to make, and that he had better not make it.

I want to say one word in consequence of the decision in *Edwards v. Meyrick* (3). That was a decision of WIGRAM, V.-C., and one pays great attention to such a decision. It is suggested that he laid it down that the rule of LORD ELDON in *Hatch v. Hatch* (1) had no application except in a case where the solicitor was employed in hac re. The judgment of WIGRAM, V.-C., in *Edwards v. Meyrick* (3) was dealt with afterwards by TURNER, L.J., and also by LORD CRANWORTH, L.C., in *Holman v. Loynes* (2). If that case is looked at, the true meaning of WIGRAM, V.-C.'s, decision may be arrived at. TURNER, L.J., speaking of that decision, after quoting the words of the Vice-Chancellor, says (4 De G.M. & G. at p. 283):

"Gifts from clients to their attorneys can be maintained only when not only the relation has ceased, but the influence may rationally be supposed to have ceased also."

In my view here Mr. Carter never did from first to last cease to be the solicitor of Mr. Wright. He was the solicitor advising Mr. Wright in all his affairs, and advising Mr. Wright in particular both as to the dealing with his property including the rejected assets—dealing with his most pressing creditor, if not his only creditor, the Capital and Counties Bank—and in dealing with the settlements that he should make on his children and in dealing with this very deed in which a gift was to be made. Under those circumstances, to my mind, it would be absolutely untrue to say that Mr. Carter did not continue solicitor in hac re. And certainly if it was held that the employment of the independent solicitor might take that particular matter out of the hands of the original solicitor, it could not possibly be said that the proper inference was that the influence of the original solicitor might rationally be supposed to have ceased under those circumstances.

In my judgment, so far as Mr. Carter is concerned, these deeds of May 15, 1900, can neither of them stand. With regard to the other beneficiaries under the deeds, I regret to say that I cannot agree with the decision of KEKEWICH, J. It seems to me that the gifts to the children and the gifts to the solicitor were wholly different. They might just as well, so far as I can see, have been in two separate deeds. The reason which operated chiefly, it might have been, to induce Mr. Wright to make these presents to his solicitor was not the reason why he was making a provision for his children, and it seems to me that it is not true in any sense of the word to say that the two gifts to the solicitor and the settlement on the children and the provision for the wife were one and the same transaction, induced by the same motives. Nor is it true to say that the wife or the children in any sense claim through the solicitor. Under these circumstances it seems to me that these deeds, excepting in respect of Mr. Carter, must stand.

Let me now pass to the deeds of 1901. In the course of this period which elapsed between May, 1900, and March, 1901, various things had happened. In the first place the Capital and Counties Bank were threatening to take immediate proceedings. One sees that at this moment the state of things was such that the life interest, at all events, of Mr. Wright would have been available for such judgment creditors, and it might possibly be that the corpus of the property also might be available for them if they succeeded in setting aside the deeds. We have nothing to do with that here. The Capital and Counties Bank are not parties to this litigation. We are dealing here merely with the rights of Mr. Wright, the grantor. The Capital and Counties Bank were pressing, and after this—and I do not think it would be unreasonable to say on account of this—an action was commenced by Miss Wright and her brother against Mr. Wright to enforce their rights. I think it included the enforcement of the original right of Miss Wright under the bond as well as any rights that there were under the

A deed of 1900. I think Mr. Nevill Wright was abroad in fact and Mr. Carter and Miss Wright went together and saw Mr. Tarbet, and Mr. Tarbet was told that this was a friendly action. One speculates as to what that means. The action was brought, and judgment was signed in default. I have not the slightest doubt myself but that Mr. Tarbet understood, and must be taken to have understood, that the new deed under which the assignment was to be effected and the covenant to be given by the assignees to pay the annuity was a deed under which it was contemplated that the assignees should relieve Mr. Wright of the obligation during his lifetime to make good the £1,200 a year to his wife, and also to pay the interest upon the £9,000 to Mrs. Webb. There was a subsequent conversation between Mr. Tarbet and Mr. Wright, and I say again of this conversation, as I said of the former conversation, that if and in so far as independent and competent advice is necessary to support this transaction, Mr. Tarbet manifestly was not in a position to give it. He knew next to nothing about the affairs of Mr. Wright and his financial condition.

I say "if and so far as independent and competent advice was necessary" because I am not prepared to lay it down that in every case of purchase independent and competent advice is necessary as distinguished from the advice of the purchasing solicitor. It may be that in some cases the transaction appears to be so manifestly fair that this independent advice in the case of a purchase is not necessary. At all events that was so in one of the cases which was cited to us, which was a case, if I remember rightly, in which the solicitor purchased at the price of thirty years' purchase on an assumed rental which was higher than, or at least as high as, any rental which had ever been received. I think in that case the transaction was supported, the action to set it aside being an action which was not brought till eleven years after the transaction, and then only brought after a railway had been made by some company across the property in question. But in this case we have no evidence to show us that this was a fair transaction. So far as I can draw inferences from this case, it seems to me highly probable that it was not a good bargain for Mr. Wright. At all events, whether it was, or not, we have not sufficient evidence that it was and Mr. Tarbet had no materials which would enable him to judge of that.

I have mentioned what the agreement was which was originally spoken of between the parties. That agreement is recited in the indenture of Mar. 14, 1901. The result of that deed, it is quite plain, is that Mr. Wright is thereunder parting with all his property, because the words of the grant are as wide as can be. They cover, first, all real and leasehold hereditaments not comprised in the principal deed of or to which Mr. Wright is beneficially seized, possessed, or entitled for any estate or interest; secondly, all moneys owing upon the security of any mortgage of a charge upon real or leasehold hereditaments; thirdly, all the real and leasehold hereditaments comprised in any such mortgages or charges; fourthly, all personal estate (not being personal chattels) of Mr. Wright, including (inter alia) all stocks, funds, and securities, and all rights and minerals reserved to the said Mr. Wright, and all other properties which he may now be or hereafter become entitled to or acquire. So that what one has got here is that the whole of the property of Mr. Wright is assigned, and he is not relieved of his liabilities to his family. It is impossible, to my mind, to read the evidence of Mr. Tarbet without seeing that this was not explained to Mr. Wright. We have the answer given by Mr. Wright when he was being cross-examined and asked whether he did not, at the time of the execution of this deed of 1901, think that it was a good deed for him; that he did then think so; but that at that moment he thought—and it seems to me very naturally he thought—that he was being relieved from all the liabilities to his family. I cannot help thinking that, if Mr. Tarbet had not understood that, he would have explained to Mr. Wright the position in which he was placed—that he was getting rid of all his property and yet was not freeing himself from his liabilities. It seems to me favourable to Mr. Tarbet to draw

the inference that he did not himself understand it, and, so far as I understand the evidence, there is nothing in anybody's evidence to show that the arrangement which was originally made that Mr. Wright should be relieved from all his liabilities and get this annuity in consideration of giving up all his property was in any way departed from; or, if that is not the right expression, in any way explained or made clear to Mr. Wright.

I have very little more to say. But I should point out that the instructions which were given to the conveyancer were instructions which were given orally by Mr. Carter, and Mr. Carter must take the responsibility of those instructions. It is very unfortunate that those instructions were not given in writing. In a case where a solicitor is dealing with his client he should take every precaution and leave no door open for a suggestion that he is not advising his client against the interest of himself, the solicitor, in the way in which it is plain it is the duty of the solicitor to do when he is dealing with his client. But here is a deed which, to my mind, not only does not show that it is a fair bargain, but there is a great deal to show that it is a bargain which the most imprudent person would not for a moment have entertained. Under those circumstances we have to decide whether this deed ought to be set aside. First, with regard to Mr. Carter, I have not the slightest doubt that this transaction cannot stand, and that it is a transaction under which he got a new consideration beyond the old gift, which was two-twentieths. He now gets one-third of the rejected assets; and he and his co-covenantors do not take over the whole of the liabilities of Mr. Wright, the whole of whose property was taken, and who stood in the relation of client to Mr. Carter the solicitor. With regard to the other two—Miss Wright and Mr. Nevill Wright—I am of opinion that they are for this purpose in the same position as Mr. Carter, and that this is not a case where you can separate the consideration which is to come to them in the way in which I have pointed out one can and ought to separate the gifts and settlements named for the children, if there are any children. But this is a case where there is a bargain and where there is a consideration, and, in my judgment, that is a bargain which was entered into in such circumstances that it is not binding on Mr. Wright. In my judgment also that bargain has not been shown to be a fair and honest bargain. It was, in my view, a bargain entered into at the time when Mr. Carter continued, notwithstanding the employment of Mr. Tarbet, to act as the solicitor for Mr. Wright. Mr. Carter throughout this matter was acting in concert with Miss Wright and Mr. Nevill Wright. In those circumstances it would be against conscience for them to attempt to take advantage of a bargain which was obtained in this way. I know it was said that the rule laid down in *Huguenin v. Baseley* (4) only applies where fraud has been proved, and that in this case we must take it that no fraud has been proved. But I do not agree with that at all. It is established here that this deed was executed by Mr. Wright under the influence of Mr. Carter, and without fully understanding what was being done, and without competent and independent advice. In my judgment, not only cannot Mr. Carter enforce that deed, but also it is within the rule in *Huguenin v. Baseley* (4), against conscience that any of the parties to that bargain should be able to enforce their rights. In those circumstances I think the second deed of Mar. 14, 1901, must be set aside as against all of the defendants.

STIRLING, L.J.—I have arrived at the same conclusions, and, after the exhaustive manner in which the case has already been dealt with by my Lord, I do not think that I need go very deeply into it. But I wish for my own part to state the grounds more particularly which have led me to the conclusion that the deeds of 1900 are to be set aside as regards the defendant Carter, and the deed of 1901 with regard to all the defendants.

The two sets of deeds have been treated, and require to be treated, in a different manner. The deeds of 1900 were deeds by which gifts were conferred on a solicitor by his client. In those deeds it is stated that the motive and consideration for

A I have considered all the various services rendered by Mr. Carter to Mr. Wright, and, just being so, the transaction is brought within the very terms of the rule of the court as it is stated by LORD ELDON in *Hatch v. Hatch* (1). With reference to that case I desire to say that I have always understood that it was an accurate statement of the law of the court at the time when LORD ELDON delivered that judgment, and it continues to be an accurate statement at the present time.

B As all events, I think it is clear authority for two propositions: First, that transactions of gift between solicitor and client are watched and scrutinised by the court with the utmost jealousy. This rule was laid down upon one which is founded on important reasons of public policy. The court has laid down a rule that before such a transaction, if made, can be upheld, it must be satisfied that—as LORD ELDON puts it—it is an act of rational consideration, and an act of pure volition and uninfluenced. In other words, the court, in dealing with such a transaction, starts with the presumption that undue influence exists on the part of the donee, and throws upon him the burden of satisfying the court that the gift was uninfluenced by the position of the donee, in the present case a solicitor.

C Secondly, I think that, according to the rule as stated by LORD ELDON, it is not a presumption which is entirely irrebuttable, but is one which is extremely difficult to be rebutted. LORD ELDON puts it that it was almost impossible to uphold such a gift in the case of the two positions which he specified, one of them being that of attorney.

D

E It has been laid down in recent cases, and particularly in two cases in this court—viz., *Mitchell v. Homfray* (5) and *Liles v. Terry* (6)—that in order to uphold a gift of this kind the donor must have competent and independent advice in conferring that gift. That appears to me to be laid down in a negative form—that is to say, the transaction cannot be upheld unless that condition is satisfied. But this old rule still remains, that the court must look at all the circumstances of the case, and, although the introduction of a new solicitor is a highly important element, it does not conclude the case; and the court still requires to be satisfied

F that the fair inference is that the influence arising from the relationship of solicitor and client can no longer be supposed to exist. I think also that a solicitor who advises in such a case does not take upon himself any light or easy task. The duties of the adviser have been considered by FARWELL, J., in *Powell v. Powell* (7), and in the course of his judgment he says this ([1901] 1 Ch. at p. 247):

G “The solicitor does not discharge his duty by satisfying himself simply that the donor understands and wishes to carry out the particular transaction. He must also satisfy himself that the gift is one that it is right and proper for the donor to make under all the circumstances; and, if he is not so satisfied, his duty is to advise his client not to go on with the transaction, and to refuse to act further for him if he persists.”

H With that view of a solicitor's duty I agree. I think that a solicitor would fail in his duty if he neglected to inform himself of the circumstances under which the transaction was taking place. It might turn out, for example, to be one in which a poor man was divesting himself of all his property in favour of the solicitor, and it would be impossible in such a case—whatever the advice may be, it seems to me—to uphold it.

I Having made these remarks as to the general state of the law applicable to such a case, I will make a few remarks on the position with regard to these deeds of 1900. I do not desire to go into detail with regard to them, but I desire to point out what seem to me to be the striking features of the transaction. First of all, although a new solicitor was called in, yet he was not called in at the inception of the transaction. The terms of the gift had been defined and draft deeds were prepared in the office—for that is the conclusion which must be come to on the evidence—of the defendant Mr. Carter before Mr. Almy's services came into operation. It is quite true that nothing to bind the plaintiff had been done. But

still the advice which he received was not given until the transaction had made progress to a certain extent. Secondly, the relationship of solicitor and client continued to exist between the plaintiff and the defendant Mr. Carter in regard to every other transaction except that of the settling and completing of the deeds which were proposed to be executed. I have already pointed out that the motive and the consideration for the deeds appear on the face of them to be the services rendered by the solicitor to the client. Those services had been rendered with reference to very many and very important matters, but particularly with reference to the position and dealings which were taking place between the client and the Capital and Counties Bank, and in relation to that the services of Mr. Carter, the solicitor, appear to begin. Thirdly, with regard to the advice which was given, it appears to me, and the conclusion I come to on the evidence is, that the solicitor called in made no attempt to inform himself of the propriety of the gifts or whether the plaintiff's circumstances were such that a prudent man in his position would make them, and he gave the plaintiff no advice on the subject at all. What the solicitor did was this—it is stated by himself in his re-examination: "I told him [the plaintiff] that it was absolutely essential, if he intended to benefit Mr. Carter, that he must be free of Mr. Carter's influence. I do not remember the exact words he made use of in reply, but he led me very clearly to understand that he was absolutely free from the influence of Mr. Carter; and, more than that, he did not strike me as a man who would be likely to be influenced by Mr. Carter or anybody else." Again, he stated: "I can recollect generally what was said, but not particularly. He gave me to understand generally that he was entirely free from Mr. Carter's influence, and that all he desired to do was to give Mr. Carter a benefit in return for services rendered." If that is all that is necessary to be done in order to establish a transaction of this kind, then, instead of such transactions being difficult and almost impossible to be upheld, there will be found very little substantial difficulty in dealing with them. Speaking for myself, I can only say that I am not satisfied that the undue influence which must be attributed to Mr. Carter did not continue to exist at the time that these deeds were executed, and, in my opinion, these deeds ought accordingly to be set aside as against him.

Now arises the question whether, the deeds being bad as against Mr. Carter, the gifts which were conferred on the wife—the provisions in favour of the wife and children of the plaintiff—are also vitiated thereby. Upon that I entirely agree with what has been said by my Lord. The case does not fall within the law which is laid down by Lord Elnox in *Huguenin v. Baseley* (4). It does not seem to me that the benefits which were conferred on the wife and children of the plaintiff have in any way been derived from the undue influence of the solicitor. It was quite clear, I think, on the evidence that, quite apart from the intention to confer a benefit on Mr. Carter, he intended to confer substantial benefits on his wife and family. Under those circumstances it appears to me that they are entitled to retain the benefits conferred upon them by these deeds.

I pass on, therefore, to consider the deed of 1901. That can no longer in this court be treated, it appears to me, as a transaction of gift pure and simple. It has been treated in argument as a transaction of sale, and I am prepared so to regard it. Here I am differing from the opinion of the learned judge who dealt with this case in the court below. But I confess I cannot agree with him in the view which he took that this was a good deed. Here, again, an onus of a different kind is cast upon Mr. Carter. The rules of the court require this to be proved in a transaction of sale in which the solicitor is a purchaser: The client must be fully informed; secondly, he must have competent advice; and, thirdly, the price which is given must be a fair one. The onus of proving that lies on the solicitor. It seems to me, without dwelling on the first two requisites, that the third entirely fails. This is a sale of all the property real and personal of the plaintiff. It is described in general terms in the deed. It was so described not through any fault of the solicitor who settled it on his behalf, but because the information could not

A be given, it appears, in settling the deed at the last moment. The point was put by Mr. Tarbet to Mr. Carter. In Mr. Tarbet's evidence he stated: "I at once said: 'Now, look here, Mr. Carter. Would it not be very much better if we could have a solicitor of this gentleman's estate to put to this deed?' He said: 'I have not got one.' I told him about what had happened with Colonel Wright, and I said: 'Then it comes to this: he wants everything included,' and Mr. Carter said: 'Yes, and, unless it is, not only will I not sign the deed, but I shall most certainly advise Mr. Nevill Wright and Miss Blanche Wright not to do so.' " So that the deed was executed without the solicitor who was advising Mr. Wright being informed of what the property was which was being included. Further, although there are several items mentioned in the deed, we have not got full evidence before us now, and it is the duty, I again say, of the solicitor to prove what the value of those items was. How, then, is it possible to say that the full consideration was given for this property and the benefits which were given for it? I agree that many other remarks may be made upon this deed, and I am not satisfied myself that any one of the three requisites to which I have referred is established as regards it. But I do not think that it is necessary, or desirable, that at this stage I should deal with it further. It seems to me, on the much simpler ground that, the defendant Mr. Carter having failed to prove that the whole value was given, the deed must fail, as laid down in *Holman v. Loynes* (2).

Then comes this question: How are the two children of the testator, Mr. Nevill Wright and Miss Blanche Wright, who are the other persons who joined with Mr. Carter in executing this deed for an annuity which was secured only by their personal covenants, to be affected? It seems to me, if the transaction is bad as against Mr. Carter, that they are so mixed up with it that the transaction cannot be separated, and the deed as against them must be set aside on proper terms no less than as against Mr. Carter. It is one single transaction, and, failing against Mr. Carter, it fails against them. For these reasons I think that the plaintiff is entitled to the relief which has been specified.

COZENS-HARDY, L.J.—I am of the same opinion, but I wish briefly to state my own views without attempting to recapitulate the facts or to discuss again the authorities referred to by my Lord and by STIRLING, L.J.

As to the deed of 1901, I think it cannot stand. I do not regard it as in any real sense a transaction of sale and purchase. The guiding object of the plaintiff was not to obtain the best price for his property, but to obtain a means of defeating the Capital and Counties Bank. It is true that we cannot in this action decide whether the conveyance was for the purpose of avoiding his creditors. But I think we are entitled and bound to ask whether this was a real bargain between vendor and purchaser, or a mere device by which the so-called vendor divested himself of all his property, present and future, without reference to its value. On this point I would refer to the evidence where Mr. Tarbet points out that, when the deed was taken to him and alterations in the parcels were suggested, Mr. Wright said to him: "Cannot you put in a general clause so that they [the bank] cannot get anything from me?" I think only one answer can be given to the question which I have put; but, assuming that it is to be treated as a sale by the plaintiff to his solicitor Mr. Carter and to Miss Blanche Wright and Mr. Nevill Wright, I am clearly of opinion that it rests upon Mr. Carter to justify the sale and to show that it was a fair and reasonable transaction, and that a fair price was given. Those, I think, are the words of KINDERSLEY, V.-C., in *Tompson v. Judge* (H), and, so far as I know, that statement is consistent with all the authorities. Mr. Carter has utterly failed to do this. Perhaps it is more correct to say he has not attempted to do this. But it is argued that Mr. Carter did all that the law required when he saw that Mr. Tarbet, a respectable solicitor, was called in to advise the plaintiff. Mr. Tarbet is not now a party to this action, and I desire to avoid needlessly saying anything which may prejudice him. I am, however,

bound to ask for what purpose he was called in to advise? Not as to the sufficiency of the consideration, not as to the propriety of the transaction, but only to do what was requisite to carry out the proposal which had been previously settled. It seems to me that as against Mr. Carter the transaction of 1901 cannot stand, and it has scarcely been contended that on that assumption Miss Blanche Wright can hold her share. The consideration was the joint and several covenant of the three persons combined to pay an annuity. Mr. Carter was really only at law the most responsible person. The contract of purchase was one and indivisible, and the deed must be set aside as a whole. I may add—though it is not necessary for our decision—that the circumstances attending the preparation and execution of this extraordinary deed are such that I doubt whether it could be supported even if no fiduciary relation had existed between the plaintiff and Mr. Carter.

With respect to the transaction of 1900, that was a pure gift without any covenant of purchase. It was a gift to Mr. Carter and to Miss Blanche Wright and to Mr. Nevill Wright. As to Mr. Carter, I agree with KEKEWICH, J., that it cannot stand. I refer especially to a passage in KEKEWICH, J.'s, judgment where he says:

"I am not prepared to lay down any general rule which will assist others to determine in other cases what is sufficient competent and independent advice to uphold a gift by a client to a solicitor, but I am satisfied not so much that the advice was not given in this instance as that the circumstances preclude the possibility of its being given."

Assuming, as I do, that the presumption of undue influence in the case of a gift by a client to his solicitor during the continuance of the relationship is not irrebuttable, I hold that something beyond what was done here is essential. Mr. Almy had not the materials necessary to enable him to advise, and he seems, moreover, to have taken a somewhat incorrect view of his duties. What competent and independent advice should be given to a man who says he has arranged to make a gift to his solicitor? I doubt whether the celebrated advice to people about to marry—"Don't"—is not the only possible advice, and it is difficult to see what bearing such advice, if ineffectual, can have upon the validity of the gift. As against Mr. Carter, the deeds of 1900 and the supplemental agreement of 1901 must be set aside, and a resulting trust declared of all benefits taken by him under those documents. But I see no sufficient reason for impeaching any of those documents as against the plaintiff's children. They do not claim through Mr. Carter, and on the evidence it is not shown that the benefits they take were procured by Mr. Carter or were due to any influence exerted by him. Neither *Huguenin v. Baseley* (4) nor *Barron v. Willis* (9) touches this point. My view is that the gifts are severable, and, so far as the children are concerned, there is neither evidence nor presumption of undue influence.

An order was made setting aside the deeds of May, 1900, and the supplemental deed of July 13, 1901, so far as regarded the defendant Carter only, and setting aside the deed of Mar. 14, 1901, in toto.

Solicitors: *Horace Whitehead Chatterton; Tucker, Lake & Lyon, for Henry Wing & Son, Nottingham; E. & J. Mote; Charles Russell & Co.; Stow, Preston & Lyttelton, for Friend & Tarbet, Exeter.*

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]

A

R. v. PARKE. Ex parte DOUGAL

[KING'S BENCH DIVISION (Lord Alverstone, C.J., Wills and Channell, JJ.), July 3, 9, 17, 1903]

Reported [1903] 2 K.B. 432; 72 L.J.K.B. 839; 89 L.T. 439; 67 J.P. 421; 52 W.R. 215; 19 T.L.R. 627]

B

Contempt of Court—Assize court—Comments tending to prejudice fair trial of prisoner—Prisoner not yet committed for trial—Remanded by justices—Contempt of inferior court—Power of High Court to punish.

The High Court has jurisdiction to punish for contempt of court in respect of the publication in a newspaper of comments tending to prejudice the fair trial of a person who at the time of such publication is on remand before a petty sessions court charged with an indictable offence which can only be tried at the assize court, although at the time of the publication of such unfair comments the person charged has not been committed for trial at the assize court.

C

Per Curiam: The King's Bench Division of the High Court has power to guard inferior courts, which possess no adequate means of protecting themselves, against unlawful attacks on them or interference with them in their duty to administer justice amounting to contempt of those courts.

D

Notes. Applied: *R. v. Davies*, 1904-07, All E.R. Rep. 60. Considered: *R. v. Clarke, Ex parte Crippen*, [1908-10] All E.R. Rep. 915. Applied: *Delbert-Erns v. Davies and Watson*, [1945] 2 All E.R. 167. Considered: *R. v. Duffy*, [1960] 2 All E.R. 891. Referred to: *R. v. Puck* (1912), 28 T.L.R. 197; *R. v. Evening Standard, Ex parte D.P.P.*, *R. v. Manchester Guardian, Ex parte D.P.P.*, *R. v. Daily Express, Ex parte D.P.P.* (1924), 40 T.L.R. 833; *R. v. Daily Mirror, Ex parte Smith*, [1927] 1 K.B. 845; *R. v. Odham's Press, Ltd., Ex Parte A.-G.*, [1956] 3 All E.R. 494.

E

As to contempt of court by comment on pending proceedings, see 8 HALSBURY'S LAWS (3rd Edn.) 7 et seq., and for cases see 16 DIGEST (Repl.) 25 et seq.

F

Cases referred to:

- (1) *R. v. Fisher* (1811), 2 Camp. 563; 15 Digest (Repl.) 841, 8040.
- (2) *R. v. Lee* (1804), 5 Esp. 123, N.P.; 32 Digest 135, 1661.
- (3) *R. v. Burchett* (1723), 1 Stra. 567; 8 Mod. Rep. 208; 93 E.R. 704; 16 Digest (Repl.) 13, 51.
- (4) *Re Application for an Attachment for Contempt of Court* (1886), 2 T.L.R. 351, D.C.; 16 Digest (Repl.) 13, 54.
- (5) *Ex parte Hermann* (1894), Times, May 9.
- (6) *R. v. Armstrong* (1894), Times, May 9; 16 Digest (Repl.) 25, 185.
- (7) *R. v. Balfour, Re Stead* (1895), 11 T.L.R. 492, D.C.; 16 Digest (Repl.) 25, 189.
- (8) *R. v. Payne*, [1896] 1 Q.B. 577; 65 L.J.Q.B. 426; 74 L.T. 351; 44 W.R. 605; 12 T.L.R. 321; 40 Sol. Jo. 416, D.C.; 16 Digest (Repl.) 28, 211.
- (9) *R. v. Williams* (1897), unreported.
- (10) *R. v. Felgate* (1897), Jan. 19, unreported.
- (11) *R. v. Newton* (1903), 67 J.P. 453; 19 T.L.R. 627, D.C.; 16 Digest (Repl.) 47, 437.
- (12) *R. v. Williams* (1823), 2 L.J.O.S.K.B. 30; 15 Digest (Repl.) 841, 8043.
- (13) *R. v. Fleet* (1818), 1 B. & Ald. 379; 106 E.R. 140; 15 Digest (Repl.) 845, 8098.
- (14) *R. v. Gray* (1865), 10 Cox, C.C. 184; 14 Digest (Repl.) 396, 3859.

G

H

I

Also referred to in argument:

- R. v. Tibbits*, post p. 896; [1902] 1 K.B. 77; 71 L.J.K.B. 4; 85 L.T. 521; 66 J.P. 5; 50 W.R. 125; 18 T.L.R. 49; 46 Sol. Jo. 51; 20 Cox, C.C. 70, C.C.R.; 16 Digest (Repl.) 25, 191.
- Cook v. Cook* (1885), 2 T.L.R. 10, D.C.; 16 Digest (Repl.) 12, 41.

Gordon v. Jones (1895), 31 L.Jo. 8; 16 Digest (Repl.) 12, 43.

Ex parte Fernandez (1861), 10 C.B.N.S. 3; 30 L.J.C.P. 321; 4 L.T. 296, 324; 7 Jur.N.S. 571; 9 W.R. 832; 142 E.R. 349; 16 Digest (Repl.) 87, 956.

R. v. Gray, [1900] 2 Q.B. 36; 69 L.J.Q.B. 502; 82 L.T. 534; 64 J.P. 484; 48 W.R. 474; 16 T.L.R. 305; 44 Sol. Jo. 362, D.C.; 16 Digest (Repl.) 23, 176.

R. v. Castro, Onslow's and Whalley's Case (1873), L.R. 9 Q.B. 219; 27 L.T. 222; sub nom. *R. v. Onslow and Whalley*, 12 Cox, C.C. 358; sub nom. *Re Whalley and Onslow*, 37 J.P. 68; 16 Digest (Repl.) 32, 270.

Rule Nisi calling on the defendant, Ernest Parke, the editor of the "Star" newspaper, to show cause why he should not be committed for contempt of court in publishing in the "Star" newspaper certain matters which might tend to prejudice the fair trial of one S. H. Dougal for forgery, on which charge Dougal was then under remand by the justices of Saffron Walden.

Daukewerts, K.C., and *C. W. Mathews* showed cause on behalf of the defendant.

Lush, K.C., and *J. R. Randolph* supported the rule.

Cur. adv. vult.

July 17, 1903. **WILLS, J.**, read the following judgment of the court.—One Samuel Herbert Dougal was, on Mar. 19, 1903, brought up before the Saffron Walden petty sessions charged with forgery, and was remanded without any evidence being taken. He was again brought up on April 2 and remanded after some evidence till April 8. Articles appeared in the "Star" newspaper, of which the defendant is the editor, on Mar. 19, 20, 21, 23, 24, 26, and 27, some of which contained statements undoubtedly very much to the disadvantage of Dougal. To take one instance only in the issue of Mar. 20, before any evidence had been given in the case, it was stated that on Jan. 27 an affiliation order had been made against him, that a remarkable story of immorality had been disclosed, that he had admitted a conviction for forgery in December, 1895, and that he had then been sentenced to twelve months' imprisonment with hard labour. It is unnecessary to go through the various articles complained of, but they were unquestionably calculated to produce the impression that, apart from the charges then under inquiry, he was a man of bad and dissolute character. On April 7 the rule now under consideration was granted by this court, calling upon the defendant to show cause why he should not be committed for contempt of court. After many subsequent hearings Dougal was committed for trial to the assizes for the county of Essex on charges of forgery and murder. True bills were found in respect of these charges. The only indictment actually tried was for murder, and as the prisoner was convicted upon that charge, the others were not proceeded with.

The important question has been raised whether the court has jurisdiction in such a case and it has been argued by counsel for the defendant that there can be no such jurisdiction because at the time of the publication of the articles complained of there was no proceeding actually pending in any court but the petty sessional court; that the jurisdiction to punish the publishers of articles of this kind is confined to cases in which at the moment of publication there is some cause actually depending in the High Court; and that the High Court cannot deal by way of attachment for contempt with interferences with the due course of justice in any court other than itself. It may be conceded that the jurisdiction to commit for contempt of court is confined to contempts of the court exercising the jurisdiction. Upon the wider and more general question whether the court will treat in this fashion inroads upon the independence of inferior courts, we propose to say a few words towards the close of this judgment. As far as the present case is concerned, it does not seem to us to arise.

By the Supreme Court of Judicature Act, 1873, ss. 16 and 29 [see now Supreme Court of Judicature (Consolidation) Act, 1925, ss. 18, 70], the court of a commission of assize is made a branch of the High Court. The crime of which Dougal was accused—a forgery cognisable for the purposes of the petty sessional inquiry at

A Sadron Walden—could not in the regular course of things be tried anywhere but at the assizes for the county of Essex, and, therefore, if a committal should take place at all, it must be to those assizes. It has been argued, however, that publication of articles of the kind in question cannot be treated as a contempt of the assize court unless a committal has actually taken place and a bill been found, when only, it is urged, is there a case pending in the assize court, when, it is also urged, the jurisdiction ought to be exercised by that court itself. A moment's consideration, it seems to us, is sufficient to dispose of such a proposition. The reason why the publication of articles like those with which we have to deal is treated as a contempt of court, is because their tendency and sometimes their object is to deprive the court of the power of doing that which is the end for which it exists—namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it.

C Their tendency is to reduce the court which has to try the case to impotence so far as the effectual elimination of prejudice and prepossession is concerned. It is difficult to conceive an apter description of such conduct than is conveyed by the expression "contempt of court." If it be once grasped that such is the nature of the offence, what possible difference can it make whether the particular court which is thus sought to be deprived of its independence and its power of effecting the great ends for which it is created be at that moment in session or even actually constituted or not? It is perfectly certain that by law it will and must be constituted, and that when constituted it and it alone can take cognisance of the particular offence which is the subject of the preliminary inquiry. The wrong can hardly be the less because the purpose or the tendency of the act complained of is that the assize court never shall have undisturbed power to fulfil its functions satisfactorily.

E The High Court exists always. To provide beforehand that one of its branches, which, although it does not at the moment exist, yet must, both according to immemorial custom and now also by statutes and rules having the same effect, come into existence, shall be hampered and hindered in the effectual discharge of its duties, as soon as it is constituted, if called upon to try a particular case which it is at all events proposed to bring into that court, is surely an offence against the High Court itself.

Looking, therefore, to the principles upon which this jurisdiction rests, and to the mischief to prevent which it exists, we can have no doubt that it is properly invoked in the present case. Great stress has been laid by counsel for the defendant upon an expression which has been used in judgments upon questions of this kind that the remedy exists where there is a cause pending in the court. We think undue importance has been attached to it. Not only has it been the fact in very nearly all the cases which have arisen that there has been a cause actually begun, so that the expression, quite natural under the circumstances, accentuates the fact, not that the case has been begun, but that it is not at an end. That is the cardinal consideration. It is possible very effectually to poison the fountain of justice before it begins to flow. It is not possible to do so when the stream has ceased.

H We proceed shortly to notice the authorities upon which reliance has been placed, which we have been able to obtain from the Crown Office. It will be observed that they are almost all of quite recent date. This is what might be expected. Before the Law of Libel Amendment Act, 1888, the publication of the proceedings before magistrates preliminary to a committal to assizes or quarter sessions was at least of doubtful legality: see note to *R. v. Fisher* (1), from which it appears that doubts had begun to be cast upon the older doctrine as early as 1858. It was considered, at least until 1858, that their inevitable tendency was to have the case tried, so to speak, in the minds of persons who might be jurors before they came into court: *R. v. Fisher* (1); *R. v. Lee* (2). Since that time till after 1888 only one case is recorded in which the publication of such reports or of extraneous matter connected with them has been brought under the notice of the courts. Modern journalism with its insatiable thirst for matter which may interest its readers is a thing of very recent

growth, and when the publication of the preliminary proceedings was unlawful, or of doubtful legality, not only was the occasion wanting for the publication of many things which since that Act have given rise to complaint, but the unlawfulness of the publication of the proceedings themselves was a standing warning to editors and publishers which was not likely to be overlooked.

The only old authority that has been cited to us (apart from those which have been spoken of as dealing with cases actually pending in a court) is *R. v. Barchett* (3), in which it is said that the Court of King's Bench never interferes with contempt of inferior courts. This case is an authority, so far as it goes, rather upon the question of the general jurisdiction of the Court of King's Bench in its character as the superintending authority over inferior courts than upon the question we are now dealing with; and the circumstances of that case are such that, except for the general proposition stated, it can have little bearing upon any question likely to arise in any other case.

We come, therefore, at once to the somewhat numerous series of cases which have arisen in quite modern times. The earliest is *Re Application for an Attachment for Contempt of Court* (4), heard in 1886, before LORD COLERIDGE, C.J., and HAWKINS, J. Certain persons had been summoned to appear at Bow Street on Feb. 13, 1886, on a charge of inciting to riot. The proceedings were adjourned, and pending the adjournment "Punch" published a woodcut and letterpress headed "Sneaking Sedition." A rule was applied for to call upon the printer and publisher of "Punch" to show cause why he should not be committed for contempt of court. The Court of Queen's Bench refused the rule. LORD COLERIDGE saying (as reported) that he had never heard it even suggested that this court could imprison a man for "contempt of court committed in another place"—an obviously incorrect expression, not at all likely to have been used by LORD COLERIDGE. The case was within the jurisdiction of the Central Criminal Court, and the trial of the persons summoned took place there. The fact that the Central Criminal Court had become by virtue of the Supreme Court of Judicature Act, 1873, ss. 16 and 29, a branch of the High Court was not called to the attention of the court.

The next case in order of time was *Ex parte Hermann* (5). The applicant had been brought before the police-court at Marlborough Street, with a view to her committal to the Central Criminal Court on a charge of murder. The "People" newspaper of April 1, 1894, contained a statement that she had been tried and acquitted in 1890 on a similar charge, and contained a fairly accurate account of what had happened on that occasion, when the Common Serjeant had held that there was no evidence against her. An application to commit the editor and publisher of the "People" was heard before WRIGHT and COLLINS, JJ. The question of jurisdiction was raised, but not insisted upon, and the matter was allowed to drop on the defendants' undertaking to pay the costs of the application. The case is reported only in the newspapers of the day under the name of *R. v. Armstrong* (6). We have had the papers in the Crown Office looked up, and the above statement of facts may be relied upon. Counsel for the defendant has satisfied us that the Central Criminal Court stands upon precisely the same footing for the present purpose as the assize courts, but that fact does not appear to have been brought to the notice of the court. WRIGHT, J., is reported to have said that, although he could find no case in point, he should hesitate long before coming to the conclusion that this court had no jurisdiction in such a case.

The next case was in January, 1895, when a rule was made absolute against one Stead and others. One of the defendants was fined, but as in that instance an indictment had already been removed by certiorari into the Queen's Bench Division, it has no bearing upon the present discussion: *R. v. Baljour, Re Stead* (7). Equally little relevance has the next case, in April, 1896, when a rule granted against the editor and publisher of the "Huntingdonshire Post" for comments on a case under committal, was discharged on the merits, no questions having been raised as to the jurisdiction: *R. v. Payne* (8). On Dec. 21, 1895, WILKS and WRIGHT, JJ., refused

A rule to respect of comments in a newspaper on a case of one Crane, who had been committed to the Central Criminal Court, on the ground of want of jurisdiction. In this case also it was not called to the attention of the court that the judges at the Central Criminal Court sat under commissions identical with those which constitute the assize courts, and it was assumed that they sat under the Central Criminal Court Act, 1834, by which the Central Criminal Court was established, and not under the commissions required by that Act: see *LAW JOURNAL* newspaper, Jan. 4, 1896, p. 8. In May, 1896, a rule was refused on the merits in respect of comments on a case in which two persons named Milson and Fowler had been committed to the Central Criminal Court on a charge of murder. No question as to jurisdiction was raised.

In January, 1897, WRIGHT and BRUCE, JJ., granted a rule in respect of an article in the "Beech and Radnor County Times," upon a case of *R. v. Williams* (9) who stood committed for trial to the assizes. The same judges in the same term allowed the rule to be discharged on the defendants undertaking to pay the costs of the applicant as between solicitor and client. The question of jurisdiction does not seem to have been raised: *R. v. Felgate* (10). On Jan. 26, 1897, a rule was refused by WRIGHT and BRUCE, JJ., against the same defendants for an article in the same paper. It is not reported, but there can be no doubt that it was refused on the merits and not on any question of jurisdiction. On April 28, 1899, this court, then consisting of LORD RUSSELL, C.J., DARLING and CHANNELL, JJ., granted a rule for comments on a case of one Mary Ann Ansell, who had been committed to the Hertfordshire Assizes on a charge of murder. The rule, however, was for some reason which we cannot trace, not drawn up. Probably, as in the late case of *R. v. Newton* (11), it was supposed to be a matter between the parties only, and was compromised without the leave of the court. We are informed that there may have been other cases on the civil side of the court of which there is no record in the Crown Office. If it is so, they would probably be cases in which comments had been made affecting proceedings in matters pending on the civil side, and, if so, would afford no assistance in the present discussion.

It will thus be seen that there have been only two cases in which the question of jurisdiction was effectively raised—in each instance with respect to cases which, if tried at all, would have been tried at the Central Criminal Court. In both cases the court assumed that the Central Criminal Court was a separate and independent court with which this court had nothing to do. We think that view is erroneous. In neither case was there any serious argument on the subject of jurisdiction, and we think, therefore, that very little assistance can be gathered from the string of cases which have just been mentioned, or from *R. v. Burchett* (3). For what they are worth they tell rather against than for the general jurisdiction of this court to protect inferior courts from attacks of this kind on their independence and usefulness. On the other hand, very serious and important considerations tend the other way. Many inferior tribunals are not courts of record, and, therefore, have no means of checking practices of the kind with which we are dealing. Many of them sit only at long intervals, and before they can do anything to interfere with such offences against public justice all the mischief possible may have been effectually done. This court exercises a vigilant watch over the proceedings of inferior courts, and successfully prevents them from usurping powers which they do not possess, or otherwise acting contrary to law. It would seem almost a natural corollary that it should possess correlative powers of guarding them against unlawful attacks and interference with their independence on the part of others.

It is said with regard to them, as has been said with respect to the present case, that there is a remedy by criminal information or indictment. The latter remedy is unsatisfactory on account of the necessary delay, though it has been made use of: see *R. v. Fisher* (1), where the defendant had published in a paper called "The Day" a sensational report of the statements made before a magistrate previous to committing a prisoner for trial at the Admiralty sessions or in the Court of King's

Bench, as the parties might think fit. Criminal information is cumbrous and is also liable to great delay. It has, no doubt, be occasionally resorted to, as in *R. v. Williams* (12), where John Thurtell had been committed to the assizes on a charge of murder, and a theatrical exhibition was held by the court to be calculated to interfere with the fair trial of his case; in *R. v. Lee* (2), where the defendant had published a statement of the contents of depositions taken before the magistrates on a charge of murder; and in *R. v. Fleet* (13), where the defendant had published the evidence given before a coroner's jury with comments unfavourable to a party accused of murder. See also *R. v. Gray* (14), an important Irish case. In England no case of a criminal information for a matter of this kind is to be found in the books since *R. v. Williams* (12), cited above, in 1823.

There are, therefore, serious objections to the proceeding by way of criminal information. Apart from those which have been pointed out before, it is usual in cases of criminal information for the court to be satisfied that the applicant is a person to whom the privilege of filing an information in the name of the Attorney-General may safely and properly be granted; and, although this condition has been dispensed with in the cases above mentioned, the court ought to be chary of departing from so wholesome a rule. On the other hand, there are not wanting expressions in the books which point in the other direction. The jurisdiction, as has been shown, has been actually exercised, whether per incuriam or rightly, in several of the cases cited. The Court of King's Bench is one to which every criminal case which may be the subject of indictment is liable, upon proper materials, to be removed. One frequent ground of removal is that prejudice exists in the natural locality of trial, and it may well be that it has a direct interest and duty in repressing practices whose influence for evil would extend, though perhaps in a less measure, to itself should it be called upon to try a case removed from another court.

But we purposely abstain from pronouncing any opinion upon this general question, and prefer to leave it entirely open when the occasion shall arise, and at the present moment confine ourselves to saying, with WRIGHT, J., that we should hesitate long before casting any more doubt than may already exist upon the capacity of this court to deal by proceedings for contempt with cases in which attempts are made to pollute the stream of justice and to interfere with its proper and unfettered administration by courts which possess no adequate means of protecting themselves in this respect. In the particular instance before us it appears that Mr. Parke was not himself the author of the articles complained of, nor was he aware that they had been written or were about to be published. His superintendence, however, must have been of a very lax and perfunctory character, as the articles were published in no less than seven issues of his paper, extending from Mar. 19 to 27, both days inclusive; and as the first of the series was one which grossly transcended all possible limits of propriety in such matters, and transcended them in a peculiarly mischievous fashion by stating a number of facts extremely damaging to the prisoner which could never be given in evidence against him on his trial, and to the publication of which any reasonable sense of justice would have induced the editor to take serious notice with regard to his subordinates, he cannot be acquitted of great negligence in allowing such violations of the law to be repeated time after time, and we think he ought to pay a substantial fine, which we fix at £50. Our order is that he pay that sum as fine, and that he be imprisoned in the custody of the court in Brixton Gaol until the fine be paid. We make no order as to costs, as, looking to the matters brought to our notice in the application recently heard against the solicitor who took the present proceedings, we can hardly doubt that the real object of the motion was to obtain for Dougal a sum of money by way of compromise—an abuse of the process of this court to which we feel bound to put a stop.

Rule absolute.

Solicitors : *Arthur J. E. Newton ; Lewis & Lewis.*

[Reported by W. W. ORR, Esq., Barrister-at-Law.]

WISE v. DUNNING

[KING'S BENCH DIVISION (Lord Alverstone, C.J., Darling and Channell, JJ.), November 19, 20, 1901]

[Reported [1902] 1 K.B. 167; 71 L.J.K.B. 165; 85 L.T. 721; 66 J.P. 212; 50 W.R. 317; 18 T.L.R. 85; 46 Sol. Jo. 152; 20 Cox, C.C. 121]

Magistrates—Breach of the peace—Conduct likely to cause—Power to bind over to restrain—Provocative language and conduct at public meeting—Breach by audience—Threat of continuance—No breach by speaker.

Justices have jurisdiction to order the holder of public meetings upon the highway to enter into recognisances to keep the peace and be of good behaviour where his provocative language and conduct have led to a breach of the peace by persons who resented that language and conduct, and are likely, if continued, to lead to further breaches, even though the holder of the meetings has not been guilty of breaches of the peace personally nor has directly incited others to commit such breaches.

Beatty v. Gillbanks (1) (1882), 9 Q.B.D. 308; *R. (Reynolds) v. County Cork Justices* (2) (1882), 15 Cox, C.C. 78; *R. v. Cork Justices* (3) (1882), 15 Cox, C.C. 149, considered.

Notes. Applied: *R. v. Little and Dunning, Ex parte Wise* (1909), 101 L.T. 859; *Thomas v. Sawkins*, [1935] All E.R. Rep. 655; *R. v. Sharp*, [1957] 1 All E.R. 577. Referred to: *Lansbury v. Riley*, [1911-13] All E.R. Rep. 1059; *R. v. Halliday*, [1917] A.C. 260; *Everett v. Griffiths*, [1921] 1 A.C. 631.

As to recognisances to be of good behaviour, see 25 HALSBURY'S LAWS (3rd Edn.) 231 et seq., and for cases see 33 DIGEST 365-369.

Cases referred to:

- (1) *Beatty v. Gillbanks* (1882), 9 Q.B.D. 308; 51 L.J.M.C. 117; 47 L.T. 191; 46 J.P. 789; 31 W.R. 275; 15 Cox, C.C. 138, D.C.; 33 Digest 367, 761.
- (2) *R. (Reynolds) v. County Cork Justices* (1882), 15 Cox, C.C. 78; 10 L.R.Ir. 1; 33 Digest 367, b.
- (3) *R. v. Cork Justices* (1882), 15 Cox, C.C. 149; 33 Digest 367, a.
- (4) *R. (Orr) v. Londonderry Justices* (1891), 28 L.R.Ir. 410; 33 Digest 366, 756iii.

Also referred to in argument:

- O'Kelly v. Harvey* (1882), 15 Cox, C.C. 435; 14 L.R.Ir. 105.
Ex parte Davis (1871), 24 L.T. 547; 35 J.P. 551; 33 Digest 367, 765.
R. v. Hughes (1879), 4 Q.B. 614; 48 L.J.M.C. 151; 40 L.T. 685; 43 J.P. 556; 14 Cox, C.C. 284, C.C.R.; 33 Digest 336, 476.
R. v. Graham and Burns (1888), 4 T.L.R. 212; 16 Cox, C.C. 420; 33 Digest 306, 235.

Case Stated by the Liverpool stipendiary magistrate.

An information and complaint was preferred by the respondent against the appellant, George Wise, charging that the appellant held meetings on sundry dates in May, 1901, on the King's highway and sundry other places within the city of Liverpool to which the public had access, that breaches of the peace had taken place in consequence of the holding of those meetings, and that the respondent had reason to believe that the appellant intended to hold similar meetings in the future, and, if such meetings were addressed by the appellant, serious breaches of the peace would follow. The respondent prayed that the appellant might be summoned to show cause why he should not be ordered to find sufficient sureties to keep the peace towards all His Majesty's subjects and be of good behaviour during the next twelve months.

At the hearing of the information and complaint, the following facts were proved. The appellant addressed a meeting held in Islington Square, Liverpool, a public place, a public thoroughfare, and part of the King's highway, on May 15, 1901, and the following night addressed a similar meeting held in the same place. The meeting so held and addressed by the appellant and the other meetings herein referred to were held by him with the view of prosecuting what is called a "crusade" in the interests of the Protestant religion. Each of these meetings was attended by a number of persons of the Roman Catholic religion in addition to the Protestant supporters of the appellant. The crowd of people present on the evening of May 16 was so large that Carver Street, a public street running into the square, was completely blocked, and the main public streets on each side of the square were filled with the overflow of people from the meeting. At the meeting held on May 16 the appellant in the course of his speech put beads round his neck and waved a crucifix above his head. The gestures and language then used by him were such as were likely to insult and annoy the Roman Catholics, and were well calculated to provoke a breach of the peace by them, and did in fact result in a breach of the peace, as at the conclusion of the meeting a breach of the peace was created by the opponents of the appellant, who made a determined rush for him, and it was only by the intervention of the members of the police force that he got away in safety. The appellant did not himself commit any breach of the peace, nor did he incite his supporters to do so, but his language and gestures did in fact provoke other persons present to do so. At this meeting the supporters of the appellant said, "Let us charge them," but the appellant restrained them, saying "Stand still, stand still."

The appellant also held a meeting on Sunday morning, May 19, 1901, at the corner of Boaler Street and Sheil Road, which were public thoroughfares and part of the King's highway in the city, and, just before addressing such meeting, the appellant remarked that he was about to "denounce" the infamous order of Jesuits and the Coronation oath. At the meeting the appellant called Roman Catholics "rednecks," a name most insulting to them, and challenged them to get up and deny the truth of any of his remarks. The term "rednecks" was intended to annoy and insult the Roman Catholics and was well calculated to provoke a breach of the peace, and a breach of the peace did take place, as a number of stones were thrown and fights took place amongst those attending the meeting, and the police had to interfere and separate them. The meeting afterwards broke up, but prior to it doing so the appellant asked those present to support him at a meeting to be held at Islington Square the following Saturday at 8 p.m. On being requested to alter the hour to 7.30, he replied, "Yes, the sooner we get at them the better." The appellant did not at the meeting commit any breach of the peace nor incite his supporters to do so, but by his language above mentioned he in fact provoked other persons present to do so. At this meeting the appellant asked his own supporters not to assault anyone.

At a meeting held and addressed by the appellant on May 22, 1901, in Mere Lane, a public thoroughfare and part of the King's highway in the city of Liverpool, the appellant, in referring to the meeting which was to be held on the following Saturday, May 25, said that as he had heard the Catholics were going to hold a meeting at the same place at 8 p.m., he thought his meeting should be at 7.30. He also said that he had received a letter informing him that the Catholics were going to bring sticks, upon which some of his supporters said they would bring sticks also. He also told his supporters that the police had refused to give him protection, and he looked to them to protect him. In the "Liverpool Evening Express" newspaper of May 24, 1901, the following advertisement which was admitted by the defendant to have been inserted by him, appeared:

"Protestantism and free speech. Do not allow the Romanists to triumph, but maintain your liberties. Support Mr. Geo. Wise on Saturday next, 7.30, at Islington Square."

A In consequence of the disturbances which took place at the meetings mentioned, an information and complaint was laid by the respondent similar to the information and complaint now in question in respect of the above meetings, and, on the hearing of such information and complaint on May 25, 1901, an undertaking was given by the solicitor of the appellant on his behalf that he would not hold the meeting then advertised and above referred to. This undertaking only referred to the meeting to take place in Islington Square, and a meeting was arranged by the appellant to be held the same evening in front of St. George's Hall, a place in the city of Liverpool to which the public had access, and notice of his intention to hold such meeting was given by the appellant to the Liverpool police about 6.30 the same evening, and a large crowd numbering 6,000 people assembled in front of St. George's Hall, and when the appellant appeared on the scene a number of his opponents, who were waiting for him, made a rush for him, and a free fight ensued between his supporters and his opponents. A number of police who had been taken there in anticipation of a breach of the peace occurring were all called up to protect him and take him away, and this was done, and he was escorted from St. George's Hall to the Central Station. On the way to the station the majority of the crowd followed, and there were many ugly rushes by them to get at the appellant, and many of the police were assaulted and knocked down in the streets. The appellant did not himself commit any breach of the peace at this meeting, nor did he threaten to do so or incite any other person or persons to do so. The meetings and addresses of the appellant in connection with his "crusade" had on several other occasions caused the police of the city of Liverpool to make special provisions to prevent a disturbance in the public streets of the city. The appellant stated in court, on the hearing of a summons heard before the present information and complaint, that he intended to hold similar meetings to those above mentioned in the future, and the respondent deposed that, if such meetings were held, he (the respondent) had no doubt whatever it would lead to a breach of the peace.

E It was contended that the information was null and void inasmuch as it did not allege that the appellant had been guilty of any offence, and that the magistrate had no jurisdiction to make any order against him; and, further, that such an order could only be made in respect of anticipated breaches of the peace against a person who had himself either been guilty of a breach of the peace or in regard to whom there was sufficient reason to believe that he would be guilty of a breach of the peace towards some particular person or persons and on the information of such person or persons; and that, inasmuch as in the present case there was no suggestion that the appellant had ever been guilty of a breach of the peace or had ever threatened or was likely to be so guilty or incite others to be so guilty, an order against the appellant was in excess of jurisdiction and erroneous in point of law. The magistrate ordered the appellant to enter into a recognisance in the sum of £100 with two sureties in £50 each to keep the peace and be of good behaviour during the twelve months then next ensuing, and in default to be imprisoned for two months unless he entered into such recognisance.

F. E. Smith for the appellant.

Pickford, K.C. (Maxwell with him) for the respondent.

LORD ALVERSTONE, C.J. This is an application by way of appeal from an order of the Liverpool stipendiary binding over Mr. Wise to be of good behaviour. **I** But I am of opinion that there is no reason to doubt that the magistrate was perfectly justified in putting Mr. Wise under recognisances.

I do not think that it is necessary to go at great length into the authorities that have been cited, beyond saying that I am not able to find any difference of opinion as to the law which is to be applied in these cases. It seems to me the whole difficulty has arisen from the attempts to apply the law to different sets of circumstances. I do not at all deny that different people may express very different opinions as to what ought to have been the application of the law in particular cases. For

instance, counsel for the appellant called our attention to the opinion of a very learned lawyer and great writer, MR. DICEY, who expressed an opinion with reference to *Beatty v. Gillbanks* (1), and as I understood the passage it was that the view taken by the Irish courts was preferable to that taken by FIELD and CAVE, JJ. It seems to me that if *Beatty v. Gillbanks* (1) is examined, there is no law there laid down inconsistent with anything that has been stated by any of the very distinguished judges in Ireland who have dealt with this matter and have had unusual opportunities for dealing with it. I think that for this purpose it is sufficient to cite the passage from FIELD, J.'s judgment in *Beatty v. Gillbanks* (1) which states the law, in my opinion, absolutely accurately. He says :

"I entirely concede that everyone must be taken to intend the natural consequences of his own acts, and it is clear to me that if this disturbance of the peace was the natural consequence of acts of the appellants, they would be liable, and the justices would have been right in binding them over. But the evidence set forth in the Case does not support this contention."

O'BRIEN, C.J., in *R. (Orr) v. Londonderry Justices*, said this (28 L.R.Ir. at p. 447) :

"No act on the part of any person was proved to show that it was reasonably probable that the conduct of the defendants would, on the day in question, have provoked a breach of the peace."

I think it is important to emphasise that enunciation of the necessary test, because it has been pressed upon us that if the appellant, Mr. Wise, did not intend to act unlawfully himself or to induce other persons to act unlawfully, the fact that his words might have led other people so to act would not be sufficient.

As to *R. (Reynolds) v. County Cork Justices* (2), I would refer to the passage in the judgment of MAY, C.J. I will not read the whole passage, although I think it is all-important, where he commences with the citation of BLACKSTONE. He says (15 Cox, C.C., at p. 84) :

"This requisition of sureties must be understood rather as a caution against the repetition of the offence than any immediate pain or punishment. This caution is such as is intended merely for prevention without any crime actually committed by the party, but arising only from a probable suspicion that some crime is intended or likely to happen, and consequently it is not meant as any degree of punishment, unless perhaps for a man's imprudence in giving just ground for apprehension."

In *R. v. Cork Justices* (3) there is the judgment of a very learned Irish judge, FITZGERALD, J., in which he says after referring to the authorities (15 Cox, C.C., at p. 155) :

"Without citing further authority we may assume that where it shall be made reasonably to appear to a justice of the peace that a person has incited others by acts or language to a violation of law and of right and that there is reasonable ground to believe that the delinquent is likely to persevere in that course, such justice has authority by law, in the execution of preventive justice, to provide for the public security by requiring the individual to give sureties of good behaviour, and in default commit him to prison."

I have referred to these cases not to try to deduce from them any new rule of law, but to point out that in a number of cases before different judges the rule has been expressed in substantially the same way. All lay down what I may call the essential condition that there must be an act of the defendant, the natural consequence of which would be likely to produce an unlawful act. I think that the present case could be put higher.

There is in this case an all-important statute, the local Liverpool Improvement Act, 1842, which provides that any person who uses any threatening or abusive or

A insulting words or behaviour with intent to provoke a breach of the peace—which is not this case—or whereby a breach of the peace may be occasioned may be summoned before the local magistrates and may be fined. Counsel for the appellant argued that that was to have a very limited scope, and was meant to prevent persons in the streets of Liverpool whose language might be less choice than it ought to be using it with impunity. I cannot think that was the scope of the legislation.

B although it may have been one of the evils which were aimed at. We have here a distinct finding of fact that Mr. Wise had held a number of meetings in the public streets with the result that those highways were blocked by crowds of thousands of people and very serious contests and breaches of the peace had arisen. We have, in addition, the further finding that the appellant himself used, with respect to a large body of people of a different religion from that of himself, language that the magistrate has said to be of a most insulting character, and to have challenged any one of them to get up and deny his remarks. It seems to me that the magistrate was only discharging his duty in having regard to the character of the population over whom he has to administer justice, and, if it is known that there are in any town a large body of any particular religion, the fact that a man has used insulting language in the public street towards that body of persons, is a circumstance that the magistrate must take into consideration when he is considering the natural consequences of the acts.

In addition to that and preparatory to a meeting, the appellant was proved to have stated that he had received a letter informing him that the Catholics were going to bring sticks, and then he added that he told his supporters that police had refused to give him protection and so he looked to them for protection. No reasonable man,

E looking at those facts, can have doubt that the police and the magistrate came to the right conclusion when they thought that the result of these continued meetings, with increasing crowds and insulting language being used to a larger body of persons who might be present, and an invitation by the appellant that he should be protected by his own supporters, went very far indeed to incite the people to use language and to so behave as to occasion a breach of the peace. In my opinion, there

F was abundant evidence on this information to show that in the public street Mr. Wise had been guilty of language which had caused an obstruction, which was abusive, and which tended to bring about a breach of the peace, and that he threatened and intended to be guilty of doing similar acts in another place. The fact that he had promised not to hold a meeting at one place, but had held one

G within half a mile or a quarter of a mile of the spot on the same day, shows, at any rate, that the magistrate was justified in taking precautions against him. Mr. Wise was represented by a solicitor and elected to call no evidence, and, instead of being punished, he was properly bound over, in my opinion, in the recognisance that he was ordered to give, and I am entirely of opinion that the magistrate acted within his jurisdiction and perfectly rightly, and that the point of law raised in this case cannot be held to be good. The appeal must be dismissed.

H

DARLING, J.—I am of the same opinion. I think it necessary to summarise shortly what facts the magistrate had before him. We begin with the knowledge afforded by Mr. Wise himself that he called himself a "crusader" who was going to preach a Protestant crusade. In order to do that, he supplied himself with a crucifix which he waved about; he hung round his neck a lot of beads which obviously were designed to represent the rosaries used by Roman Catholics, and, got up in this way, he confessedly made use of a number of expressions most insulting to the faith of the Roman Catholic population among whom he went. There had been disturbance and riots caused by this conduct of his before, and the magistrate has found that the language which he used was provocative, and that that kind of language was likely to occur again. Large crowds had assembled in the streets, and the people were prevented from creating a serious riot only by the intervention of the police. Was that the natural consequence of all these doings?

Was not that exactly what has happened over and over again, what has given rise to every one of the cases that have been cited before us, both the Irish cases and *Beatty v. Gillbanks* (1)—namely, that they have arisen out of precisely this kind of conduct on the part of a person calling himself of one religion, and outraging the religion of another. I do not care to use language of my own to say what kind of person the evidence shows Mr. Wise to have been. I am content to use the language of SAMUEL BUTLER when he says (*HUDIBRAS*, Part 1):

“One of that band
Of errant saints, whom all men grant
To be the true Church Militant;
A sect whose chief devotion lies
In odd perverse antipathies.”

As I say, the natural consequence of this conduct has been to create the riots that have given rise to these cases. Counsel for the appellant says the natural consequence ought to mean the legal consequence, but I do not think so. The natural consequences are illegal acts, and I think that those illegal acts are the natural product of the eloquence of this crusader, and that from these acts circumstances have arisen which justified the magistrate in binding him over to be of good behaviour. In one of the cases that have been cited—*R. (Orr) v. Londonderry Justices* (4)—O'BRIEN, C.J., says (28 L.R.Ir. at p. 447):

“Now, I wish to make the ground of my judgment clear, and carefully to guard against being misunderstood. I am perfectly satisfied that the magistrates did not make the order which is impugned, by reason of there having been or there being likely to be any obstruction of the highway, and that the true view of what took place is that the defendants were bound over in respect of an apprehended breach of the peace, and, in my opinion, there was no evidence to warrant that apprehension.”

It is clear that, if there had been evidence to warrant that apprehension, the Chief Justice would have held the magistrates' decision in that case to be right. It is said that *Beatty v. Gillbanks* (1), which was decided in the English Court of Queen's Bench, is in conflict with that decision of the Chief Justice of Ireland. I am not sure that it is, and I am inclined to think that, having regard to the passage which my Lord read from the judgment of FIELD, J., the whole thing is a question of evidence. However, I do not hesitate to say that, if there be a conflict between *R. (Orr) v. Londonderry Justices* (4) and *Beatty v. Gillbanks* (1), I prefer the law as laid down in *R. (Orr) v. Londonderry Justices* (4). I think that that is a right statement of the law, and, if it be, it is perfectly ample, even without the help of the local Act of Parliament to which my Lord has referred, to warrant the stipendiary magistrate in coming to the conclusion to which he did in this particular case. I, therefore, think that his order was right.

CHANNELL, J.—I entirely agree in the judgments which have been given. I quite agree with the proposition that the law does not, as a rule, regard an illegal act as being the natural consequence of any temptation which may be held out to commit it. For instance, a person who exposes his goods outside his shop is often said to tempt people to steal, but it could not be said that that is the natural consequence of it. The House of Lords has recently held, with reference even to leaving a blank space in a cheque, which can easily be filled up by adding to the amount, that it is not the natural consequence if it leads to somebody committing a forgery in writing the further amount in the cheque. Those propositions were, of course, quite correct, but I think that the cases show that the law does regard the infirmity of human temperament to such an extent as to consider that a breach

A of the peace, although an illegal act, is the natural consequence of insulting language or matters of that kind. Possibly it is an exception to the general rule, but it is clearly made out by the cases. I, therefore, think the learned stipendiary was right, and that the appeal should be dismissed.

Appeal dismissed.

B Solicitors: *Field, Roscoe & Co.*, for *Miller, Peel, Hughes & Rutherford*, Liverpool; *F. Venn & Co.*, for *Pickmere*, Liverpool.

[*Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.*]

C

D

R. v. OLLIS

COURT FOR CONSIDERATION OF CROWN CASES RESERVED (Lord Russell, C.J., Mathew, Grantham, Lawrance, Wright, Bruce, Kennedy, Ridley and Channell, JJ.), May 5, July 2, 1900]

E

[*Reported* [1900] 2 Q.B. 758; 69 L.J.Q.B. 918; 83 L.T. 251; 64 J.P. 518; 49 W.R. 76; 16 T.L.R. 477; 44 Sol. Jo 593; 19 Cox, C.C. 554]

Criminal Law—Evidence—Evidence of similar offences—Act charged in previous proceedings when prisoner acquitted.

F

Evidence of the commission by a prisoner of an act similar to those charged against him is admissible to negative the defence of accident or mistake or to establish guilty knowledge or intention in connection with the present charges even though the act of which evidence is given formed the basis of a charge in former criminal proceedings of which the prisoner was acquitted.

G

The prisoner was acquitted on a charge of obtaining money by false pretences from H.R., the false pretence alleged being that a cheque drawn by him would be honoured, whereas he knew that it would not. He was later arraigned on an indictment charging him with obtaining by means of worthless cheques, sums from B.R. and M., and during the trial of this indictment evidence of the facts on which the earlier indictment had been based was admitted.

H

Held by LORD RUSSELL, C.J., MATHEW, J., GRANTHAM, J., LAWRENCE, J., WRIGHT, J., KENNEDY, J., and CHANNELL, J., BRUCE, J., and RIDLEY, J., dissentiente, that the evidence was rightly admitted.

Notes. Considered: *R. v. Wyatt*, [1904] 1 K.B. 188; *R. v. Bond*, [1904-7] All E.R. Rep. 24; *R. v. Shellaker*, [1914] 1 K.B. 414. Referred to: *R. v. Smith* (1905), 92 L.T. 208; *R. v. Boyle and Merchant*, [1914-15] All E.R. Rep. 553; *Perkins v. Jeffery*, [1914-15] All E.R. Rep. 172; *R. v. Thompson*, [1917] 2 K.B. 630; *R. v. Lovegrove*, [1920] 3 K.B. 643.

As to evidence in a criminal case of similar offences by the prisoner, see 10 HALSBURY'S LAWS (3rd Edn.) 442-445, and for cases see 14 Digest (Repl.) 420 et seq.

Cases referred to:

- (1) *R. v. Westwood* (1831), 4 C. & P. 547; 2 Man. & Ry.M.C. 509; 14 Digest (Repl.) 417, 4068.
- (2) *R. v. Plant* (1836), 7 C. & P. 575; sub nom. *R. v. Birchenough*, 1 Mood. C.C. 477, C.C.R.; 14 Digest (Repl.) 388, 3777.

- (3) *R. v. Francis* (1874), L.R. 2 C.C.R. 128; 43 L.J.M.C. 97; 30 L.T. 503; 33 J.P. 469; 22 W.R. 663; 12 Cox, C.C. 612, C.C.R.; 14 Digest (Repl.) 437, 4244.
- (4) *R. v. Rhodes*, [1899] 1 Q.B. 77; 68 L.J.Q.B. 83; 79 L.T. 360; 62 J.P. 774; 47 W.R. 121; 15 T.L.R. 37; 43 Sol. Jo. 45; 19 Cox, C.C. 182, C.C.R.; 14 Digest (Repl.) 438, 4245.
- (5) *R. v. Harellon* (1874), L.R. 2 C.C.R. 134; 44 L.J.M.C. 11; 31 L.T. 451; 39 J.P. 37; 23 W.R. 139; 13 Cox, C.C. 1, C.C.R.; 15 Digest (Repl.) 1181, 11,950.
- (6) *Makin v. A.-G. for New South Wales*, [1894] A.C. 57; 63 L.J.P.C. 41; 69 L.T. 778; 58 J.P. 148; 10 T.L.R. 155; 17 Cox, C.C. 704; 6 R. 373, P.C.; 14 Digest (Repl.) 420, 4094.
- (7) *R. v. Oddy* (1851), 2 Den. 264; T. & M. 593; 4 New Sess. Cas. 602; 20 L.J.M.C. 198; 17 L.T.O.S. 136; 15 J.P. 308; 15 Jur. 517; 5 Cox, C.C. 210, C.C.R.; 14 Digest (Repl.) 502, 4851.
- (8) *R. v. Holt* (1860), Bell, C.C. 280; 30 L.J.M.C. 11; 3 L.T. 310; 24 J.P. 757; 6 Jur.N.S. 1121; 9 W.R. 74; 8 Cox, C.C. 411, C.C.R.; 14 Digest (Repl.) 421, 4103.
- (9) *Blake v. Albion Life Assurance Society* (1878), 4 C.P.D. 94; 48 L.J.Q.B. 169; 40 L.T. 211; 27 W.R. 321; 14 Cox, C.C. 246; 22 Digest (Repl.) 67, 448.

Also referred to in argument :

- R. v. Roebuck* (1856), Dears. & B. 24; 25 L.J.M.C. 101; 27 L.T.O.S. 143; 20 J.P. 325; 2 Jur.N.S. 597; 4 W.R. 514; 7 Cox, C.C. 126, C.C.R.; 14 Digest (Repl.) 437, 4241.
- R. v. Long* (1833), 6 C. & P. 179; 14 Digest (Repl.) 417, 4070.
- R. v. Salt* (1862), 3 F. & F. 834; 14 Digest (Repl.) 441, 4279.
- R. v. Geering* (1849), 18 L.J.M.C. 215; 8 Cox, C.C. 450 n.; 14 Digest (Repl.) 422, 4112.
- R. v. Gilmore* (1882), 15 Cox, C.C. 85; 14 Digest (Repl.) 387, 3774.

Case Stated by the recorder of Bath.

The defendant was charged at the Michaelmas Quarter Sessions for the city and county of Bath with obtaining money by false pretences.

There were two indictments against him, one charging that he had on July 5, 1899, obtained a cheque for £3 from Harold Fairbrother Ramsey by means of a worthless cheque; and another, containing three counts, charging that he had, also by means of worthless cheques, obtained on July 6, 1899, 10s. from Bertha Lucy Rawlings, on June 24, 1899, a cheque for £1 10s. from William Henry Morris, and on June 26, 1899, the sum of £2 from the same Morris. The prisoner was tried first on the indictment which charged the obtaining of £3 from Ramsey on July 5, 1899. In support of the charge evidence was given that the prisoner in payment of a debt of £2 to Ramsey had drawn a cheque on the Birkbeck Bank for £5, and had obtained a cheque from Ramsey for the balance of £3; that the prisoner's cheque for £5 was dishonoured when presented; that at the time the prisoner had an account at the Birkbeck Bank, but nothing had been paid into or drawn out of the account since Mar. 31, 1896, and that on July 6, 1899, the balance to the credit of the prisoner was 3s. 10d. It was also proved that the prisoner had been made bankrupt on April 7, 1899. The prisoner said in evidence that at the time he drew the cheque he expected that a certain firm of solicitors would have paid into his account at the Birkbeck Bank the sum of £183 due to him as commission on the sale of a certain hotel. It was proved, however, that the sale had never taken place. The jury acquitted the prisoner, who was then tried on the second indictment, but, the jury disagreeing, he was remanded to the next quarter sessions.

At the January quarter sessions the prisoner was again tried on the second indictment, and counsel for the prosecution called as a witness Ramsey, the prosecutor in the case in which the prisoner had been acquitted. The prisoner objected

A to the evidence of Ramsey on the ground that, he having been acquitted of fraud in the matter of Ramsey's cheque, Ramsey's evidence was inadmissible as evidence of fraud on the trial of any subsequent indictment, but the recorder overruled the objection, and permitted Ramsey to give evidence as to the prisoner's transaction with him. The prisoner was convicted, and the recorder stated a case for the opinion of the court, the question being whether Ramsey's evidence was admissible.

B *Harris-Stone and C. T. Lawrance for the prisoner.*
Sir Sherston Baker for the Crown.

Cur. adv. vult.

July 2, 1900. The following judgments were read.

C **LORD RUSSELL, C.J.**—The question comes before us on a case stated by the recorder of Bath on a charge tried before him at the quarter sessions for that city. The facts of the case stated in chronological order are these. The first trial took place at the quarter sessions held on Oct. 13, 1899. The indictment was confined to a single charge—that the prisoner obtained on July 5, 1899, from one Harold Fairbrother Ramsey the sum of £3 by means of false pretences. It appears that on July 1 Ramsey lent to the prisoner the sum of £2, and a few days afterwards asked the prisoner to return the money. Thereupon the prisoner gave Ramsey a cheque for £5 and Ramsey gave him a cheque for £3. In addition to these facts the following facts were proved. The prisoner was bankrupt in May, 1899, his liabilities being £450 8s. and his assets nil; he had had an account at the Birkbeck Bank, though no money had been paid into it or drawn out since March, 1896, and the amount standing to his credit in July, 1899, was 3s. 10d. At the trial a suggestion was made by the prisoner and evidence was given by him that he expected a payment into his account to be made of an amount due to him for commission which he had earned. On this a solicitor was called who stated in evidence that the prisoner would have been entitled to a sum of £183 as commission on the sale of a certain hotel if the hotel had been sold, but that in fact the sale had not taken place. The prisoner was in the end acquitted. That acquittal may have proceeded on either of two grounds—that the representations were not made, or that the representations were made and were not false. So much for the first case. On Oct. 14 the prisoner was again put on his trial on the charges that he had obtained on June 24, 1899, 30s. from one Morris, on June 26, 1899, the sum of £2 from the same Morris, and on July 6, 1899, the sum of 10s. from Bertha Lucy Rawlings by means of worthless cheques. The same evidence was given as to the prisoner's banking account and his bankruptcy as I have stated with reference to the first trial. On this trial the jury disagreed. Ultimately on Jan. 8, 1900, the prisoner was again tried. On this occasion counsel for the prosecution pressed on the recorder that he ought to admit evidence of the facts proved in the first case, the ground being that these facts proved that the prisoner's transactions were part of a system of fraud.

H The only point on which the learned recorder has asked our opinion is whether this evidence was admissible on the second trial for the purpose of proving the prisoner's guilty knowledge, being evidence of facts which were relevant to the charge on which the prisoner had been acquitted. It does not appear to have been argued before the recorder, nor was it argued in this court, that the evidence, while relevant to the charge of obtaining money by false pretences, was not on the first occasion relevant to the question of guilty knowledge. It is clear that there was no estoppel. There was no negation by the jury of the criminal intention. *Nemo debet bis puniri pro uno delicto*. Therefore, on the second trial the evidence was not admissible to show that he was guilty of the charge of obtaining money by false pretences. It was, however, evidence of the state of the prisoner's knowledge, and it was not the less admissible because it was evidence tending to show that he was in fact guilty of the first charge. It was clearly relevant on the second trial, for it was evidence negating a reasonable belief by the prisoner that the cheques would be honoured. He drew cheques on June 24, June 26, July 5, and, finally, on July 6, all on a bank

into which nothing had been paid and nothing drawn since Mar. 31, 1896, and in which his balance was only 3s. 10d. It seems to me impossible to say that this evidence was not relevant as tending to show a system of fraud. I have had the advantage of reading the judgment of BRUCE, J., and, while appreciating the value of the arguments in that judgment, it seems to me that they go more to the weight of the evidence than to its admissibility. The result will be that the conviction will be affirmed.

In the judgment I have delivered **MATHEW, J.**, concurs.

GRANTHAM, J.—As my Lord has gone so fully into the facts of this case, I will confine my remarks to what seems to me to be the only legal question for our determination, and the only one argued before us—viz., whether or not evidence given against a prisoner on one charge on which he has been acquitted can be afterwards used against him on another charge, not for the purpose of again attempting to get him convicted of the offence of which he has been acquitted, but merely to prove guilt in his conduct on the second charge by reason of his conduct in the first case; in other words, to negative the suggestion of innocence of his conduct in the matter which is the subject of the second charge by giving evidence of facts previously given on the first charge which disprove his suggestion of an innocent mind, and an innocent action, in the second case. Take as an example the case of a man charged with uttering base coin. He is first charged with uttering a base half-crown. He pleads ignorance of its being bad, and that he remembers he took that one half-crown from a stranger on the sale by him of a particular article for half-a-crown. He is acquitted, and is afterwards tried on a charge of uttering another bad half-crown made in the same mould as the last one, having endeavoured to pass it off within five minutes of his uttering the first bad one, and under exactly similar circumstances—say, for example, buying half a pint of ale, and tendering this bad half-crown for it. Can it be suggested that the prosecution could not give evidence of the first uttering to disprove his anticipated alleged innocence in the second case? What is the difference between that case and this? None that I can see.

The objection to the admissibility of the evidence has arisen, I think, from an entire misapprehension of the principle of *neemo debet bis puniri pro uno delicto*. That fundamental maxim of our criminal law means that a man shall not be put in peril for the same offence after a verdict has been returned by the jury, where the verdict has been given, it must be remembered, on a good indictment, on which the prisoner could be legally convicted. How can it be said that this is the same offence as that on which the prisoner here was acquitted? The indictment charges an entirely different offence. *R. v. Westwood* (1) seems in point. There evidence of finding a coat of the prosecutor, or of one of his witnesses, in the prisoner's possession was admitted to prove the identity of the prisoner, though the prisoner had during the same trial been acquitted, at the suggestion of the judge, to enable the prosecution to give in evidence the possession of the coat as a means of identification. Again, in *R. v. Birchenough* (2) it was held that a person having been acquitted as a principal on a charge of murder may be afterwards charged on the same evidence as an accessory before the fact. It was held in another case that evidence given against a prisoner on a charge of murder on which he was acquitted could be given in evidence against him on a charge of burglary arising out of the same transaction. The real test is: Was the first charge the same as that on which the prisoner is being charged again, or was the second indictment sufficient to prove a legal conviction on the first? If not, the evidence on the first charge can be used again, because it is being used in a different case and on a different charge. For these reasons, in my judgment, our answer must be, "Yes, the evidence was admissible."

WRIGHT, J. (read by LORD RUSSELL, C.J.).—The first question argued was whether, on the trial of the indictment for obtaining money by false pretences from

A Rowlings and Morris on June 24 and 26, and July 6, evidence was relevant which was admitted to show that on July 5 or 6 the prisoner was endeavouring by an exactly similar pretence to obtain money from Ramsey. I think that the question must be answered affirmatively. The evidence tended to show that the conduct of the prisoner in tendering drafts on a bank at which he had no active account was not inadvertent or accidental, but was part of a systematic fraud extending over a period immediately preceding and following the date of the offence charged, and the case in that respect seems to me to be governed by *R. v. Francis* (3) and *R. v. Rhodes* (4).

B The real question is whether the relevant evidence of the false pretence on July 5 and 6 ought to have been excluded on the ground that it was part of the evidence given for the prosecution at the former trial on which the prisoner was acquitted. C I think that the evidence was rightly admitted, because it was not shown that the jury at the first trial negatived the making or the fraudulent character of the pretence charged at that trial. The offence charged was not alone the making of that false pretence, but was the making of it and the obtaining of the then prosecutor's money by means of it. The only possible ground of objection to the reception of the evidence, assuming it to be relevant, seemed to be that there was an estoppel of record or quasi of record. D An objection in the nature of autrefois acquit could not, of course, be maintained, because on either indictment the prisoner could not have been convicted of the offences or any of them which were alleged in the other indictment.

E Nor could there be an estoppel of record or quasi of record unless it appeared by the record itself, or as explained by proper evidence, that the same point was determined in the first trial which was in issue in the second trial. But in this case the record of the first trial would show no more than a general verdict of not guilty. It would not show, nor would evidence be admissible to show, whether the jury acquitted on the ground that in their opinion the pretence was not false, or on the ground that, though false, it was not fraudulently made, or on the ground that the money was not thereby obtained from the prosecutor. F The use at the subsequent trial of Ramsey's evidence was not an attempt to re-open the question of the prisoner's innocence of the charge on which he had been acquitted, or to defeat the immediate and direct object of the former acquittal of that charge. I agree, therefore, with the majority of the court.

G **BRUCE, J.**—The indictment on which the prisoner was convicted contained three counts, each count alleging a separate offence. June 24, June 26, and July 6, 1899, are the dates laid for the several offences. In form there are three separate false pretences alleged in each count, but I think, having regard to the judgments of KELLY, C.B., and POLLOCK, B., in this court in *R. v. Hazelton* (5), that the false pretence upon which the jury must be taken to have founded their verdict was a false pretence that the cheque which was passed in each case was a good and valid order for the payment of its amount; in other words, that the prisoner represented that the existing state of facts at the time each cheque was passed was such that the cheque would be met, when he knew at the time that the facts were such that the cheque would not be met, so that the real question for the jury on each count was whether the prisoner, at the time he passed the cheques in the counts mentioned, believed that the facts were such that the cheques would be met. We are not told in the Case what was the texture of the evidence offered in support of any of the charges in the indictment, save that we are told that a witness, Harold F. Ramsey, gave the same evidence he had given on the trial of the prisoner on a former indictment. H

I The question in this case is whether the evidence of the witness Harold F. Ramsey was admissible, and it becomes a little difficult to decide that question without knowing what was the direct evidence offered in support of the charges in the indictment upon which the prisoner was convicted, and what was the nature of the

defence raised by the prisoner. But it appears to me that enough is stated to show that the evidence of Harold F. Ramsey was not admissible on the trial of the prisoner on the indictment on which he was convicted, which I will call for shortness the second indictment. Although it was not stated in terms, I think we are justified in concluding that the three cheques in the second indictment mentioned were all passed by the prisoner on the dates in that indictment mentioned, and were all dishonoured, and, further, I think we may assume that the defence raised on the second indictment was in substance similar to the defence which we are told was raised on the first indictment—namely, that the prisoner at the time when each cheque in the second indictment mentioned was passed believed that the state of facts was such that the cheque would be met. That defence raised a question the answer to which must have depended upon the knowledge or belief of the prisoner as to the state of his banking account on the respective dates of June 24, June 26, and July 6. There may have been evidence given on the trial of the second indictment to show that the prisoner on each of the three dates in the second indictment mentioned must have known that the state of his banking account was such that there was no reasonable probability of the three cheques, or any of them, being honoured. I assume that such evidence was given, and that the witnesses Lomath, Boyle, and White, who were called on the trial of the second indictment, gave, on the trial of the second indictment, the same evidence they had given on the trial of the first indictment. That evidence alone may have been sufficient to support a conviction; but that does not concern the question we are asked to consider, which is whether the statements of the witness Ramsey with reference to the issuing by the prisoner of a cheque to him on July 5 were relevant to the question affecting the prisoner's knowledge of the state of his banking account on June 24, June 26, and July 6.

I do not think that the transactions of July 5 can reasonably be considered to have any bearing upon the prisoner's knowledge or belief as to the state of his banking account on June 24 and 26. They certainly had no direct bearing on those questions, and, if they are admissible, they are admissible on the ground that they fall within the rule which allows in some cases evidence to be given of facts distinct from, but similar to, the facts on which a charge is based. It seems to me to be important to bear in mind that the rule to which I have last referred does not render it competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment on which he stands charged, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried: *LORD HERSCHILL, L.C., in Makins v. A.-G. for New South Wales* (6) (1894) A.C. at p. 65. Of this *R. v. Oddy* (7) is a good illustration. It was held that, on the trial of an indictment containing counts for stealing and receiving property knowing it to be stolen, evidence of the possession by the prisoner of other property stolen some time before from other persons was not admissible upon the count for receiving with guilty knowledge.

The Prevention of Crimes Act, 1871, s. 19 [see now Larceny Act, 1916, s. 43], although it lays down a special rule with regard to the evidence admissible in proceedings against a person for having received goods knowing them to have been stolen, does not affect the general principle laid down in *R. v. Oddy* (7). On the contrary, it shows that a statute was necessary to introduce an exception in the general law with reference to a special class of cases. *R. v. Holt* (8) is a decision illustrating the same principle. In *R. v. Holt* (8) the question was whether A. obtained money from B. by falsely pretending that C. had authorised him to collect the money. It was held that evidence that A. subsequently obtained money from D by a similar false pretence was inadmissible to show that he had no authority on the occasion in question. It is difficult to distinguish *R. v. Holt* (8) from the present case, for in the present case the questions as to the second and third counts were whether the prisoner on June 24 and 26 had obtained money by false pretences from

A Morris, and in support of those charges evidence was offered and admitted to prove that on July 5 the prisoner had by a similar false pretence obtained an order for the payment of money from Ramsey.

A line of cases has established the rule that when it becomes material to establish that an act charged in an indictment, and proved to have been done, was intentional and not accidental, evidence is admissible of similar acts done by the same person, having no bearing upon, or connection with, the acts charged in the indictment, save that the acts are similar and done by the same person. This rule is sometimes stated, I think accidentally, to be a rule which admits indirect evidence of this class to prove guilty knowledge. The evidence is, I believe, admissible under the rule I have mentioned only on the ground that it tends to negative mistake or accident. It is quite true that in many cases to negative mistake or accident is to have no other alternative but that the act was intentionally done with a criminal intent. But the ground on which this indirect evidence is admissible is that it tends to negative mistake or accident. When upon a charge against A. of the murder of B. by administering arsenic, arsenic is proved to have been administered by A. to B., and the question arises whether the administering of the poison was by mistake, evidence is admissible that other persons to whom A. had access died from the same poison. So where A. is charged with uttering a counterfeit coin knowing it to be counterfeit, and the question is raised whether he knew it to be counterfeit or uttered it by mistake for a genuine coin, the fact that A. had at other times uttered counterfeit coin is admissible. So on a charge of arson, where the question arises whether the fire was caused by accident or design, evidence that other fires had occurred in other houses which the prisoner had previously occupied is admissible. In the same way, where a person is charged with obtaining money by falsely pretending that false jewellery was genuine jewellery, and the defence is raised that he mistook the false jewellery for genuine jewellery, evidence is admissible to show that the accused had previously on other occasions passed off to other persons false jewellery for genuine. The ground upon which evidence of this class is admissible is that it leads to raise a presumption that the accused person was not acting under a mistake. To quote the words of LORD COLERIDGE, C.J., in *R. v. Francis* (3) (L.R. 2 C.C.R. at p. 132), which are cited with approval by LORD RUSSELL, C.J., in *R. v. Rhodes* (4) ([1899] 1 Q.B. at p. 82):

"It tends to show that he was pursuing a course of similar acts, and thereby it raises a presumption that he was not acting under a mistake. It is not conclusive, for a man may be many times under a similar mistake, or may be many times the dupe of another, but it is not likely that he should be so more often than once, and every circumstance which shows that he was not under a mistake on any one of those occasions strengthens the presumption that he was not on the last."

When the real question raised in the present case is accurately stated, I think it becomes clear that the case does not fall within the category of the cases I have mentioned. In the present case there was no question of accident or mistake; the question was knowledge of the state of the banker's account or of circumstances raising a belief in the mind of the prisoner respecting the state of his banker's account, just as in *R. v. Holt* (8) the question was authority or no authority: see per BLACKBURN, J., in *R. v. Francis* (3). There is no doubt a superficial resemblance between the act of pretending that a false coin is a genuine coin and the act of pretending that a cheque is a valid cheque when it is not. But the distinction, and it seems to me it is an important one, is this: in the case of the coin, the character of the coin is inherent in it; it is the same to-day and every day—a false coin—and its character does not depend upon external circumstances; but in the case of a cheque which is a genuine cheque—that is, signed by the person by whom it purports to be signed—the validity of the cheque depends upon the state of the banker's account, or upon arrangements made between the customer and the banker.

which may vary from day to day and are in no way inherent in the cheque. A successive acts of passing false coin as genuine, of putting off false jewellery as genuine, are successive acts of the same character. So successive acts of administering the same kind of poison are successive acts of the same character, and if a mistake is made in administering the poison in the place of food or medicine, the mistake is as to the inherent character of the thing administered, which does not vary and is the same at the time of the commission of each successive act. But the act of pretending that a genuine cheque is a valid one is in substance a pretence that circumstances exist at the time of the passing of the cheque which justify a belief that the cheque will be met. Such circumstances may exist on one day and not on another, and the fact that such circumstances exist or do not exist on one day have no necessary connection with the question whether such circumstances exist or do not exist on another day. In other words, the successive acts of passing at different dates genuine cheques, falsely pretending that they are valid, are not necessarily successive acts of the same character, because the quality of each successive act depends upon the knowledge of the person passing the cheque of circumstances existing at the time external to the instrument itself, and varying in character from day to day.

Therefore, I think that indirect evidence, based upon transactions other than those charged in the indictment, was not admissible within the rule which permits such evidence to be given to negative mistake or accident. *R. v. Rhodes* (4) has been spoken of as though it were an illustration of the rule to which I have referred. When the case is carefully examined, I think it is plain that the evidence in that case was admitted because it had a direct bearing upon the matter in issue. The false pretence alleged in that case was that the defendant pretended that he was carrying on a bona fide business, when in truth it was a bogus business. The fact that the business was a bogus business could only be proved by showing the manner in which the business had been carried on, and, therefore, all transactions tending to show the general character of the business carried on had a direct bearing upon one of the main questions in the case. The principle of that case seems to me to have no analogy to the present.

Blake v. Albion Life Assurance Society (9) is a case in which it was held that, in order to establish that a particular transaction was fraudulent to the knowledge of the person charged, evidence was admitted to prove that the act in question was one of a series of fraudulent acts having common features. In that case a person acting under the real or assumed name of Howard had induced the plaintiff to pay to the defendant company a sum of money by way of premium to effect a policy of assurance on his life upon the representation that if he effected the policy he would obtain from the defendant company a loan of money. The plaintiff never did obtain any such loan, and he brought his action against the defendant company to recover back the amount of the premium paid by him, on the ground that it had been obtained from him by fraud, and that there never was any intention on the part of the defendant company to make the promised loan. In order to prove that Howard was the agent of the defendant company, and that the company had obtained the money paid to them by the plaintiff through the fraud of Howard committed for them and with their knowledge, evidence was admitted to prove a series of similar transactions extending over years.

But the present case does not fall within the rule of the case I have last referred to. The single incident of July 5 cannot be regarded as evidence of a system of fraud. If, then, the evidence of the transaction on July 5 is not admissible to negative mistake or accident, and is not admissible as evidence of a system of fraud, it is inadmissible on the ground that it tended directly to prove the knowledge of the prisoner of the state of his banking account at the dates when the cheques mentioned in the second indictment were issued. But I think it is obvious the passing of a cheque by the prisoner on July 5, which was dishonoured, had no bearing upon the question of the knowledge of the prisoner of the state of his

A banking account on June 24 or 25, and such evidence was, I think, inadmissible on the charges contained in the second and third counts. Further, I think, such evidence was not admissible on the charge of July 6 contained in the first count, because there is no evidence to show that the dishonour of the cheque of July 5 was brought to the knowledge of the prisoner before or at the time he issued the cheque of July 6. But even if this evidence were admissible on the charge of July 5, I think it was clearly not admissible on the charge of June 24 and 25. The evidence of Harold F. Ramsey was admitted without any restriction, and the jury were not directed that they were to consider it as bearing upon the first count only.

The jury, as I understand, returned a general verdict, and, if any evidence was improperly admitted, I think the conviction should be quashed. No doubt in cases where a general verdict has been given and in the opinion of this court the evidence adduced has been insufficient to support the charge on one count, and sufficient to support the charge on another, it may be right to quash the conviction on one count only and to uphold the conviction on the other. But where evidence which was admissible on one count only has been admitted generally, I do not think that such a course can be safely pursued, because it is impossible to know what effect the admission of such evidence may have had upon the minds of the jury. I, therefore, think that the evidence of the transaction of July 5 was not admissible on any of the counts of the second indictment, and that the conviction should be quashed; and even if the evidence of the transaction of July 5 should be held to be admissible as bearing on the first count, yet, as it was admitted generally, and the jury were not directed to consider that evidence in connection with that count alone, I should still be of opinion that the conviction should be quashed. On the question whether, if the evidence of Ramsey were admissible on other grounds, it ceased to be admissible on the ground that the defendant had been acquitted of the charge contained in the first indictment, I entertained during the argument considerable doubt, but on consideration I am of opinion that that objection cannot be maintained. I have had the advantage of reading the judgments of WRIGHT, J., and CHANNELL, J., and on the last-mentioned point I agree with the opinions expressed by them.

RIDLEY, J.—I have read the judgment which has been delivered by BRUCE, J. I agree with it, and I do not think that I can usefully add anything further.

DARLING, J.—It appears to me that the evidence of Ramsey would certainly have been admissible in the first instance on the trial of the indictment on which the defendant was convicted although in itself incapable of sustaining another charge against him of a criminal offence—that is, had there not been the former trial in the course of which this evidence had already been given. I think it was material, for it went some way to show that the defendant knew he had no assets at the bank on which he gave a cheque, as this had already been brought to his notice with regard to another cheque given by him but a very short time before. This evidence had, however, been given in the first trial, and it is said that, therefore, it was not again admissible, on the ground stated in the case reserved.

This is in effect to state that this case comes within the rule *nemo debet bis puniri pro uno delicto*, a rule which applies equally in civil actions under the form *nemo bis vexari debet pro eadem causa*. This rule is the foundation of the pleas in bar known as *autrefois acquit* and *autrefois convict*. To this indictment, on which the defendant was convicted, it would not have availed him to plead either of those pleas, and to have supported them by evidence of the trial in Ramsey's case. Had only the evidence given on the trial of Ramsey's case been given on the trial of this indictment there would have been no evidence to go to the jury, for there would have been none of the giving of the cheque or making the false pretence charged as a crime by this indictment. It seems to me, therefore, that by the admission of this evidence the defendant was not *bis vexatus*, for I feel sure that

those words are not to be understood as meaning that a man is not to be more than once annoyed by the same evidence. I think they mean that he is not to be by legal process twice exposed to the risk of being found guilty of the same crime, or the same tort, or liable twice to pay the same debt, be it to the State or to his fellow citizen. To hold otherwise seems to me to rule that evidence which has been given once shall never again be produced against the same defendant: yet it is plain that up to a certain point the evidence must often be the same although the defendant is accused of wrongs done to two distinct persons, and that in different suits or forensic proceedings.

It seems to me impossible to say that the evidence of which a summary has been given by my Lord was irrelevant to the issue, but I think it might well have produced a prejudice against the defendant out of all proportion to its real weight and importance. The recorder might, therefore, I think, well have suggested to the counsel for the prosecution that he should not press the evidence on the court. But as a matter of law I am of opinion that the evidence of Ramsey was admissible.

CHANNELL, J. It is an elementary principle of criminal law that a prisoner can only be convicted on a criminal charge by evidence bearing directly on that charge, and that it is inadmissible to endeavour to support the charge by showing that the prisoner has committed other similar offences, and is, therefore, likely to have committed the one with which he is charged. I know of no exceptions to this rule; but nevertheless there are cases where evidence of transactions other than those the subject of the indictment can be given, because those transactions have a direct bearing upon one of the questions at issue on the trial of the particular indictment. Where the proof of an offence involves the proof of such matters as intent to defraud, or guilty knowledge, or the like, the evidence of other transactions is often the only evidence by which that essential part of the offence can be proved. In such cases evidence of other transactions is admitted, not for the purpose of showing that the prisoner committed the other offences, but for the purpose of showing that the transaction the subject of the indictment was done with the intent to defraud or with guilty knowledge, as the case may be. It seems to me to be a mistake to say that if the other transactions have been the subject of an indictment the prisoner is being twice vexed for the same matter by the proof of them, on a subsequent indictment, being allowed. The objection in the present case is to the evidence of Ramsey. The mere fact that he had given evidence in the case in which the prisoner had been acquitted did not, of course, make his evidence inadmissible. No one suggested that the evidence of the banker's clerk, the solicitor, and the trustee in bankruptcy, given also in the former case, was inadmissible in the second case. If the evidence of Ramsey was wanted to show that the prisoner had committed a fraud on Ramsey, that not being the fraud for which he was indicted, it would be inadmissible. But it was wanted, not for that purpose, but to show, if possible, that frauds were committed on Rawlings and Morris. In my opinion, its admissibility depends upon its relevancy, and upon the question of relevancy I fully concur in the judgment of the court.

Solicitors : *Solicitor to the Treasury; Tuttle, Bath.*

[Reported by A. A. BETHUNE, Esq., Barrister-at-Law.]

ATTORNEY-GENERAL v. ESHER LINOLEUM CO., LTD.

[CHANCERY DIVISION (Buckley, J.), July 24, 25, 26, 1901]

R. : 1-4 1901 2 Ch. 647; 70 L.J.Ch. 808; 85 L.T. 414; 66 J.P. 71; 50 W.R. 221

Highway—Dedication—Public footway coexistent with private carriageway—Presumption of intention of owner.

Where there is a public right of footway across land and a certain amount of surface of land lying along the course of the public footway devoted to traffic, even if that be private carriage traffic *primâ facie* the owner of the soil must be taken to have dedicated to the public as a footway so much of the surface as he has in fact devoted to traffic.

Notes. By s. 34 (1) of the Highways Act, 1959 (39 HALSBURY'S STATUTES (2nd Edn.) 450) "Where a way over land, not being a way of such a character that user thereof by the public could not give rise at common law to any presumption of dedication has actually been enjoyed by the public as of right and without interruption for a full period of twenty years the way shall be deemed to be dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it."

Distinguished: *Ware U.D.C. v. Gaunt*, [1960] 3 All E.R. 778. Referred to: *A.-G. v. Hemingway* (1916), 81 J.P. 112; *Stoney v. Eastbourne R.D.C. and Devonshire* (1925), 90 J.P. 133; *Williams-Ellis v. Cobb*, [1934] All E.R. Rep. 465.

As to creation of highways by dedication and acceptance, see 19 HALSBURY'S LAWS (3rd Edn.) 43 et seq., and for cases see 26 DIGEST (Repl.) 289 et seq.

Case referred to:

(1) *Grand Surrey Canal Co. v. Hall* (1840), 1 Man. & G. 392; 1 Scott, N.R. 264; 9 L.J.C.P. 329; 133 E.R. 386; 26 Digest (Repl.) 295, 176.

Also referred to in argument:

Brownlow v. Tondlinson (1840), 1 Man. & G. 484; 8 Dowl. 827; 1 Scott, N.R. 426; 133 E.R. 423; 26 Digest 318, 360.

Wells v. London, Tilbury, and Southend Rail. Co. (1877), 5 Ch.D. 126; 37 L.T. 302; 41 J.P. 452; 25 W.R. 325, C.A.; 26 Digest (Repl.) 380, 902.

Hutton v. Hamboro (1860), 2 F. & F. 218, N.P.; 26 Digest (Repl.) 328, 466.

Action by the Attorney-General, on the relation of the urban district council of Esher and the Dittons, for an injunction to restrain the defendants from inclosing or encroaching on a strip of land in such a way as to interfere with the rights of the public to use it as a public highway.

The land in question was a rectangular strip some 250 yards long, and varied in width from about fifty-five feet at the end inclosed to forty feet at the other. It was bounded on the south by the main line of the London and South-Western Railway, and was separated therefrom by a ditch and hedge and a post and rail fence; on the north partly by the wall of the defendants' premises and their manager's residence, and partly by a fence and other buildings and premises; and on the west by the river Mole. The defendants' premises were situate at the end nearer the river Mole, and about one hundred feet from the river there was a gate in the wall through which access was gained to the defendants' mill. The defendants were the owners of the soil of the strip opposite their premises. The strip was fenced off from the river, but at the north-west corner there was a footbridge over the river, and a public right of footway over it. From Esher—i.e., from the east—the strip was approached by a road through an arch under the railway line. The roadway then turned to the west towards the river. There was also a private carriageway along the strip from the arch to the mill gate, and the plaintiffs contended that the carriageway extended up to the river. The defendants alleged that

the public footway coming from Esher was along the southern side of the strip by the side of the railway until nearly opposite their mill gate, and that then it crossed over the strip in a slanting direction towards the mill gate and ran along the northern side by the wall of the defendants' premises to the bridge. This left a more or less triangular piece of land, bounded on the south by the railway, on the west by the river Mole, and on the north and east by what the defendants alleged was the line of a public footway. The defendants had inclosed the triangular piece of land.

Macmorran, K.C., H. Terrell, K.C., and E. S. Ford for the plaintiffs.

Astbury, K.C., and G. Henderson for the defendants.

BUCKLEY, J., described the strip of land, and continued: The fence on the south side of the strip was no doubt put up by the railway company. There is no evidence when the buildings or the fence on the north side were erected. It is not disputed that over the footbridge and running along the rectangular strip or some part thereof and then passing under the archway there exists an ancient public right of footway. The defendants do not dispute that the public right of footway existed before the carriageway was laid out. How and when the carriageway was laid out, I do not know. The plaintiffs assert a right to exercise the public right of footway over every part of the rectangular strip so laid out. They say they are not bound to walk in one part of it rather than in another part; that they are entitled to walk upon any part, including the piece of land which is now inclosed. The defendants deny that. The plaintiffs by their pleadings put forward public rights both of carriageway and footway. At the Bar they have withdrawn any claim to a public right of carriageway; but as regards the inclosure of the piece of land in question, if there be a public right of footway, it is, of course, impossible that the defendants can inclose it so as to prevent the public from using that right.

The question, I think, is a pure question of fact; but in determining that question I am bound to proceed upon certain legal presumptions. In the first place, I presume that the public right of footway existed before the private right of carriageway existed. In the second place, it seems to me that when you have a public right of footway across land and you find a certain amount of surface of land lying along the course of the public footpath devoted to traffic, even if it be private traffic, then *prima facie* the owner of the soil must be taken to have dedicated to the public so much of the surface as he has in point of fact devoted to traffic, even if it be private traffic. In all these cases of right of way it is necessary to remember that the thing to be established is dedication, not user. A highway is not acquired by user. You cannot acquire a right of public way under the Prescription Acts. If you want to acquire a right by prescription you must go back to the time of Richard I.—to a time before legal memory. In most of these cases dedication is proved by user. But user is the evidence to prove dedication; it is not user, but dedication, which constitutes the highway. Therefore what you always have to investigate is, whether the owner of the soil did or did not dedicate certain land to the use of the public. Where you find a certain amount of land laid out for the purposes of traffic, even though it be private traffic, and there is along the same line a right of public footway, it seems to me that, in the absence of evidence to the contrary, I ought to presume that the landowner dedicated, for the purpose of a public footway, so much of it as he devoted to traffic in fact.

I am told that there is little or no authority upon the question. It seems to be new; except that in *Grand Surrey Canal Co. v. Hall* (1) I find MAULE, J., stating this (1 Man. & G. at p. 406):

"It seems to me that the circumstance of the bridge being originally erected, as a carriageway, for the accommodation of a considerable number of individuals, inasmuch as the company must either have permitted the bridge to be used indiscriminately, or have put themselves to great expense in employing some person to see that those passing had a right to do so, furnishes a strong reason why they should have intended to dedicate the bridge to the public."

A The facts in that case were that the bridge was built to accommodate a private right of carriageway. Over the same line of country there existed a public right of footway. After the bridge was erected the public did come there with carriages, and the owners did not raise any objection. What was the proper inference from that state of facts? The owner of the soil might of course have posted someone there to see that no one with a carriage passed unless he was entitled to a private right of carriageway. He did not do so. Why did not he do so? Because it was not worth his while to discriminate between one and the other. There you have the *animus dedicandi*—that he meant the public to come there if they liked.

B So here it appears to me that I ought to apply the same principle. When the owner of the soil devoted the rectangular strip to traffic of some kind, and there was the public right to pass along the same line of country, he might, if he had been so minded, have kept the public to a particular line. He might have inclosed the footway between hurdles, if he could have done so consistently with the carriageway, or he might have paved part of the way and said, "You must walk upon that and must not depart from it," or he might have put a servant there, and made everybody who was on foot go on that particular line. If he did nothing of the sort, C if in point of fact he devoted that surface to traffic of some kind, then I think that D the proper presumption is that he intended the public, who were entitled to access to some part of that piece of ground, to have a right to go all over that piece of ground. *Prima facie* that is a dedication to the public as a footway of all the surface which he devoted to traffic. If that be right, the next question to ascertain is, Did the owner of the soil devote the whole of this rectangular strip, including the triangular piece, to the purposes of a roadway?

E [His Lordship referred to certain of the defendants' title deeds and said that it was clear therefrom that the owners of the soil had appropriated this piece of land for purposes of traffic at the latest in 1873, and probably many years before that, and that from the time when it was appropriated for the purposes of traffic, although it was private traffic, the public were allowed in the exercise of the public right of footway to use such part of the surface as they thought proper; and therefore F that he ought to presume that the owners of the soil intended to dedicate it to the public. The acts of ownership relied on by the defendants were insufficient to rebut this presumption, and the plaintiffs were entitled to an injunction.]

Solicitors: *C. M. Barker; Wilson & Son.*

[*Reported by H. PROCTER, Esq., Barrister-at-Law.*]

ALLEN v. GOLD REEFS OF WEST AFRICA, LTD.

COURT OF APPEAL (Sir Nathaniel Lindley, M.R., Vaughan Williams and Romer, L.J.J.), January 18, 19, 20, February 19, 1900]

Reported [1900] 1 Ch. 656; 69 L.J.Ch. 266; 82 L.T. 210; 48 W.R. 452; 16 T.L.R. 213; 44 Sol. Jo. 261; 7 Mans. 417]

Company—Notices—Deceased member—Executors not registered—Member known by company to be dead—Notice sent to registered address of deceased member.

The articles of association of a company provided that notices might be served by the company on any member by post addressed to such member at his registered address, and also that the representatives of a deceased member should not be entitled to receive notices of, or attend, or vote at any meeting of the company until they should have been registered as members in respect of such shares. Notices convening meetings of the company were addressed to a member at his registered place of address, although the directors knew he was dead, but the notice came to the knowledge of his executors, who had not registered themselves as members.

Held: the validity of the resolutions passed at the meetings was not affected by the facts relating to the service of the notices, and the resolutions bound the estate of the deceased member.

Company—Articles of association—Amendment—Lien on shares—Imposition of lien on fully paid-up shares—Companies Act, 1862 (25 & 26 Vict., c. 89), s. 50.

A limited company registered with articles conferring no lien on its fully paid-up shares **held** to have power under s. 50 of the Companies Act, 1862, by special resolution to alter the articles and impose a lien on those shares, provided it was done *bonâ fide* for the benefit of the company as a whole. The lien so imposed could be made to apply to debts owing by fully paid-up shareholders to the company at the time of the alteration of the articles; but there might be special circumstances which excluded the fully paid-up shares held by certain persons from the operation of the altered articles.

Notes. The Companies Act, 1862, has been repealed. Section 50 of that Act corresponds to s. 10 of the Companies Act, 1948 (3 HALSBURY'S STATUTES (2nd Edn.) 469).

Considered: *Punt v. Symons*, [1903] 2 Ch. 506; *Brown v. British Abrasive Wheel Co.*, [1918-19] All E.R. Rep. 308; *Dafen Tinplate Co. v. Llanelli Steel Co.*, [1920] 2 Ch. 124; *Sidebottom v. Kershaw, Leese & Co.*, [1920] 1 Ch. 154; *Shuttleworth v. Cox* (Maidenhead) (1926), 43 T.L.R. 83; *Southern Foundries v. Shirlaw*, [1940] 2 All E.R. 445. Referred to: *Re Welsbach Incandescent Gas Light Co.*, [1904] 1 Ch. 87; *Agre v. Skelsey's Adamant Cement Co.* (1904), 20 T.L.R. 587; *Baily v. British Equitable Assurance*, [1904] 1 Ch. 374; *British Rubber Co. v. Alpertons* (1914-15) All E.R. Rep. 346; *Phillips v. Manufacturers' Securities* (1917), 86 L.J.Ch. 305; *McEllistram v. Ballymacelligott Co-operative, Agricultural and Dairy Society*, [1919] A.C. 548; *Balu Pahat Bank, Ltd. v. Tan Keng Tin*, *Official Assignee of Property*, [1933] A.C. 691.

As to alteration of articles, see 6 HALSBURY'S LAWS (3rd Edn.) 271 et seq.; and for cases see 9 DIGEST (Repl.) 591 et seq.

Cases referred to:

(1) *Walker v. London Tramways Co.* (1879), 12 Ch.D. 705; 49 L.J.Ch. 23; 28 W.R. 163; 9 Digest (Repl.) 595, 3938.

(2) *Andrews v. Gas Meter Co.*, [1897] 1 Ch. 361; 66 L.J.Ch. 246; 76 L.T. 132; 15 W.R. 321; 13 T.L.R. 199; 41 Sol. Jo. 255, C.A.; 9 Digest (Repl.) 593, 3922.

- A** (3) *Pope v. City and Suburban Permanent Building Society*, [1893] 2 Ch. 311; 62 L.J.Ch. 501; 68 L.T. 846; 41 W.R. 548; 37 Sol. Jo. 355; 3 R. 471; 7 Digest (Repl.) 481, 22.
- (4) *Hotten v. City and Suburban Permanent Building Society*, [1895] 2 Ch. 441; 64 L.J.Ch. 609; 72 L.T. 722; 44 W.R. 12; 11 T.L.R. 418; 39 Sol. Jo. 504; 13 R. 591; 7 Digest (Repl.) 531, 331.
- B** (5) *James v. Baena Ventura Nitrate Grounds Syndicate, Ltd.*, [1896] 1 Ch. 456; 65 L.J.Ch. 284; 74 L.T. 1; 44 W.R. 372; 12 T.L.R. 176; 40 Sol. Jo. 238, C.A.; 9 Digest (Repl.) 596, 3948.
- (6) *Swabey v. Paul Darwin Gold Mining Co.* (1889), 1 Meg. 385, C.A.; 9 Digest (Repl.) 597, 3955.
- (7) *Griffith v. Paget* (1877), 5 Ch.D. 894; 46 L.J.Ch. 493; 25 W.R. 523; 9 Digest (Repl.) 237, 1539.
- C**

Appeal by the company from an order of KEKEWICH, J.

The plaintiffs were the executors of Emilio Zuccani, who died on Feb. 5, 1897. At the time of his death he held a large number of fully paid-up and partly paid-up shares in the defendant company. The plaintiffs claimed a declaration that the defendants had no lien on the fully paid-up shares, and an injunction to restrain the forfeiture of the partly-paid shares. KEKEWICH, J., held ([1899] 2 Ch. 40) that the forfeiture was bad because the notice threatening forfeiture claimed interest from too early a date, and also because it was addressed to the deceased member. He also held that the company had no lien on the paid-up shares, because the notice of a meeting to be held for the purpose of altering the articles by extending the lien to these shares was bad as being also wrongly addressed. His Lordship also doubted whether the company had power to alter its articles for the purpose of retrospectively affecting the existing rights of the owner of a particular group of shares without his consent. The court affirmed the decision of KEKEWICH, J., that there was no forfeiture of the shares on the ground that the notice threatening forfeiture claimed too much interest (which point depended on certain evidence, and does not call for a report) and the other points were then argued.

Warrington, Q.C., and *Dunham* for the company.

Renshaw, Q.C., and *Kerly* for the plaintiffs.

Cur. adv. vult.

Feb. 19, 1900. The following judgments were read.

SIR NATHANIEL LINDLEY, M.R.—This is an appeal from a decision of KEKEWICH, J., granting an injunction restraining the defendants from enforcing a lien on some fully paid-up shares in the company and belonging to a deceased shareholder named Zuccani. The appeal is not only important to the parties to it, but it raises several questions of great general interest relating to the power of limited companies to alter their articles, and especially to their power to alter their articles so as to affect shares standing in the names of deceased shareholders, and to the effect of an alteration duly made on vendors' fully paid-up shares issued before the alteration is made.

The facts are as follows: The defendant company was formed and registered under the Companies Act, 1862, with limited liability. Its memorandum of association declared its nominal capital to be £90,000 divided into 360,000 shares of 5s. each. The fifth clause of the memorandum declared that the original shares, or any of them or any other shares which might be afterwards created, might be issued fully paid up and with such preference privileges, or priority over, or postponement to the remaining or any other shares of the company in respect of dividends or otherwise as might be determined. The memorandum was accompanied by articles of association, which will be referred to presently, and which made a marked distinction as regards lien and transfer between shares fully paid up and shares not fully paid up. Both classes of shares were issued. Zuccani, as the

nominée of the vendor to the company, had a number of fully paid-up shares allotted to him, and he held 27,885 of these when he died. It was not suggested that these shares were not his own. There is no evidence of any special bargain conferring on Zuccani any special rights in respect of these shares. In addition to these fully paid-up shares, Zuccani applied for and had allotted to him 66,000 ordinary 5s. shares, not paid up. These were applied for and allotted on the terms of the company's prospectus and articles of association. Nothing in this appeal turns on the prospectus. Calls were from time to time made in Zuccani's lifetime on the unpaid-up shares of the company. He did not pay these calls when they became due, and as early as May, 1896, and thenceforward during his life letters were sent to him pressing for payment of his arrears.

Although Zuccani did not pay his calls, he constantly paid up quantities of shares in full before their amounts had been called up. In other words, he from time to time not only paid all the calls due on some of his shares, but he also prepaid the uncalled-up amounts of the same shares. He did this constantly all through 1896, and in that way he was able to sell and transfer the shares so paid up free from all liability to calls and from all lien in favour of the company. From the money so obtained by him he made remittances to the company on account of his calls in arrear. His object in fully paying up batches of these shares in the way described obviously was to obtain shares which he could put on the market free from all claims and demands by the company. Why the directors allowed him to do this is not explained. It was obviously an accommodation to him, and I cannot find any evidence to show that it was anything more. All the shares thus paid up were transferred by him in his lifetime; he did not hold any of them when he died, and it is unnecessary, therefore, to consider what special rights, if any, his executors might have had in respect of such shares if he had continued to hold any of them up to the time of his death.

Zuccani died on Feb. 4, 1897. He left a will which was proved in March, 1897, by the plaintiffs, his executors. When he died he held the 27,885 fully paid-up vendor's shares already mentioned. He also held 36,435 other shares not fully paid up, and he owed the company over £6,000 in respect of these. This sum did not include interest which amounted to a large additional sum. The plaintiffs did not register themselves as members of the company in respect of Zuccani's shares, and they had not assets enough to pay his liabilities. No one can blame the directors for endeavouring to obtain payment of the money due from Zuccani's estate to the company by any legal means. Steps were taken to have his estate administered in the Chancery Division, and the company could, of course, have carried in a proof for its debt. But other and more summary means were had recourse to.

The articles of association, as they stood when Zuccani died, contained a power to forfeit shares in respect of which any money was due to the company. The company attempted to exercise this power, but the court has held that, owing to mistakes made by the company, the forfeiture only extended to shares not fully paid up. The articles gave to the company no power to refuse to register a transfer of fully paid-up shares. The directors did, however, refuse to register a transfer of some paid-up shares on Jan. 29, 1897. But they were wrong in so doing, and that transfer was ultimately passed. Again, the company had no lien whatever on fully paid-up shares (art. 29). A lien on such shares or the possibility of a lien on them renders them unquotable on the Stock Exchange, and it is usual in articles of association conferring a lien on shares expressly to exclude fully paid-up shares from any lien. Article 29 did this. The articles of the company gave it a lien on unpaid-up shares, not only for money due from their holder to the company in respect of such shares, but for all debts, liabilities, and engagements of the holder to the company; and on proper notice and default of payment power was given to the company to sell the shares subject to such lien (art. 30). Moreover, the directors were empowered to refuse to register a transfer

A at any shares on which the company had a lien. The lien so conferred by the articles clearly extended to all Zuccani's unpaid shares, and did not cease on his death. It continued to be as available against his executors (although not themselves members) as it was against him in his lifetime. But, independently of any article, a lien on property does not cease on the death of the owner of the property.

B So far, therefore, as Zuccani's unpaid-up shares are concerned, the company was entitled to the lien and power of sale conferred by arts. 29 and 30. I do not understand that this was disputed. The directors, however, desired to extend the lien and power of sale and power to refuse to register transfers to Zuccani's fully paid-up shares. I say to his shares, for he was the only person entitled to fully paid-up shares from whom any calls were due. Accordingly, steps were taken to pass a special resolution to alter art. 29 by striking out the words "not being fully paid," and a resolution to that effect was passed on Feb. 18, 1897, and was confirmed on Mar. 8, 1897. Notice convening these meetings was sent addressed to Zuccani at his registered address; and the notice came to the knowledge of his executors. The directors knew that he was dead; but I cannot agree with the learned judge that the resolution was invalid by reason of any defect in the notice. Notices of meetings have only to be given to members, and the executors were not members. If no notice at all had been sent to the executors or to Zuccani's registered address, the omission would not, in my opinion, have affected the propriety of holding the meetings or the validity of the resolutions passed at them. Article 45 expressly provided that notices of meetings need not be sent to executors who had not become members. To hold that meetings of companies could not be properly held unless the notices convening them were given to the unregistered legal personal representatives of all deceased members would be to paralyse the transaction of business, and would be contrary to the ordinary principles applicable to corporate bodies, and, indeed, to other associations as well. The regularity of the proceedings to alter the articles by no means, however, disposes of the matters in controversy.

F The facts above stated raise the following very important questions, viz.: (i) Whether a limited company, registered with articles conferring no lien on its fully paid-up shares, can by special resolution alter those articles by imposing a lien on those shares? (ii) Whether, if it can, the lien so imposed can be made to apply to debts owing by fully paid-up shareholders to the company at the time of the alteration of the articles? (iii) Whether, if it can, fully paid-up shares allotted to vendors of property to the company are in any different position from other fully paid-up shares issued by the company? (iv) Whether, assuming the altered articles to be valid and to be binding on the general body of the holders of fully paid-up shares in the company, there are any special circumstances in this particular case to exclude the fully paid-up shares held by Zuccani from the operation of the altered articles?

H The articles of a company prescribe the regulations binding on its members. They have the effect of a contract; but the exact nature of this contract is even now very difficult to define. Be its nature what it may the company is empowered by the statute to alter the regulations contained in its articles from time to time by special resolutions (sects. 50 and 51); and any regulation or article purporting to deprive the company of this power is invalid on the ground that it is contrary to the statute: (*Walker v. London Tramways Co.* (1)). The power thus conferred on companies to alter the regulations contained in their articles is limited only by the provisions contained in the statute and the conditions contained in the company's memorandum of association. Wide, however, as the language of s. 50 is, the power conferred by it must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also bona fide for the benefit of the company as a whole, and it must not be exceeded. These conditions

are always implied, and are seldom, if ever, expressed. But if they are complied with, I can discover no ground for judicially putting any other restrictions on the power conferred by the section than those contained in it. How shares shall be transferred, and whether the company shall have any lien on them, are clearly matters of regulation properly prescribed by a company's articles of association. This is shown by table A in the schedule to the Companies Act, 1862 (ell. 8, 9, 10).

Speaking, therefore, generally, and without reference to any particular case, the section clearly authorises a limited company, formed with articles which confer no lien on fully paid-up shares and which allow them to be transferred without any fetter, to alter those articles by special resolution, and to impose a lien and restrictions on the registry of transfers of those shares by members indebted to the company. But then comes the question whether this can be done so as to impose a lien or restriction in respect of a debt contracted before and existing at the time when the articles are altered. Again, speaking generally, I am of opinion that the articles can be so altered, and that, if they are altered bona fide for the benefit of the company, they will be valid and binding as altered on the existing holders of paid-up shares, whether those holders are indebted or not indebted to the company when the alteration is made. But, as will be seen presently, it does not by any means follow that the altered article may not be inapplicable to some particular fully paid-up shareholder. He may have special rights against the company which do not invalidate the resolution to alter the articles, but which may exempt him from the operation of the articles as altered.

The conclusion thus arrived at is based on the language of s. 50, which, as I have said already, the court, in my opinion, is not at liberty to restrict. This conclusion, moreover, is in conformity with such authorities as there are on the subject. *Andrews v. Gas Meter Co.* (2) is an authority that, under s. 50 of the Companies Act, 1862, a company's articles can be altered so as to authorise the issue of preference shares taking priority over existing shares, although no power to issue preference shares was conferred by the memorandum of association or by the original articles. The answer to the argument that the company could not alter existing rights is that, within the limits set by the statute and the memorandum of association, the rights of shareholders in limited companies, so far as they depend only on the regulations of the company, are subject to alteration by s. 50 of the Act.

The decision of CURRY, L.J., in *Pepe v. City and Suburban Permanent Building Society* (3) is in principle also clearly in point. A member of a building society who had given notice of withdrawal, and who by the rules, as they then stood, became entitled to a certain sum of money, was held to be deprived of his right to that sum by an alteration made in the rules before he had ceased to be a member. This case went very far, but it has been treated as correct in *Bollen v. City and Suburban Permanent Building Society* (4). It was urged that a company's articles could not be altered retrospectively, and reliance was placed on the observations of RIGBY, L.J., in *James v. Buena Ventura Nitrate Grounds Syndicate* (5). The word "retrospective" is, however, somewhat ambiguous, and the concurrence of RIGBY, L.J., in *Andrews v. Gas Meter Co.* (2) shows that his observations in *James v. Buena Ventura Nitrate Grounds Syndicate* (5) are no authority for saying that existing rights, founded and dependent on alterable articles, cannot be affected by their alteration. Such rights are in truth limited as to their duration by the duration of the articles which confer them. But, although the regulations contained in a company's articles of association are revocable by special resolution, a special contract may be made with the company in the terms of or embodying one or more of the articles, and the question will then arise whether an alteration of the articles so embodied is consistent or inconsistent with the real bargain between the parties. A company cannot break its contracts by altering its articles, but when dealing with contracts referring to revocable articles, and especially with contracts between a member of the company and the company respecting his

A shares, care must be taken not to assume that the contract involved as one of its terms an article which is not to be altered.

It is easy to imagine cases in which even a member of a company may acquire by contract or otherwise special rights against the company which exclude him from the operation of a subsequently altered article. Such a case arose in *Swabey v. Port Dundee Field Milling Co.* (16), where it was held that directors, who had earned fees payable under a company's articles, could not be deprived of them by a subsequent alteration of the articles, which reduced the fees payable to directors. I take it to be clear that an application for an allotment of shares on the terms of the company's articles does not exclude the power to alter them, nor the application of them when altered to the shares so applied for and allotted. To exclude that power or the application of an altered article to particular shares, some clear and distinct agreement for that exclusion must be shown, or some circumstances must be proved conferring a legal or equitable right on the shareholder to be treated by the company differently from the other shareholders.

This brings me to the last question which has to be considered—viz., whether there is in this case any contract or other circumstance which excludes the application of the altered article to Zuccani's fully paid-up vendor's shares. First, let us consider the shares. I am unable to discover any difference in principle between one fully paid-up share and another. Whether a share is paid for in cash or is given in payment for property acquired by the company appears to me quite immaterial for the present purpose. In either case the shareholder pays for his share, and in either case he takes it subject to the articles of association and power of altering them, unless this inference is excluded by special circumstances.

E Next let us consider whether a vendor, who makes no special bargain except that he is to be paid in fully paid-up shares, is in any different position from other allottees of fully paid-up shares. I fail to see that he is, unless he stipulates that his shares shall be specially favoured. Zuccani bargained for fully paid-up shares, and he got them. The imposition of a lien on them did not render them less fully paid-up than they were before. They remained what they were. Zuccani did not bargain that the regulations relating to paid-up shares should never be altered, or that if altered his shares should be treated differently from other fully paid-up shares. I cannot see that the company broke its bargain with him in any way by altering its regulations or by enforcing the altered regulations as it did. I have already drawn attention to cl. 5 of the memorandum of association. Having regard G to its plain language, no allottee of shares, whether a vendor or an ordinary applicant, can justly complain of injustice or even hardship if his rights under the original articles are modified to his disadvantage. Every allottee was told by the memorandum that his rights as a shareholder were subject to alteration, and no allottee acquired any rights except on these terms, unless, of course, some special bargain was made with him. If Zuccani had not been indebted to the company, H could he have successfully maintained that the company had no power to alter the articles and so make his shares liable to a lien, and, consequently less marketable than before? I take it that it is clear that he could not. But I arrive at this conclusion only because the bargain with him has not been broken. Zuccani's indebtedness to the company confers on him or his executors no rights against it. But it is his indebtedness which creates the embarrassment from which they seek I to escape. The fact that Zuccani's executors were the only persons practically affected at the time by the alterations made in the articles excites suspicion as to the bona fides of the company. But, although the executors were the only persons who were actually affected at the time, that was because Zuccani was the only holder of paid-up shares who at the time was in arrear of calls. The altered articles applied to all holders of fully-paid shares, and made no distinction between them. The directors cannot be charged with bad faith.

After carefully considering the whole case, and endeavouring in vain to discover grounds for holding that there was some special bargain differentiating Zuccani's

shares from others, I have come to the conclusion that the appeal from the decision of the learned judge, so far as it relates to the lien created by the articles, must be allowed. His decision as to the forfeiture having, however, been affirmed, each party should be left to pay his own costs.

VAUGHAN WILLIAMS, L.J.—I have had an opportunity of reading the judgments of my brethren. I do not know that I differ from them as to the law of this case. We are all agreed that there was power in the shareholders to pass the resolution which they did pass. There is no question as to the abstract validity of the resolution. It falls within the power of alteration conferred by s. 50 of the Companies Act, 1862. We are further all agreed that a company cannot contract itself out of the statutory power of alteration conferred by s. 50, and the alteration of the articles in the present case involves no contravention of the memorandum of association. But I think that we are all agreed that cases might occur in which a member might have acquired by contract or otherwise special rights against the company which would exclude him from the operation of the altered article. It is in this sense that I understand the observations of RIGBY, L.J., in *James v. Buena Ventura Nitrate Grounds Syndicate* (5). A resolution may alter the regulations of a company, but cannot retrospectively affect existing rights. I also take it to be clear that the alteration must be made in good faith, and I take it that an alteration in the articles which involved oppression of one shareholder would not be made in good faith.

The result is that we have to consider in the present case whether the alteration, if enforced against Zuccani's executors, would defeat existing rights or operate oppressively. On this point I confess that I have much more doubt than my brethren seem to have. It is of course true that Zuccani, when he took these shares as the price of the property which he was selling, knew, or must be taken to have known, of the statutory powers of alteration; but it does not seem to me that it follows that the company could make alterations which would alter the value, according to the articles in force, of the consideration which they were giving for the property purchased. For instance, I doubt very much whether in a case in which the articles provided (as they might well do) for the issue of ordinary and preference shares and the memorandum of association contained a clause in the terms of cl. 5 of the present memorandum, a company who had bought property by the issue of fully-paid preference shares could afterwards, by altering the articles, issue preference shares and thus reduce the value of the consideration which they had agreed to give. It is impossible to suppose that the parties to such contract of sale and purchase could have contemplated the value of the consideration shifting from time to time at the will of the purchasers. *Griffith v. Paget* (7), which, of course, was decided prior to *Andrews v. Gas Meter Co.* (2) is an authority that in the absence of express power in the memorandum such a thing could not be done. This, of course, is not the present case.

In the present case the company, by the articles then in force, reserved to themselves a lien on all shares then not being fully paid, and then purchased a property by the issue of fully-paid shares; and the question is whether they could, on the very day after the contract, it might be, materially affect the consideration given by passing a resolution that the fully-paid shares thus given as a price should be subject to a lien for all debts, obligations, and liabilities of the vendor to the company, whether such debts, obligations, and liabilities should have actually arrived or not, and thus render the shares unmarketable. I think not. I think that, notwithstanding the statutory powers of alteration, the basis of the contract of purchase was that the property should be paid for in marketable shares. I think that the very object of the exception in art. 29 of fully-paid shares from lien was to render those shares marketable, and, as they chose to pay for the property in shares thus made marketable, I think that to allow the company to subject the vendor's shares to a lien would be to make the alteration of the articles retrospec-

A tively affect existing rights. I think, moreover, that the resolution was not passed in good faith, being really passed merely to defeat the existing rights of an individual shareholder. My observations have no bearing on shares fully paid up in pursuance of calls in the ordinary way, but it is worthy of observation that Zuccani did, in respect of shares other than vendor's shares, prepay such shares with the assent of the company for the purpose of freeing those shares from lien. I doubt if the company could have subjected these shares to lien after receiving prepayment.

C **ROMER, L.J.**—For the reasons given by the Master of the Rolls in his judgment I agree with him that there was no defect in the resolutions altering the articles of the company as to lien on the ground of absence of notice to Mr. Zuccani or his representatives, and I have nothing to add to what the Master of the Rolls has said on this head. I also agree with him in the conclusions he has come to on the other points taken by the respondents on this appeal, but having regard to the importance of some of the arguments addressed to us I think it right to give my reasons for arriving at these conclusions. A company such as this may undoubtedly by its articles of association provide for a lien on the shares of its shareholders in respect of any debts for the time being due from them to the company, and, if the original articles do not provide for the lien, the company may subsequently, by duly altering its articles, give itself such a lien; and the fact that the original articles did not provide for a lien would be in itself no ground justifying a shareholder who was indebted when the articles were altered in saying that he contracted the debt or that he took his shares in reliance on there being no lien, and that the new articles must not operate so as to make the lien thereby given extend to his existing debt. A shareholder must be taken to have known that the articles might be so altered as to give the lien. And certainly a shareholder could not say as against the company that he was entitled to special rights because he did not pay his debts. And the same considerations apply to the case where the original articles give only a limited lien, as, for example, a lien limited to debts due for unpaid calls. The company might by subsequent articles extend the lien, and a shareholder would have no right to object to the extended lien because he happened to be indebted to the company.

F Of course, by the above observations I have not been dealing with exceptional cases. I can imagine a case, for example, where by the memorandum of association certain provisions as to lien are made part of the constitution of the company which could not be affected by any alteration of the articles. And special contracts might be made with particular classes of shareholders or individuals, or special obligations to them might be incurred by the company, and that even by virtue of the original articles alone, which would prevent the articles being altered as against them, or prevent the alteration being enforceable against them. But, putting aside such exceptional cases, the observations I have made as to the general law are in my opinion sound. I will now consider the circumstances of the case before us. The first question is as to the meaning and effect of art. 29 of the company.

H In my opinion that article merely provides for a limited lien, that is to say, it limits the lien so as to exclude fully paid-up shares. There is nothing in the memorandum of association of the company to prevent that lien being subsequently extended to fully paid-up shares by an alteration in the articles. There is nothing in the company's original articles of association to prevent such extension of the lien, nor was any shareholder justified in assuming from art. 29 that fully paid-up shares would never be made subject to the lien by an alteration in the articles. That article only in substance stated that the lien thereby given did not extend to fully paid-up shares. No one was justified in assuming from it that the company thereby held out in favour of any person acquiring fully paid-up shares that those shares should never be made subject to a lien by an alteration of the articles. If art. 29 had gone on to state expressly that the lien

thereby provided might be extended later on by an alteration of the articles, no one could venture to doubt what was the true meaning and effect of the article. But such a statement is implied though not expressed. It was not, in my opinion, necessary for the article to say at the end, "Caution. Remember the power of the company by altering its articles to extend its lien," or any words to that effect. A

But then it is said that, though holders of shares paid up in the ordinary way by calls could not complain of an alteration of the articles, yet the holders of other paid-up shares stand in a different position though they were not the subject of any special contract as to lien. I cannot think this contention sound. Putting aside for the moment (as we are doing) any case of a special bargain with the company, in my opinion, no shareholder was justified in assuming from art. 29 that if he obtained by allotment fully paid-up shares, or subsequently paid-up ordinary shares in full in advance of calls, those shares should be specially distinguished from shares subsequently paid up in full by ordinary calls, or give him special rights so as to prevent the company from altering the articles and extending the lien to fully paid-up shares, or so that he would be able to say that such an alteration of the articles if made could not be enforced as against his shares. I find nothing in art. 29 to deprive the company of its rights by altering the articles to extend its lien to fully paid-up shares generally, or to limit that right to shares paid up by ordinary calls. Still less, in my opinion, was any shareholder entitled to assume from the company's memorandum and original articles that the lien, if extended at all, should only be extended so as to give a lien for liabilities incurred after the alteration in the articles. I fail to see why a shareholder, because he became indebted to the company, should acquire special rights against the company in respect of that debt, as to the alteration of the articles, or why the company should not, when it obtained its extended lien, use it in respect of any existing debt as well as in respect of debts subsequently incurred. In truth, every shareholder was bound to bear in mind, both in paying up in full his shares, or in acquiring fully paid-up shares and incurring a debt to the company, that the company had a legal right by altering its articles to extend its lien, and might exercise that right at any time. B C D E F

This being so, in my opinion Zuccani's shares became bound by the company's alteration of its articles, unless he can show some special bargain with the company or some special obligation incurred towards him by the company in respect of his fully paid-up shares. He fails to establish any such special bargain or obligation. There was certainly no such special bargain or obligation alleged or proved with regard to the shares allotted to him as fully paid-up shares, and, as already pointed out, no such bargain or obligation can be implied merely from the wording of art. 29. Nor was there any special bargain or obligation with regard to the shares paid up in full by him after allotment. The fact is with regard to the latter that, being indebted in very large sums at the time to the company, and paying certain sums on account he was permitted, as a favour to him, to attribute the payment to a few shares, so as to make them paid up. No doubt this was done so as to give him the opportunity, so long as the lien was limited by the original articles, of disposing of the fully paid-up shares: but if he did not avail himself of the opportunity before the alteration of the articles, then he could not do so afterwards. I understand that, as a matter of fact, he did fully avail himself of the opportunity, but even if he did not do so as regards some shares, that would not, in my opinion, prevent those shares from becoming subject to the extended lien. Zuccani, in respect of all his fully paid-up shares, whether allotted as paid up or not, in fact has obtained and enjoyed all the advantages with regard to lien which the company ever impliedly or expressly promised him—that is to say, the right to deal with the shares without their being subject to any lien so long as the articles remained unaltered and did not extend the lien to fully paid shares. G H I

Something was said on behalf of the respondents as to want of good faith on the

A part of the company in altering its articles. I fail to see any want of good faith. In my opinion it is eminently fair for a company to provide by its articles as originally framed, or as altered by resolutions, that shareholders who are indebted to the company should not be permitted to dispose of their shares without paying their debts, and that the company should have a lien on the shares for the debts. On the ordinary case of a partnership no partner would be permitted to withdraw or sell his shares in the partnership venture without his debts to the partnership being first paid thereout and if the company in the present case had, as I think it had, the legal right to alter its articles so as to give it the lien it now claims, I cannot see why, in exercising that legal right, it should be accused of want of good faith. That the reason for the alteration was the very existence of the large debt due from Zuccani, and that the company had principally in mind this large debt when it made the alterations in the articles, is no ground for impeaching the action of the company. It appears to me that the shareholders were acting in the truest and best interests of the company in exercising the legal right to alter the articles so that the company might, as one result, obtain payment of the debt due from Zuccani. The shareholders were only bound to look to the interests of the company. They were not bound to consult or consider Zuccani's separate or private interests.

Further, I may say that the alteration of the articles giving the extended lien was, in my opinion, in no true sense retrospective. The lien given was not made to take effect before the date of the alteration. It operated only from and after that date. Again, the alteration of the articles cannot be impeached as being one not binding on all shareholders alike. It purports to bind, and does bind, all the shareholders without exception. An article giving a lien cannot be objected to as made in favour of or against a special class of shareholders merely because some shareholders only are or may become indebted to the company. Lastly, I may say that the contention that there was anything improper in the way the alteration of the articles was effected falls to the ground on examination. It is untrue that the company intentionally waited for the death of Zuccani before attempting to alter the articles with the object of thereby preventing votes in respect of his shares being used in considering whether the alteration should or should not be made. Besides, as a matter of fact, under the articles Zuccani, if living, could not have voted, seeing that he was indebted to the company. I have now dealt substantially with the points raised on behalf of the respondents, and in the result I can find no good or sufficient ground on which to hold that the lien given by the amended articles was not good against Zuccani's executors, and accordingly I think that the appeal on this point should be allowed.

Appeal allowed.

Solicitors: *Mayo & Co.; Kerly, Son & Verden.*

[*Reported by W. C. Biss, Esq., Barrister-at-Law.*]

**ROWLLS v. BEBB. Re ROWLLS
WALTERS v. TREASURY SOLICITOR**

[COURT OF APPEAL (Sir Nathaniel Lindley, M.R., Rigby and Henn Collins, L.J.J.),
April 30, May 1 and 3, 1900]

[Reported [1900] 2 Ch. 107; 69 L.J.Ch. 562; 82 L.T. 633; 48 W.R. 562;
44 Sol. Jo. 448]

Trustee—Trust for sale—Power to postpone—Unproductive property—Discretion of trustees—Failure to exercise discretion.

A testator, who died in 1887, bequeathed all his personal estate to two trustees on trust for conversion and investment and to pay the income of the investments to his sister for life, and after her death to hold the investments on trusts for her children, and, in default of children who should attain a vested interest, for the two trustees beneficially. The testator empowered the trustees to postpone conversion for such period as to them should seem expedient, but the outstanding personal estate was to be subject to the trusts thereinbefore declared concerning the investments of the proceeds of conversion, and the yearly produce thereof was to be deemed annual income for the purposes of such trusts. Part of the testator's estate consisted of a reversionary interest in a sum of consols, subject to the life interest therein of his sister, the tenant for life under his will. At his death she was aged thirty-five. She died in 1899 a spinster and intestate. She had no next of kin, and administration to her estate was granted to the Solicitor to the Treasury. The trustees had not during the lifetime of the sister sold the reversionary interest in the consols, and the Solicitor to the Treasury contended that this ought to have been done and that her estate was entitled to be recouped to the extent of the income which she would have enjoyed if there had been a conversion. Evidence was given which disclosed that the trustees had given no consideration to the question whether the reversionary interest should be sold.

Held: the trustees had never exercised their discretion with a view to benefiting themselves, and, if the conversion of the reversionary interest had been postponed by the trustees in the proper exercise of their discretionary power, they would have been beneficially entitled to the same in equal moieties; but since they had simply omitted to convert without considering the question at all, and since, if they had considered the question, the only conclusion possible was that they ought to sell the reversion, the claim of the Solicitor to the Treasury was well founded.

Notes. Considered: *Re Woods, Gabellini v. Woods*, [1904] 2 Ch. 4; *Re Baker, Baker v. Public Trustee*, [1924] 2 Ch. 271. Distinguished: *Re Holliday's Will Trusts, Houghton v. Adlard*, [1947] 1 All E.R. 695. Referred to: *Re Whiteford, Inglis v. Whiteford*, [1903] 1 Ch. 889. *Re Beech, Saint v. Beech*, [1920] 1 Ch. 40; *Re Hey's Settlement Trusts, Hey v. Nickell-Lean*, [1945] 1 All E.R. 618; *Re Barbour's Life Assurance Policies, Westminster Bank, Ltd. v. L.R. Comrs.*, [1955] 3 All E.R. 41.

As to trustees' duty as to conversion, see 38 HALSBURY'S LAWS (3rd Edn.) 977 et seq.; and for cases see 43 DIGEST 615 et seq.

Cases referred to:

- (1) *Howe v. Earl of Dartmouth, Howe v. Countess of Aylesbury* (1802), 7 Ves. 137; 32 E.R. 56, L.C.; 43 Digest 869, 3142.
- (2) *Mackie v. Mackie* (1845), 5 Hare, 70; 9 Jur. 753; 67 E.R. 831; 40 Digest (Repl.) 729, 2185.

- A [3] *Johnson v. Moore* (1858), 27 L.J.Ch. 453; 31 L.T.O.S. 353; 4 J. & N.S. 356; 6 W.R. 490; 43 Digest 618, 583.

Appeal by the personal representative of Alice Rowlls Rowlls from an order of STIRLING, J., dated Aug. 5, 1899.

- B Alfred Rowlls Rowlls by his will, dated Sept. 26, 1882, appointed two solicitors to be executors and trustees thereof. He devised all the real estate to which he should be entitled at his decease and he bequeathed all the personal estate to which he should then be entitled to the trustees on trust to sell his real and leasehold estates and to convert and get in his residuary personal estate and invest the moneys to arise from such real and leasehold estates and residuary personal estate as therein mentioned, and he empowered his trustees to vary such investments at their discretion; and on further trust to pay to or to permit and empower C his sister Alice Rowlls Rowlls to receive the annual income of the moneys, stocks, funds, and securities during her life for her sole and separate use and independent of any husband with whom she might intermarry, and the testator directed that her receipts alone should be a sufficient discharge to his trustees, and she should not have power to alienate or anticipate such income; and after the death of Alice D Rowlls Rowlls the testator directed that his trustees should stand possessed of the moneys, stocks, funds, and securities and the interest, dividends, and income thereof thenceforth to accrue due in trust for the child if only one, or all the children if more than one, of his sister who, either before or after her decease, should being a son or sons attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry under that age, and if more than one equally; but if no child of his sister should (being a son) attain the age of E twenty-one years or (being a daughter) attain that age or marry under that age, the testator directed that his trustees should stand possessed of one equal moiety of the moneys, stocks, funds, and securities and of the dividends, interest, and income thereof in trust for one of his trustees, and of the other equal moiety in trust for the other of his trustees. The testator declared that no sale of his real or leasehold estate should be made in the lifetime of his sister without her F previous consent in writing, and that his trustees should have a

- "discretionary power to postpone for such period as to them shall seem expedient the conversion or getting in of any part of my residuary personal estate which shall at my decease consist of stocks, funds, shares, and securities of any description whatever, but the unsold real estate and outstanding G personal estate shall be subject to the trusts hereinbefore contained concerning the moneys, stocks, funds, and securities aforesaid, and the rents and yearly produce thereof shall be deemed annual income for the purposes of such trusts, and such real estate shall be transmissible as personal estate under and for the purposes of the ultimate trusts hereinbefore contained."

- H The testator died on Sept. 1, 1887. The testator was at the time of his death entitled to the reversion of a sum of £5,666 13s. 4d. New Consols standing to the credit of an action of *Rowlls v. Bebb*, subject to the life interest therein of his sister, Alice Rowlls Rowlls. At his death she was aged thirty-five. She died on April 19, 1899, a spinster and intestate. She had no next of kin, and administration to her estate was granted to the Solicitor to the Treasury. The trustees had not during the lifetime of the sister, sold the testator's reversionary I interest in the consols, and it was contended that this ought to have been done, and that her estate was entitled to be recouped to the extent of the income which she would have enjoyed if there had been a conversion. STIRLING, J., held that, as a matter of the construction of the will, the deceased life tenant's personal representative had no right to be so compensated.

The Attorney-General (Sir R. E. Webster, Q.C.) and Ingle Joyce for the personal representative of the life tenant.

Butcher, Q.C., and Frank Russell for the will trustees.

SIR NATHANIEL LINDLEY, M.R.—In this case we have to consider a question of some difficulty both on the construction of the will and also on what has been done under the will since the death of the testator. The testator, A. R. Rowles, died in 1887. He was entitled to various real and leasehold property and personal property, and among his personal property was a reversionary interest in some consols which had been set apart to answer an annuity in favour of his sister Alice. He appointed as his executors and trustees two gentlemen who were solicitors and evidently friends of his, and by the will he gives them £500 apiece for their trouble. He devises and bequeaths his property to them on trust to convert and to pay the income to his sister Alice for life with remainder to her children if she should have any. She was a spinster at that time, of about thirty-five years of age, we are told, and unmarried when the testator died. In the event of her having no children, the testator devised and bequeathed his property to his trustees beneficially in equal shares. That was the state of his property and the short effect of his will. It contains a clause which is important as to postponing the sale and conversion, which I will read.

There was a preceding trust for conversion. [His Lordship read the clause empowering the trustees to postpone the conversion, as above set forth, and continued:] So that here we have not only a discretionary power to postpone for such purpose as to the trustees shall seem expedient the conversion of the testator's residuary personal estate, but a direction which applies to the income of any of the unsold real estate.

In other words, if the conversion of any of the testator's residuary personal estate should be postponed, then the rule in *Howe v. Earl of Dartmouth* (1), as I understand it, is excluded by the words which I have just read. Assuming this discretionary power to have been properly exercised, and that the conversion of the residuary personal estate was postponed in the exercise of that power, it appears to me that, on the authority of *Mackie v. Mackie* (2), the decision of STIRLING, J., is right. The case of *Mackie v. Mackie* (2) covers and decides a point which but for that decision would be a little difficult, i.e., whether a clause of this kind relating to the produce of the unsold real estate and outstanding personal estate can apply to property which does not yield income. That is a little nut which was cracked in *Mackie v. Mackie* (2) by the Vice-Chancellor of England holding that the clause did so apply, and STIRLING, J., has taken the same view. It is on this principle, that if one looks at the will as a whole the tenant for life is to take the income of the residuary personal estate for better or for worse. *Howe v. Earl of Dartmouth* (1) does not apply against him or in his favour. In other words, if the property is yielding more income than the tenant for life is entitled to, the tenant for life is to have it, and if less he is to go without it. On that authority (which, as I have just said, settles a point of some little difficulty) I have come to the conclusion that on the true construction of the will in the present case the view of STIRLING, J., was correct.

But another point, and a totally different one, has been raised before us, and that is as to what has been done since the testator's death. STIRLING, J., assumed that the discretionary power had been exercised by the trustees; and it has been, by consent of the parties, arranged that we should investigate that ourselves on such evidence as counsel have thought right to lay before us. They have accordingly laid before us some affidavits and exhibits, and a letter and an affidavit by the trustees in reply. Although it is quite true that these trustees were trustees and executors and residuary legatees, and although it is quite true that it was, of course, to their interest that the reversionary interest which formed a portion of the testator's trust estate should not be converted, yet I am satisfied from the evidence which is against them as well as from the evidence which is for them that they never exercised their discretionary power with a view to benefiting themselves. I am perfectly satisfied that this point as to converting under the rule of *Howe v. Earl of Dartmouth* (1) a reversionary interest in which the tenant

A her life was entitled to the income under another will never crossed their minds at all. As I said before, it requires the keen eyes of an extremely good equity lawyer to see that there is such a point. However, there it is. They did not see it, and they never thought of it. I do not mean that they did not think of the reversionary interest. They knew that the testator had this reversionary interest, and they knew that the sister was receiving the income of it. But they never imagined that she was also entitled to have the reversion of that sum of which she was already in the receipt of the income turned into money. It never occurred to them at all, and I am satisfied from their own evidence that although they knew that they had this discretionary power, and although they knew that there was a reversion, they never imagined that the tenant for life was entitled to have that reversion sold and the proceeds invested so as to increase her income. It would not occur to ninety-nine men out of a hundred. It was an oversight.

C Before I go further, I will consider what is the scope of this discretionary power. Supposing they had thought of it, what does it mean? It strikes me, and it follows from what I have already said about *Mackie v. Mackie* (2), that if this power had been exercised and the reversionary interest which ought to have been sold had been sold it would have altered the relative positions of the tenant for life and the remaindermen. I do not doubt that. But it does not at all follow that this is a discretionary power of anything in the nature of a power of management. I mean that there is nothing in these words, to my mind, which would give the trustees a right to say apart from managing the estate: "We will postpone selling this reversionary property in the interests of the children at the expense of the tenant for life." I do not think that that would be within the power at all. E That means this: "We will under the power of management, which if exercised might and will to a certain extent vary the rights of the tenant for life and of the remaindermen, do more than that; we will mulct the tenant for life whether she likes it or not." I do not think that that is the scope of it. The method of treating it is this: Supposing the tenant for life had insisted on the conversion of this reversionary interest, could the trustees have possibly refused? I think F not. The position of the property is important. There was no wasting property here. I am not speaking of the leaseholds, because that is another matter. But, apart from the leaseholds, amongst the residuary personal estate there was no property yielding more income for the benefit of the tenant for life than she would be entitled to. There was nothing, therefore, which as a matter of management would justify the trustees in saying: "There is some property which might have G been converted and that would reduce the income of the tenant for life; there is some reversionary interest which ought to be sold and which will increase the income, and as a matter of management we will not convert either." They might have done that; but there was no such property. There was nothing to be gained by anybody by preserving this reversionary interest as unsold, except, of course, H what would accrue to the remaindermen. I throw this out because I am perfectly satisfied that these gentlemen were not intending to benefit themselves. They never thought of it.

If I am right that they never did think about this power, and that they could not, if they had thought of it in this particular instance, have properly refused to convert this reversionary interest, what follows? It follows that the tenant for I life's executors or administrators (now represented by the Crown, she having died intestate and without any relatives) are entitled to have that income which she has lost during her life made good out of the capital of the estate. I think that there is no answer to that view unless we take another view of the case altogether to which I will allude now and which I think is admissible.

It has been suggested to us that, as this lady when her brother died was thirty-five years of age and that had she thought of marrying she might have had children, although the trustee did not think about converting the testator's residuary reversionary estate, still in point of fact what they have done was the

right thing to do. I cannot come to that conclusion. That conclusion first of all involves the assumption that their discretionary power was a great deal more than the power of management, which I do not think it was. And, apart from that, I am not at all satisfied that, even if they had, the circumstances which did exist would have justified them in exercising their discretion to the extent of saying that this reversionary interest shall not be sold during the life of the tenant for life. If she were unmarried and possibly might have had children, if that power had been more extensive than I think it was, it would have justified them in postponing the sale to see whether she got married or not, but not in making up their minds that it should not be sold whether she got married or not. When this poor lady became lunatic it was obviously wrong, in any method of looking at it, to keep this reversionary interest unsold. She became lunatic while she was a spinster, and after that it was too obviously wrong to keep the reversionary interest unsold, however widely this power is construed. I fall back on the narrower construction of the power as far as giving the trustees discretion is concerned. I do not think that the discretion went so far as to alter the rights of the tenant for life except that the trustees postponed the conversion of the one portion of the estate rather than another in the management of it.

Therefore I think on the circumstances as they stand, and without imputing anything whatever against these gentlemen except an oversight which, as I have said, ninety-nine people out of a hundred, and even ninety-nine solicitors out of a hundred, would very likely have made, the appellants here are in the right, and that the account must be rectified accordingly.

RIGBY, L.J.—In this case, two gentlemen who are trustees of the will—solicitors, I understand—by the appointment of the testator himself, and in the events which have happened the beneficial residuary legatees, claim to hold the residuary estate free from any claim on the part of the representative of the tenant for life in respect of the interest which would have been produced from the sale and investment of the proceeds of a sum of £5,666 consols. I mention these circumstances particularly because I think that they have some bearing on the construction of what has been done under the will. But I want to make it plain that to my mind these gentlemen have not been swayed in their exercise of the power that has been given them by the will by any notions of self-interest; and, in fact, that they have not, except technically, done any wrong whatsoever throughout the whole administration of the estate, or any wrong that has been called to our attention or suggested in any way.

What in fact took place with reference to the £5,666 which is the subject of the question that is now raised? It was raised before STIRLING, J., on the construction of the will; but it is raised here on such evidence as is forthcoming—which, of course, is very slight—of what has actually been done. In the first place, the £5,666 never was realised during the life of the tenant for life. I beg particularly to repeat what I have said—that I do not think anything wrong was done. If the question had been raised (I am only going on an hypothesis which I do not believe in) and clearly brought to the attention of the trustees at the time when, on their petition the tenant for life was made a lunatic, it would have been obviously their duty from that time forward, at any rate, whatever was true of the preceding time, to provide for her estate an allowance on the assumption that the £5,666 reversion was sold. It would have been a very grave malversation on their part if they had not made such an arrangement. The chances were enormous at that time that they would gain pecuniarily themselves by continuing to postpone the sale or the consideration of the way in which the fund was ultimately to be dealt with. I do not hesitate to say that if we had reasons to suppose that they did it deliberately, then we should look on it in a very unfavourable view, but I am satisfied, from the affidavits which they filed at the time of the lunacy proceedings and from the affidavit which they have now filed, that the whole

A thing was absent from their minds, and that then and before that time they never imagined at all that they had any duty about selling the £5,666 reversion. I should assume that from the letter which they wrote. No doubt that letter would be explained on production of proper evidence in the way in which it was argued by counsel that it ought to be explained. It may mean that they did not know whether on the construction of the postponement clause they were or were not entitled to have it sold, but that is not the *prima facie* meaning. The *prima facie* meaning is that the question altogether—not in one aspect of it, but the whole question—was brought before them for the first time, and I believe that was the fact.

When I come to read their affidavit—I do not suggest that the affidavit was otherwise than a candid and fair affidavit—they are not able to say with truth that they exercised their discretion for one moment on this question. I do not think that they did. I do not think that it ever occurred to them. I have pointed out that at the time of the lunacy it was imperative on them, if they thought fit, to decide in a different way. It so happens that there were no wasting securities. Landsholds I leave out of consideration as they are not important; but there was no wasting property that could be affected by this power of postponement, and, so far as has been brought to our attention, only one case of a reversion not producing interest. Therefore, not only is it plain that the trustees never did exercise their discretionary power to postpone, but, in my judgment, it is plain also that they never ought to have done so. Doing so would, in effect, be a decision that they would take from the tenant for life the proportion of income to which she was entitled and present it to the remaindermen—either her children or themselves. I do not see any justification for that. I do not say that under the peculiar circumstances of this case they were bound to sell the £5,666 consols. One knows that the court look on that class of investment to be as safe as possible. But I think that they were bound not to exercise the power to postpone so as to produce an unequal effect between the tenant for life and the remaindermen.

I say nothing as to what might have taken place if there had been wasting property and other things that they kept on foot. There was no such thing. The exercise of their discretion must necessarily have had one result, and one only, and that was to charge the tenant for life for the benefit of the remaindermen. Probably they thought that the remaindermen would be the children. I do not know that it is very remote. When a lady has attained the age of thirty-five years, the chance of her not marrying is pretty large. But that is not conclusive, and, therefore, they may have thought probably that persons other than the children might be the remaindermen. But they must have known perfectly well that there was a very fair chance of their being themselves the remaindermen; and, as I say, they ought not to have gone on the hypothesis that the children would be the remaindermen. But supposing it were quite clear that the children would take vested interests, excluding the two trustees, I do not think that it would have been justifiable. They had no power to take from the mother what has been mentioned at about £100 a year and give it to the children. *De facto*, there never was a time when they professed or thought that they would exercise their power to postpone. *De jure*, it cannot be assumed that they exercised their power in this unequal manner, because unequal it would be between the tenant for life and the remaindermen.

In *Johnston v. Moore* (3) Woon, V.-C., came to a conclusion which was inevitable from the will, where a portion of the outstanding personal estate consisted of an interest in a business. There had been a partnership, and the trustees *de facto* allowed that portion to remain outstanding. Unless they were grossly ignorant of the law (and we must attribute to them knowledge of it) they must have known that they had no power, *prima facie*, to leave it outstanding. But in the will was contained a power to postpone the realisation, and it was assumed, and as I think rightly and necessarily assumed, that they had done so in the exercise of their

power, and the rights of the tenant for life and remaindermen were adjusted on that basis. It does not, however, prove (and I do not think it is the law) that if it turns out, in a matter in which the trustees were really ignorant, that what has been done might have been done under a power in the will it should be deemed to have been done. I think that great injustice will often be done by that result. I do not think it ought to be assumed that that did take place which we know, on the evidence, did not take place.

I will only add that, if I had to deal simply with the question of construction, I should have hesitated a good deal before I came to the conclusion that STIRLING, J., was wrong in treating *Mackie v. Mackie* (2) as covering this case. It is not necessary to say anything from my point of view about that, and I must be considered not to express any opinion about it. But on the facts which are before us, and which were not before STIRLING, J., I have no hesitation in saying that I cannot consider that there was any justification which would entitle the residuary legatees to say: "We must be deemed to have exercised our power and to have exercised it equitably, and the result follows that we have not got to pay anything out of the proceeds in court of the £5,666." On all the facts of the case I think that such a contention would be absolutely wrong. However, again, the trustees have behaved very properly and fairly. In an ingenious argument it was suggested that on the state of facts so appearing they were entitled to hold this money. I have said nothing about what would really be the case if they were actually asserting a right adversely. I do not consider that to be an adverse assertion. They very fairly have told us what has taken place; but, from their position as trustees and solicitors, I think that they would have many difficulties to get over which at present do not seem to arise.

HENN COLLINS, L.J. I agree; and I have nothing to add to the reasons already given by the other members of the court.

Appeal allowed.

Solicitors: *Solicitor to the Treasury; Walters, Deverell & Co.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

Re NEW. Re LEAVERS. Re MORLEY

[Court of Appeal (Rigby, Hann Collins and Romer, L.JJ.), July 8, 22, 1901]

[Reported 1901 2 Ch. 534; 70 L.J.Ch. 710; 85 L.T. 174; 50 W.R. 17; 45 Sol. Jo. 706]

Trust—Variation by court—Jurisdiction—Matter not foreseen by author of trust—Consent to reconstruction of company.

As a rule, the court has no jurisdiction to give, and will not give, its sanction to the performance by trustees of acts with reference to the trust estate which are not on the face of the instrument creating the trust authorised by its terms. But in a matter for which provision is not expressly made by the trust instrument and which may reasonably be supposed to be one not foreseen or anticipated by the author of the trust, where the trustees are embarrassed by an emergency that has arisen and the duty cast on them to do what is best for the estate, and the consent of all the beneficiaries cannot be obtained by reason of some of them not being *sui juris* or in existence, it may be right for the court, and the court in a proper case would have jurisdiction, to sanction on behalf of all concerned that certain acts should be done by the trustees which in ordinary circumstances they would have no power to do.

Trustees of certain settlements held, as part of the trust funds, shares in a prosperous limited company whose shares were fully paid-up. A condition of affairs arose which made it desirable, in the interests of the shareholders, that with their consent the company should be reconstructed by its being wound-up and a new company formed to take over its assets. The new company was to be like the old company except that the capital was to be larger and that the new company would have power to issue debentures. The shares in the old company were to be represented by fully paid-up shares and debentures in the new company. Each shareholder who was *sui juris* agreed to the scheme of reconstruction. As to the shares which were held by the trustees, they required the sanction of the court to their assenting to the scheme of reconstruction on behalf of beneficiaries not *sui juris* or not in existence, the other beneficiaries agreeing. The evidence showed that it would be for the benefit of the beneficiaries and other shareholders that the scheme of reconstruction should be carried into effect.

Held: (i) the court had jurisdiction to sanction, and ought to sanction, the proposed acts of the trustees; but the evidence should be supplemented so as to make clearer the importance of further capital being provided by the proposed reconstruction of the company, the issue of debentures by the new company, and the difficulties that would arise if the trustees were obliged to stand aloof and to take no part in any reconstruction; (ii) in the cases where the trustees were not by the terms of the trust instrument authorised to invest in the shares or debentures of such a company as the proposed new company, they must undertake to apply to the court for leave further to retain the shares and debentures which they would obtain under the scheme of reconstruction, if they desired to retain them beyond one year from the time the reconstruction was carried out.

Re Crawshay, Dennis v. Crawshay (1) 60 L.T. 357; and *Re Morrison, Morrison v. Morrison* (2), [1901] 1 Ch. 701, considered.

Notes. Powers similar to those exercised by the court in these cases were conferred on the court by the Trustee Act, 1925, s. 57 (26 HALSBURY'S STATUTES (2nd Edn.) 138), and the Settled Land Act, 1925, s. 64 (23 HALSBURY'S STATUTES (2nd Edn.) 144).

Distinguished: *Re Tollemache*, [1903] 1 Ch. 955. Considered: *Re Wells, Beyer v. Muelcan*, [1903] 1 Ch. 848. Applied: *Re D's Settled Estates*, [1952] 2 All E.R. 603; *Chapman v. Chapman*, [1954] 1 All E.R. 798. Considered: *Re Forster's Settlement, Michelmore v. Byatt*, [1954] 3 All E.R. 714. Referred to: *Re B's Settlement*, [1952] 2 All E.R. 647.

As to deviation from the terms of a trust, see 38 HALSBURY'S LAWS (3rd Edn.) 1025 et seq.; and for cases see 43 DIGEST 839 et seq.

Cases referred to:

(1) *Re Crawshaw, Dennis v. Crawshaw* (1888), 60 L.T. 357; 5 T.L.R. 144; 24 Digest (Repl.) 831, 8243.

(2) *Re Morrison, Morrison v. Morrison*, [1901] 1 Ch. 701; 70 L.J.Ch. 399; 84 L.T. 383; 49 W.R. 441; 17 T.L.R. 330; 45 Sol. Jo. 344; 8 Mans. 210; 43 Digest 840, 2861.

Appeals from orders of COZENS-HARDY, J.

Re NEW'S SETTLEMENT.

By an indenture of settlement, dated Oct. 21, 1875, and made between the settlor David New of the one part and the trustees John Langham and Henry Edward Hunt of the other part, the settlor covenanted with the trustees to transfer into their names 110 shares of the nominal value of £100 each in the Wollaton Colliery Co., Ltd., and also certain other shares therein mentioned (all of which shares were then of the aggregate value not exceeding the sum of £12,500) on trust either to permit the whole or any of the shares respectively to remain in their actual state of investment or at any time or times at the discretion of the trustees or trustee for the time being to sell the same or any of them and invest the moneys produced thereby (inter alia) on the debentures or debenture or guaranteed or preference stocks or mortgages of any company in the United Kingdom paying dividends on its ordinary shares or stock at the time of the investment, with power to vary such investments at discretion; and to divide the trust funds and the investments thereof or treat the same as divided into two equal shares, and to pay the income of one such share to each of the two unmarried daughters of the settlor, namely, Charlotte Elizabeth New and Alice Flude New, during her life, provided that during any coverture the same should be for her sole and separate use independently of any husband and of his debts, control, and engagements without power of anticipation; and after the death of each daughter to stand possessed of her share and the income thereof in trust for all the children or any the child of such daughter who being sons or a son should attain the age of twenty-one years or being daughters or a daughter should attain that age or marry under that age, and if more than one in equal shares. After certain conditional limitations in favour of the settlor's married daughter Martha Ann Langham and other declarations it was by the indenture further declared that the power of appointing new trustees should be exercisable by the settlor during his life and after his death by the surviving and continuing trustees or trustee or by the last retiring trustees or trustee with power to augment or reduce the number, and, further, that the settlor might at any time by deed either vary or absolutely revoke all or any of the trusts and provisions by the indenture declared and by the same or any other deed declare such other trusts and provisions of and concerning all or any of the trust funds thereby settled as he should think fit. By a deed of revocation and new appointment, dated Aug. 31, 1877, the settlor declared that the before-stated indenture of settlement should be read and construed and have effect as if the name of the therein-named Martha Ann Langham had been originally inserted therein instead of the name of Charlotte Elizabeth New (who had since died without having been married), and that Martha Ann Langham and her children or child should respectively be entitled to and have such and the same interests and benefits original as well as accruing as were by the indenture of settlement settled on or in trust for Charlotte Elizabeth New and her children or child and to the

A same extent respectively. And the settlor thereby declared that the trustees for the time being should have full powers of executing and doing all releases and things relating to the trust premises as fully and effectually as if they were absolute owners.

B The settlor died on Sept. 28, 1878. Henry Edward Hunt, one of the trustees, died on July 24, 1900, leaving John Langham sole surviving trustee of the settlement. The settlor's daughter Martha Ann Langham had been once married only, namely, on Aug. 2, 1866, to John Langham, and there had been issue of their marriage two children, namely, John Alfred Langham and Thomas Cecil Langham, both of whom were sui juris. The settlor's daughter Alice Flude New had been married once only, namely, to Charles Henry Stafford on July 18, 1877, and there had been issue of their marriage eight children, namely, Charlotte Evelyn Stafford who was sui juris, and Henry Norman Stafford, David New Stafford, Alice Gladys Stafford, Kathleen Annie Stafford, and Florence Mary Stafford who were respectively infants, and Percy Beaumont Stafford who was sui juris and out of the jurisdiction of the court, and Thomas Edward Stafford who was an infant and also out of the jurisdiction of the court. There was standing in the name of John Langham as such trustee and in the name of his deceased co-trustee the 110 shares of £100 each in the Wollaton Colliery Co., Ltd., and £2,750 in cash in his name, representing some debentures in that company which were allotted in 1892 by way of bonus, and which were paid off on May 20, 1901. The capital value of the 110 shares of £100 each in the Wollaton Colliery Co., Ltd., at the present market price was £175 each. The company had paid to the shareholders dividends and bonuses for the past five years as follows: 1896, 1897, and 1898, 10 per cent.; 1899, 12½ per cent.; 1900, 25 per cent. and 25 per cent. bonus. The debentures produced an income of £165 annually up to the date of their payment off as above stated.

F The Wollaton Colliery Co. Ltd. was incorporated in 1875 under the Companies Acts, 1862 to 1870, as a company with liability limited by shares and having a capital of £105,000, divided into 1,050 shares of £100 each. One thousand shares had been issued, and the company had therefore a paid-up capital of £100,000. The assets of the company consisted of collieries at Wollaton and Radford, in the county of Nottingham, held under leases for terms of which about fifty-seven years were unexpired, stores, stocks, book debts, goodwill, etc., and were valued at a sum exceeding £300,000. It was considered desirable in the interests of the shareholders that the company should be reconstructed in consequence of the constantly increasing dividends which the company had been able to pay combined with the large outlays which it had been necessary to make from time to time out of the profits in developing the collieries. The scheme was to recapitalise the company at a higher figure, so that the present shareholders might receive £100,000 of debenture stock, £100,000 of preference shares, and £100,000 ordinary shares in lieu of their present holdings, and, if carried through, would enable them with largely increased holdings of preference and ordinary shares, each at £10 nominal value respectively instead of shares of £100 nominal value, to obtain much greater facilities for realising or settling or dealing with those holdings. It was, accordingly, proposed that the existing company should be wound-up voluntarily and dissolved, and that a new company under the name of "The Wollaton Collieries Co., Ltd." should be incorporated under the Companies Acts, 1862 to 1900, with a capital of £210,000, divided into 10,000 preference shares of £10 each and 11,000 ordinary shares of £10 each. The shares of the existing company were proposed to be exchanged for fully paid-up preference shares and ordinary shares and debentures of the new company, on the footing that each shareholder should be entitled in exchange for each of his existing £100 shares to ten fully paid-up £10 preference shares and ten fully paid-up £10 ordinary shares and a £100 debenture of the new company. It was also proposed that the preference shares should carry a non-cumulative dividend at the rate of 6 per cent. per annum on

the capital paid up thereon, and to rank, both as regarded dividend and capital in priority to the other shares, and up to 10 per cent. on the amount of such preference shares, and no further, to participate *pari passu* with the other shares in the assets available for distribution in the winding-up after paying off the whole of the paid-up capital of the company. The authorised debentures of the new company were proposed to be £150,000, of which £100,000 was to be issued to the shareholders of the old company as above stated, the remaining £50,000 being reserved for future issue, and it was proposed that the whole of the assets of the old company should be transferred to the new company. The debentures were to carry interest at the rate of 5 per cent. per annum, and to be secured by a floating charge on the undertaking and to be redeemable by annual drawings at a premium of 5 per cent.

The surviving trustee was desirous of obtaining the sanction of the court to his concurrence in the proposed scheme of reconstruction, as to the best of his knowledge, information, and judgment the scheme was advantageous for the shareholders, and he submitted to the directions of the court as to retaining permanently or otherwise the preference and ordinary shares and debentures of the new company, or any of them, to be issued in exchange for the shares in the existing company as a trust investment. He was advised that, although there was a market for the shares of the existing company, it would be disastrous, in the interests of the new company and of the shareholders, to attempt to realise any large proportion of the securities of the new company when issued by placing them on the market until after the new company had become established and had been proved a success; and for that reason he desired to obtain leave to retain such securities when obtained subject to the directions of the court as to realisation after a period of postponement or otherwise as might be deemed expedient. Accordingly the surviving trustee took out an originating summons for the determination of the following questions, and asking for the following relief: (i) Whether the plaintiff as the holder of 110 fully-paid shares of the nominal value of £100 each in the Wollaton Colliery Co., Ltd., which were subject to the trusts of the settlement and deed poll, ought to ratify an agreement dated Mar. 29, 1901, and made between William Dawson (on behalf of himself and other the shareholders of the company) of the one part and Douglas Alexander Howden (on behalf of a new company intended to be formed and called "The Wollaton Collieries Co., Ltd.") of the other part. (ii) That the plaintiff as the holder of such shares might be authorised to ratify the agreement. (iii) That the plaintiff might be authorised to accept in exchange for each of the said shares in the Wollaton Colliery Co., Ltd., ten fully-paid £6 per cent non-cumulative preference shares of the new company (with a preference as to dividend and capital), ten fully-paid ordinary shares of the new company, and £100 £5 per cent. debenture of the company. (iv) Whether the plaintiff as such trustee had power to retain permanently such preference and ordinary shares and debentures of the new company. (v) If not, for what period the plaintiff as such trustee might hold such preference and ordinary shares and debentures of such new company.

Re LEAVERS.

John Wells Leavers by his will, dated Oct. 4, 1892, after appointing executors and trustees and after making certain specific bequests as therein mentioned, devised and bequeathed all his real and personal estate not thereby otherwise disposed of to his trustees on trust (but during the life of his widow with her consent in writing) for sale, but subject to the proviso thereafter contained, and conversion and for investment of the residue of the moneys (*inter alia*) on the stocks, funds, shares, debentures, debenture stock, mortgages, or securities of any corporation, company, or public body or authority municipal, local, commercial or otherwise, in the United Kingdom, with power to vary or transpose such investments into or for others of any nature thereby authorised at their

A distribution and on trust to pay the income of the residuary trust moneys to his widow during her life, and after her decease to pay certain charitable and other pecuniary legacies as therein mentioned, and on further trust to pay the residue of the trust moneys and of the investments for the time being representing the same to his nephews and nieces therein named as tenants in common in equal shares; and the testator declared that his trustees at their own absolute discretion might permit all or any part of his personal estate to continue in the same state of investment in which it was found at the time of his decease notwithstanding that the same or any of them might be of a wasting or hazardous nature and not allowed by law for the investment of trust moneys; and it was the testator's express wish that his trustees should in all matters of investment act in the same manner in all respects as if they were alone beneficially and absolutely interested within without being responsible for loss; and the testator also declared that it should be lawful for his trustees to postpone the sale, conversion, and collection of the whole or any part or parts of the real and personal estate as long as they should in their uncontrolled discretion think proper. The testator died on Aug. 13, 1897. Part of the testator's residuary estate consisted of 228 fully-paid shares of £100 each nominal value in the Wollaton Colliery Co., Ltd., of which the estimated value was £34,440 and the annual income £9,822 4s. Of such shares, 182 were investments of the testator and forty-six were purchased by the trustees in 1900. The trustees took out an originating summons in identically the same terms as in the case of *Re New*.

Re MORLEY.

E Samuel Morley by his will, dated June 3, 1881, after appointing executors and trustees and after bequeathing certain pecuniary legacies, devised and bequeathed all the real and personal estate to which at his death he should be entitled or of which he should have power to dispose by will unto his trustees on trust to sell the real estate and convert into money such part of his personal estate as should not consist of money, with power to postpone such sale and conversion as his trustees should think proper, and be directed them to stand possessed of the residue of the said moneys after payment of his funeral and testamentary expenses, debts, and the legacies bequeathed by his will or any codicil thereto on trust in the first place to pay certain sums of money as therein mentioned, and to set apart certain sums of money to be held by them on the trusts hereinafter declared concerning the same, and to invest the whole of the residue in their or his names or name (inter alia) in the purchase of the preference or wholly or partially guaranteed stock or shares or on the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock of any railway or other public company in Great Britain incorporated by special Act of Parliament and having within one year of the time of investment paid a dividend on its ordinary stock or shares, with power to vary; and the testator directed his trustees to stand possessed of the said investments and of the annual income thereof on trust as to one equal third part thereof to pay the income to his sister Mary Farrand, widow, during her life for her separate use independently of any husband, and without power of anticipation; as to one other equal third part thereof to pay the income to his sister Ann Morley, spinster, during her life for her separate use without power of anticipation; and as to the remaining equal third part thereof to pay the income to his sister Sarah Leavers, the wife of John Wells Leavers, during her life for her separate use and without power of anticipation, and after the death of Sarah Leavers for John Wells Leavers during his life, and on the respective deaths of his sisters (but as to the one third part of Sarah Leavers on the death of John Wells Leavers) the testator declared that the trustees should stand possessed of the capital of the investments the income whereof should have been respectively so paid as aforesaid, on trust for Edward Henry Fraser, Arthur Fraser, William Frederick Fraser, Mary Fraser, and Annie Fraser, or such of them as should be living at the time of the respective deaths of his sisters, and the issue then living

and attaining twenty-one, or in case of females on their marrying, of one of them who might then be dead, and whether having died in the testator's lifetime or after his death, in equal shares per stirpes as tenants in common; and the testator declared the trusts on which the trustees should stand possessed of the sums of money thereinbefore directed to be set apart. The testator died on Mar. 12, 1890. William Frederick Fraser died on June 22, 1891, leaving four children, all of whom were now living and were infants. Part of the testator's residuary estate consisted of 166 fully-paid shares of £100 each nominal value in the Wollaton Colliery Co., Ltd., of which the estimated value was £29,050 and the annual income £7,001 16s. Of such shares, 132 were investments by the testator and thirty-four were purchased by the trustees in May, 1900. The trustees took out an originating summons in identically the same terms as in *Re New*.

On June 17, 1901, the originating summonses in the three cases came on together to be heard before COZENS-HARDY, J., sitting at chambers. The judge was himself satisfied that the course proposed to be adopted by the trustees was one which, if it could be, should be sanctioned by the court; but his Lordship was of opinion that he could not accede to the applications, having regard to the decisions of NORTH, J., and BUCKLEY, J., respectively in *Re Crawshay, Dennis v. Crawshay* (1) and *Re Morrison, Morrison v. Morrison* (2). From that decision the trustees of the several instruments respectively now appealed.

Haldane, K.C., and *Peterson* for the trustees.

R. J. Parker for all beneficiaries who were sui juris.

W. J. Manning, for the infant beneficiaries.

Cur. adv. vult.

July 22, 1901. **ROMER, L.J.**, read the following judgment of the court.—As a rule the court has no jurisdiction to give, and will not give, its sanction to the performance by trustees of acts with reference to the trust estate which are not on the face of the instrument creating the trust authorised by its terms. *Re Crawshay, Dennis v. Crawshay* (1), decided by NORTH, J., and *Re Morrison, Morrison v. Morrison* (2), decided by BUCKLEY, J., are instances where the court was asked to sanction steps to be taken by trustees which it thought unjustifiable and which it declared it had no jurisdiction to authorise. But in the management of a trust estate, and especially where that estate consists of a business or shares in a mercantile company, it not infrequently happens that some peculiar state of circumstances arises for which provision is not expressly made by the trust instrument, and which renders it most desirable, and it may be even essential, for the benefit of the estate, and in the interest of all the cestuis que trust, that certain acts should be done by the trustees which in ordinary circumstances they would have no power to do.

In a case of this kind, which may reasonably be supposed to be one not foreseen or anticipated by the author of the trust where the trustees are embarrassed by the emergency that has arisen, and the duty cast on them to do what is best for the estate, and the consent of all the beneficiaries cannot be obtained by reason of some of them not being sui juris or in existence, then it may be right for the court, and the court in a proper case would have jurisdiction, to sanction on behalf of all concerned such acts by the trustees as we have above referred to. By way merely of illustration we may take the case where a testator has declared that some property of his shall be sold at a particular time after his death, and then, owing to unforeseen change of circumstances since the testator's death, when the time for sale arrives, it is found that to sell at that precise time would be ruinous to the estate, and that it is necessary or right to postpone the sale for a short time in order to effect a proper sale; in such a case the court would have jurisdiction to authorise, and would authorise, the trustees to postpone the sale for a reasonable time.

A It is a matter of common knowledge that the jurisdiction we have been referring
to, which is only part of the general administrative jurisdiction of the court, has
B been constantly exercised, chiefly in chambers. Of course the jurisdiction is one
to be exercised with great caution, and the court will take care not to strain its
powers. It is impossible, and no attempt ought to be made, to state or define all
the circumstances under which, or the extent to which, the court will exercise
the jurisdiction; but it need scarcely be said that the court will not be justified
in sanctioning every act desired by trustees and the beneficiaries merely because
it may appear beneficial to the estate, and certainly the court will not be disposed
to sanction transactions of a speculative or risky character. But each case brought
before the court must be considered and dealt with according to its special circum-
stances. As a rule these circumstances are better investigated and dealt with in
C chambers. Very often they involve matters of a delicate and private nature, the
publication of which is not requisite on any good ground, and might cause great
injury to the trust estate.

With these general observations we pass to the cases now before us. The cir-
cumstances, and the evidence, have been considered by us. We do not think it is
D necessary to refer to them in detail. We need only say that they relate to a
prosperous limited company whose shares are fully paid-up, and to a condition of
affairs that has arisen which makes it desirable in the interests of all the share-
holders that with their consent the company should be reconstituted by its being
wound-up and a new company formed to take over its assets. The new company
is to be like the old company, except that the capital is larger, and that the new
E company will have power to issue debentures. The shares in the old company
will be represented by fully paid-up shares and debentures in the new company.
Every shareholder who is sui juris agrees to the scheme. But some shares are
held by trustees who wish the sanction of the court to their assenting on behalf
of beneficiaries not sui juris or not in existence, the other beneficiaries agreeing.
We understand that COZENS-HARDY, J., was himself satisfied that the course
F proposed to be adopted by the trustees was one which, if it could be, should be
sanctioned by the court. We think under the circumstances of the case that the
court has jurisdiction to sanction, and ought to sanction, the proposed acts of the
trustees. But the evidence should be supplemented, so as to make clearer the
points urged in the course of the argument before us as to the importance of
G further capital being provided by the proposed reconstruction of the company,
the issue of debentures by the new company, and the difficulties that will arise
if the trustees are obliged to stand aloof and to take no part in any reconstruction.
Then in the cases where the trustees are not by the terms of the trust instrument
authorised to invest in the shares or debentures of such a company as the
proposed new company, they must undertake to apply to the court for leave to
further retain the shares and debentures which they will obtain under the scheme
H of reconstruction if they desire to retain them beyond one year from the time
the reconstruction is carried out.

Appeals allowed.

Solicitors: *Taylor, Hoare & Pilcher*, for *Hunt & Dickins*, Nottingham, and
Parr & Butlin, Nottingham.

I [*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

Re BODEGA CO., LTD.

[CHANCERY DIVISION (Farwell, J.), November 25, 26, 1903]

[Reported [1904] 1 Ch. 276; 73 L.J.Ch. 198; 89 L.T. 694; 52 W.R. 242;
48 Sol. Jo. 84; 11 Mans. 95]

Company—Director—Vacation of office—Re-election—Period of vacation—Recovery of director's fees by company.

W., a director of a limited company, arranged with the company's solicitor that under an agreement made in December, 1900, by the company for the purchase of certain property the company would be charged more than the actual price and that the secret profit thus made should be enjoyed by W. and the solicitor. The property was conveyed in June, 1901. The amount of the secret profit was never in fact paid by the company, but in February, 1903, the company discovered the arrangement made by W. with the solicitor. In the meantime director's fees and bonus had been paid to W., and in accordance with the company's practice W. had retired annually in July, 1901, and July, 1902, and been re-elected. Clause 70 of the company's articles of association provided that "the office of any director shall be vacated . . . if he be concerned in or participate in the profits of any contract with the company not disclosed to and authorised by the board." The company claimed that W. had vacated his office as director in December, 1900, and claimed repayment of fees and bonus paid to him since that date.

Held: under cl. 70 W. had vacated his office in December, 1900, but the vacation only lasted for the current year, i.e., until his re-election in July, 1901; accordingly, the company were entitled to the repayment of the sums paid to W. between December, 1900, and July, 1901, and no more.

Notes. Referred to: *Admiralty Comrs. v. National Provincial and Union Bank of England* (1922), 38 T.L.R. 492; *Morgan v. Ashcroft*, [1937] 3 All E.R. 92; *Agres v. Moore*, [1939] 4 All E.R. 351.

As to vacation of office by director, see 6 HALSBURY'S LAWS (3rd Edn.) 319 et seq.; and for cases see 9 DIGEST (Repl.) 553 et seq.

Cases referred to:

- (1) *Turnbull v. West Riding Athletic Club, Leeds, Ltd.* (1894), 70 L.T. 92; 10 T.L.R. 191; 9 Digest (Repl.) 555, 3677.
- (2) *Re George Newman & Co.*, [1895] 1 Ch. 674; 64 L.J.Ch. 407; 72 L.T. 697; 43 W.R. 483; 11 T.L.R. 292; 39 Sol. Jo. 346; 2 Mans. 267; 12 R. 228, C.A.; 9 Digest (Repl.) 520, 3431.
- (3) *Moses v. Macferlan* (1760), 2 Burr. 1005; 1 Wm. Bl. 219; 97 E.R. 676; 35 Digest 154, 511.
- (4) *Aiken v. Short* (1856), 1 H. & N. 210; 25 L.J.Ex. 321; 27 L.T.O.S. 188; 4 W.R. 645; 156 E.R. 1180; 35 Digest 148, 461.

Motion asking that the register of members of the Bodega Co., Ltd., a company registered in 1881 under the Companies Acts, 1862 to 1880, might be rectified by inserting therein the name of Adolphus Eugene Walton, as the holder of 300 fully-paid £5 shares of the above-named company which then stood registered in the name of the applicant.

The applicant, Edward Talbot Wolseley, was one of the first directors of the company, and had been chairman of the board of directors for many years. He

A was appointed a director in 1881, and he then acquired and continued to hold, until Dec. 2, 1900, three hundred fully-paid shares of £5 each in the company. It appeared from the evidence that the applicant had, on or about Dec. 24, 1900, entered into a secret arrangement with a solicitor by which he was concerned in or agreed to participate in the profits of a contract for sale to the company of certain licensed premises known as the Durham Ox, Nottingham. This solicitor was employed by the company as their agent for the purchase of the Durham Ox. He attended a meeting of the board of the Bodega Co., Ltd., on Dec. 19, 1900, and reported that he had completed the negotiation for the purchase of the Durham Ox. The board thereupon authorised him to enter into a contract for the purchase by the company of this licensed house, and on Jan. 2, 1901, the board, on behalf of the company, accepted two bills of exchange amounting to £1,200 in respect of the deposit. These bills of exchange were handed to the solicitor.

On Dec. 24, 1900, the solicitor entered in his own name into a contract with the vendor of the Durham Ox by which the vendor contracted to sell it to him for £8000, and he paid a deposit of £800 in respect thereof. The board of directors were informed that the purchase had been effected for £12,000, and by a deed of June 24, 1901, the vendor conveyed the property to the company in consideration of £8,000 paid to the vendor and £4,000 paid to the solicitor. The receipt of the consideration was acknowledged by the deed, but as a matter of fact it was not then paid, and the additional £4,000 was never paid. This conveyance was kept for some time in the solicitor's custody and not seen by the board; the directors were consequently ignorant of the secret profit of £4,000, but in July, 1902, the accountants to the company in the course of auditing the accounts found it necessary to see the deed, and the solicitor's secret profits became known. The £4,000 which he was to receive had never been paid, and the company thereupon declined to pay it and dismissed him from their employment. It was not until February, 1903, that it was discovered that Wolseley had had a secret arrangement with the solicitor by which he was to participate in the profit of £4,000. This was admitted by Wolseley on Feb. 10, 1903, at a board meeting. The company thereupon called on Wolseley to acknowledge that he had vacated his office of director under cl. 70 of the articles of association. This he did by a letter of Feb. 25, 1903, in the following terms:

"I acknowledge that I have in the circumstances which have occurred and by the operation of cl. 70 of the articles of association vacated my office as a director of your company."

During the period from December, 1900, to February, 1903, the company paid to Wolseley in monthly instalments his director's remuneration which was determined by the resolution of the board. By the articles of association a fixed sum was available for the salary of the directors, who had power to allocate it among themselves as they thought fit. The company alleged that Wolseley vacated office on or about Dec. 24, 1900, and that either the company or the directors were entitled to recover all payments of salary made to him since that date. A claim was also made for a sum of £400 voted by the board to Wolseley at a meeting to which the following minute of July 17, 1901, refers, which was passed by the board. Extract from minute:

"And it was also proposed . . . that the chairman for the past year—Mr. Edward Wolseley—he voted a sum of £400 for his special and constant services during that period."

It was the practice of the board that the directors should all retire each year, and then stand for re-election to the post of director. Therefore during the period in respect of which the company claimed to recover his salary, Wolseley retired and was re-elected to the post of director twice—that is to say, on July 8, 1901, and

July 8, 1902. In each case he was re-elected by the board of directors to the post of chairman.

In August, 1903, the company took action to recover the amount of director's fees and bonus paid to Wolseley during the period in dispute. This action was commenced in the King's Bench Division; but, as Wolseley was in Scotland and the company were unable to effect service, the company commenced proceedings in Scotland. On Oct. 2, 1903, Wolseley agreed to sell his three hundred shares for £1,350, and executed a transfer of the shares. The company refused to register the transfer on the ground that the company had a first and paramount lien thereon under art. 21 in respect of the return of director's fees, amounting to £1,380 11s. 4d., to which it claimed to be entitled. On Oct. 12, 1903, Wolseley issued a notice of motion asking for rectification of the register as stated above. On this motion coming on for hearing on Nov. 6, 1903, it was ordered that the motion should be put in the non-witness list for the judge to try all questions between the parties, Wolseley, by his counsel, submitting to the jurisdiction of the court. In the Scottish action all proceedings were stayed by consent pending the trial of the case in England.

To avoid the difficulty which might arise by an allegation that it was the directors, and not the company, who were entitled to recover the salaries, the company took an assignment of all the share and interest of the directors in the sum of £980 11s. 4d. paid to Wolseley as salary during the period from December, 1900, to February, 1903.

The following articles out of the company's articles of association were referred to at the hearing :

"Art. 21. The company shall have a first and paramount lien upon the shares of any shareholder for any money due to the company, alone or jointly with any other person; . . .

Art. 70. The office of any director shall be vacated—If he become bankrupt or insolvent or compound with his creditors. If he be declared a lunatic or become of unsound mind. If he be concerned in or participate in the profits of any contract with the company not disclosed to and authorised by the board. If he cease to hold the required number of shares qualifying for the office. . . .

Art. 75. The remuneration of the directors shall as from the 31st day of March, 1887, be £1,400 a year, to be distributed among them in such manner as the majority of the directors may direct."

It was arranged that the case should be heard on the assumption that Wolseley and the solicitor were conspirators and were equally implicated in the fraud, and equally responsible for the machinery of carrying it out. Wolseley was to be allowed to apply at his own risk to disprove this assumption if he thought fit.

Upjohn, K.C., and *Galbraith* for Wolseley.
Jenkins, K.C., and *Neilson* for the company.

FARWELL, J.—This case, under the guise of an innocent application to rectify the register, has raised a number of points of very considerable difficulty. The first difficulty I find is in ascertaining the facts, because the parties appear to have come here with a laudable desire to save expense without having clearly formulated any agreement of facts on which I can proceed. [His Lordship here stated that he would assume, as was, he believed, the basis of agreement of the parties, that Wolseley was equally implicated with the solicitor in the entire fraud, though he would reserve to Wolseley the right to apply at his own risk to disprove this if he saw fit. His Lordship then stated the facts, and continued:] Wolseley, therefore, was concerned in the contract from the beginning. "The office of director is

A vacated if a director be concerned in any contract." Wolsley was undoubtedly concerned in that contract.

B The first point is this: Does the director who is himself concerned in a contract not disclosed thereupon ipso facto or automatically vacate his office, or does anything further remain to be done? In my opinion it is quite plain on the words of the article that he automatically or ipso facto vacates on the act being done. If he becomes bankrupt, on the adjudication nothing more is to be done; if he becomes lunatic, in the same way, nothing more is to be done; nor, indeed, is there any *locus penitentiae* for him, or any means by which the directors can condone the offence, if it be an offence, or condone the act which causes the vacation. The office is vacated; he has to be re-elected in the ordinary way, or the casual vacancy has to be filled up under the article to that effect. The directors have nothing C whatever to do with the vacation of the office by an event over which they have no control, and with which they have nothing to do except to satisfy themselves that it has in fact happened if it be put in issue.

D In the present case there is no dispute of fact, because there is no dispute that Wolsley was concerned in the contract. The difficulty is a decision to which I have been referred of KEKEWICH, J., in *Turnbull v. West Riding Athletic Club, Leeds, Ltd.* (1) but, as I read that case, the learned judge there was really addressing his mind to a different state of circumstances. The article was not absolutely identical. It was practically this. If a director contract with the company or be E concerned in or participate in the profits of any contract with or work done for the company without declaring his interest at the meeting of directors, his office shall be vacated. The directors took on themselves to call a meeting and to declare his office vacant, and the learned judge said in effect: "As you chose to call that meeting for the purpose of declaring this man no longer a director, you ought in common fairness to have given him notice of it." I do not think anybody would find any fault with this view. If one is proposing to adjudicate on a man's conduct and F position, one ought at least to give him notice of it and give him the opportunity of being heard. But if the learned judge meant to go on and say, as it is possible he might have meant—I am not sure whether it is necessary to his judgment—that after the event causing the vacation of office the board of directors must take steps to remove the director who would have been entitled to be heard, and might possibly have been so plausible as to win over the directors to excuse his fault, I respectfully disagree, for I cannot see what useful purpose it would serve if he had won over every director; the fact would have remained, and the fact was absolutely impossible G to get over.

The result, therefore, is that, in my opinion, on Wolsley being concerned in the contract he vacated the office of director. What further happened was this. The directors were elected each year for a year, and Wolsley went out of office with the other directors in the following July, 1901, and was re-elected on July 8, 1901. H He held office that year, and after this was re-elected on July 8, 1902. The vacation of his office by the contract of Dec. 24, which I will assume for the moment was a vacation of the then office of director, and did not, in my opinion, disqualify the man who had been a director and who had vacated his office from thereafter being qualified as a director. I do not understand the article to mean that if a man be concerned in a contract not disclosed, and thereby vacate his office, he cannot be I elected in a subsequent year, or even (I will not say in the then current year, but in the subsequent year), be appointed to fill a casual vacancy. To my mind it is not a continuing disqualification unless the work to be done under the contract is a continuing work. If the work to be done under the contract is practically to be reviewed by the director under contract, and the discretion to which the company are entitled from the director is still to be exercised after the next election, then, and then only, the election would be voided by the continuing contract. But when, as here, it is a contract made once for all for a particular purchase, then I think it only applies so as to cause a vacation of the directorship

for the current year; so that I am of opinion that Wolsley vacated his office on the entering into the contract, and that the vacation lasted only until July 8, 1901, when he was re-elected. A

The date of the contract, on the evidence I have before me, which is extremely meagre and unsatisfactory, is Dec. 24, 1900. From that date Wolsley vacated his directorship. Then there comes the conveyance of June 24 which recites the contract, and which then proceeds to convey the property to the company. The purchase money was not paid. It has been argued that on the conveyance to the company when £8,000 only was paid, and £4,000 was left unpaid, there would be a lien arising for that unpaid purchase money. Well, I do not think I am concerned with saying whether that lien arises by implied contract as certainly it is called in some of the cases, or by a natural equity or by some implication of equity as it has been certainly called in other cases, because I think the transaction for this purpose came to an end on June 24, when the conveyance was executed and the money not paid. Whatever the lien was, it arose then. If it was a contract, then the implied contract was then entered into; if an equity, the equity then arose. I do not think I can carry the continuance of the contract on beyond June 24, because, although the money was not paid, there was no further exercise of any discretion in this transaction which would render the service of the director necessary. The mischief was then done, and could only be set aside by being discovered by the directors, and not by any exercise of the directors' discretion as such, as distinguished from the conspirators. That being so, it appears to me that the only period for which this claim for a refunding of the fees can succeed really is from Dec. 24, 1900, to July 8, 1901. C D

I may mention, to get rid of it, that the sum of £400 which was paid to Wolsley as an extraordinary allowance could not fall under any article, and was not a part of the £1,400 to which the directors were entitled under art. 75, but was an extra sum given by the directors. It is quite clear on the authorities—*Re George Newman & Co.* (2) and other cases—that the gift was utterly unjustifiable, and that sum of money must be refunded. Therefore to the extent of £400 I may dismiss the consideration of it by saying that until that is paid there can be certainly no rectification of the company's register in respect of Wolsley's transfer of his shares. E F

The other question with reference to fees is a more difficult one. Under art. 75 the remuneration of the directors was as and from Mar. 31, 1887, to be £1,400 a year, to be distributed amongst them in such proportion as the majority might direct. What happened, I was told, was that in 1897 there was a resolution of the directors, which has been in fact acted on ever since, under which each director got a certain proportion. The particular director, Mr. Wolsley, got, I think, £40 a month. The £40 a month has been paid to Mr. Wolsley in respect of his services as a director, and the company now claims to have it refunded, either to itself in its own right as the company or to itself as the assigns of the then directors, as money paid either under a mistake of fact or on a total failure of consideration. This has become very small in point of money, but seems to me to raise questions of some little interest. The action for money had and received has been dealt with by LORD MANSFIELD in a passage which has been quoted so often I am almost ashamed to quote it again, and which occurs in *Moses v. Macferlan* (3) (2 Burr. at p. 1012): G H

"It lies for money paid by mistake or upon a consideration which happens to fail." I

The mistake on which one can recover must be a mistake which, as LORD BRAMWELL says in *Aiken v. Short* (4) (1 H. & N. at p. 215),

"must be as to a fact which, if true, would make the person paying liable to pay the money; not where, if true, it would merely make it desirable that he should pay the money."

A That, I apprehend, means this: if one is claiming to have money repaid on the ground of mistake, one must show the mistake is one which led one to suppose that one was legally liable to pay. I am not sure that the same proposition is not involved in the second head—total failure of consideration.

B I will deal with the company first in its own right. If the company was liable to pay, it was because it had impliedly contracted with Wolseley to pay him for his services by accepting the benefit of those services, although he was not a director. Of course, so far as he was a director, the contract is an express contract. During the first period Mr. Wolseley would not be entitled under express contract, because the contract was to pay the directors, and he was not one. But it is put on the ground of a quantum meruit, or, traversing the statement of BRAMWELL, B., it is said that there was some legal liability, although not to the full extent; it was not a mere sum which it was desirable to pay, but a sum which, as to some part of it, at any rate, had to be paid. That, I think, brings the question down to this. When speaking of total failure of consideration, does consideration mean merely something of value, or such a legal consideration as would support some form of action by the claimant? In my opinion, it is the latter. I think the position when analysed is this. Money is recoverable by a man for work done when A., the person on whose property the work has been done, has accepted it; it is because of the request which is implied from A.'s acceptance of the work that the workman is entitled to recover money for the work done by him. That can only operate, I think, when both parties know the true state of circumstances.

E In the present case it is clear that the company never would have requested Wolseley to do the work if they had known the facts, and had known he was not a director. In fact, without putting it on any question of fraud, Wolseley by his silence and concealment of this particular act of his misled the company into making a request which they otherwise certainly would not have made. The mere fact that the work has been done, without the request, is no consideration at law. The request is only implied from the acceptance of the work, and, in my opinion, only by the acceptance with the knowledge of the circumstances. If there be a circumstance which is so material that the court could not properly imply request which, after all, has to be a matter of implication by the court, the mere fact that the company had taken the benefit of the work is immaterial, and there is no consideration.

G From that point of view, whether I take the case of mistake or take the total failure of consideration, in my opinion, the company can recover back the money paid for these director's fees. Whether it be the company in their own capacity or the other directors I do not think is very material; but, in my view, it is the company, apart from a question which might be raised by reason of the fact that the company can only act through its directors, and that all the other gentlemen are its directors. The company would appear to be in the position that it had paid to the wrong person. It is bound to pay £1,400 to its directors. It has in point of fact paid a proportion of that to someone who was not a director. If it were not that the people who act for the company are themselves these other directors, the answer that the company is entitled in itself would appear to be correct. That is not, however, very material to consider, because, if I do not take the view that the company have suffered by having to pay over again, then the directors have suffered because they have, on the footing that this man was a director, given him a share of the £1,400, which was to be divided amongst the directors. If I am to apply the same test to them as I do to the company, I certainly could not imply that they, knowing the circumstances, ever would have requested Wolseley to do the work which he did if they had known that he was not a director. He was to be remunerated as a director, and the other directors never would have requested, either impliedly or expressly, a man who they knew had ceased to be a director by means of such conduct as this to do any act as a director. The result is that, in my opinion, the fees paid from Dec. 24, 1900 to July 8, 1901, must be refunded.

With regard to the rest, the man has been re-elected, and I do not hold that there has been any vacating of the office because the director had been guilty of conduct which if known would have induced the company not to re-elect him. He was a director and has done the work, and, so far as that period is concerned, I think the application to recover fees fails. [The amount to be repaid by Wolseley was agreed at £635, and it was ordered that only on repayment of such sum ought the transfer of shares to be registered.]

Order accordingly.

Solicitors : Parker & Richardson ; Gadsden & Treherne.

[Reported by H. C. GARSIA, Esq., Barrister-at-Law.]

Re WILMER'S TRUSTS. MOORE v. WINGFIELD

[COURT OF APPEAL (Vaughan Williams, Romer and Stirling, L.JJ.), June 10, 15, 16, 1903]

[Reported [1903] 2 Ch. 411; 72 L.J.Ch. 670; 89 L.T. 148; 51 W.R. 609; 47 Sol. Jo. 602]

Perpetuities—Will—Life in being—Child en ventre sa mère.

A testatrix devised real estate to her trustees upon trust for her daughter A. for life, and after her death upon trust for the second and every younger son of A. born or to be born, successively for his life with remainder after the death of each such son upon trust for his first and other sons successively in order of seniority in tail male with remainders over. At the date of the death of the testatrix A. had two sons living and she was pregnant of a third son, who was born three and a half months after the death of the testatrix. The second son having become entitled on the death of the eldest son to other property, the limitations in favour of the third son took effect. He claimed that in the events which had happened the remainders over to his first and other sons were void for remoteness, and that he took an estate tail in possession.

Held: for the purpose of applying the rule against perpetuities, as there was a child en ventre sa mère at the date of the death of the testatrix who was eventually born alive and turned out to be a son, the court would refer that state of circumstances back to the date of the death of the testatrix and say retrospectively that the son must be considered as having been born at her death and, therefore, the limitations over to the first and other sons of the third son were not void for remoteness.

Notes. Considered: *Villar v. Gilbey*, [1904-7] All E.R. Rep. 779.

As to the period allowed for suspension of vesting, see 29 HALSBURY'S LAWS (3rd Edn.) 281 et seq., and for cases see 37 DIGEST 55 et seq.

Cases referred to:

(1) *Doe d. Lancashire v. Lancashire* (1792), 5 Term Rep. 49; 101 E.R. 28; 41 Digest 835, 6871.

(2) *Long v. Blackall* (1797), 7 Term Rep. 100; 101 E.R. 875; 37 Digest 65, 71.

Originating Summons taken out by Stephen Thomas Moore to which the surviving trustees of the will of Anne Wilmer, together with one Randal Kingsmill Moore, as heir-at-law and next of kin of the testatrix, were made defendants, asking for a

A declaration that he was at the date of a disentailing assurance entitled as tenant in tail male in possession to the hereditaments and securities representing the Wilmer estate.

Anna Wilmer by her will dated Sept. 25, 1876, after making a specific bequest and a specific devise of certain real estate, devised all her residuary estate to trustees upon the trusts thereafter declared, and bequeathed all her residuary personal estate to her trustees upon trusts for sale and conversion and reinvestment in real estate to be held upon the trusts thereafter declared. The testatrix declared that the trustees should stand seised and possessed of her residuary real estate and any hereditaments to be purchased with her residuary personal estate as thereinbefore directed (hereinafter collectively referred to as "the Wilmer estate") upon trust to pay the net rents and profits thereof to her daughter, Anna Maria Moore, during her life for her separate use without power of anticipation, and as if she were tenant for life without impeachment for waste, and from and after her death to stand possessed of the Wilmer estate upon trust for the second and every younger son of Anna Maria Moore, born or to be born successively during his life, without impeachment of waste, with remainder, after the death of each such son, upon trust for his first and other sons successively, in order of seniority, in tail male, so that every elder (except the eldest) son of Anna Maria Moore, born or to be born, and his first and other sons and their issue male respectively, should take before every younger son of Anna Maria Moore and his first and other sons and their issue male respectively, with remainder in trust for the second and every other son (except the eldest son) of Anna Maria Moore, successively, in order of seniority in tail, with certain remainders over in favour of the daughters of Anna Maria Moore. The testatrix also declared that if any person (other than the eldest son of Anna Maria Moore and his issue) to whom any estate as aforesaid in the Wilmer estate was devised in trust should be at her death or become entitled afterwards to another estate, called "the Barne estate," then the next gift in remainder of the Wilmer estate should take effect. The testatrix died on Oct. 28, 1880. At the date of the death of the testatrix, Anna Maria Moore had had one son, Stephen Wilmer Moore, who died in the lifetime of the testatrix, on June 17, 1877, and a second son, Randal Kingsmill Moore, who was born on Feb. 12, 1873, and who afterwards became entitled to the Barne estate, and she was pregnant of a third son, Stephen Thomas Moore, who was born on Feb. 7, 1881. She had also four daughters, all of whom attained the age of twenty-one years. Anna Maria Moore died intestate on Dec. 22, 1886. Stephen Thomas Moore attained the age of twenty-one years on Feb. 7, 1902. Being advised that the remainders after his life estate were void for remoteness, and that he was absolutely entitled as tenant in tail male in possession, in order to raise the question for the decision of the court he executed a disentailing assurance of the Wilmer estate, dated Sept. 15, 1902, which was duly enacted on Sept. 19, 1902, and took out this originating summons. The summons was adjourned into court, and came on to be heard before BUCKLEY, J., on Feb. 14 and Feb. 19, 1903, when his Lordship decided, applying the principle laid down in *Doe d. Lancashire v. Lancashire* (1) that, for the purpose of applying the rule against perpetuities, as there was a child en ventre sa mère at the date of the death of the testatrix, who was subsequently born alive and turned out to be a son, the court would refer that state of circumstances back to the date of the death of the testatrix, and say retrospectively that the son must be considered as having been born at her death. His Lordship also decided that the doctrine that a child en ventre sa mère at the death of a settlor must be considered as being born was to be treated as a general one, and was not confined to cases where it was for the advantage, or was immaterial to, such child to consider him as being born. The limitations over were consequently declared not to be void for remoteness. From that decision the plaintiff now appealed.

Buckmaster, K.C., and Sargant for the plaintiff.

J. Austen-Carmichael, for the defendant Randal Kingsmill Moore, and *Warrington, K.C., and Samuel Dickinson*, for the defendants the trustees of the will.

VAUGHAN WILLIAMS, L.J.—This is an appeal from a decision of **BUCKLEY, J.** It is convenient in this case to begin with a short statement of the facts of the case, and I propose to take the statement which appears in the report of case before **BUCKLEY, J.**, in the court below. [His Lordship read the statement of the facts, and continued:] The question which we have to decide here is really a question whether for the purposes of the rule against perpetuities the child of which the testatrix's daughter, Anna Maria Moore, was pregnant at the moment of the testatrix's death is to be treated as a life in being, or, to put it in another way: Can we, in view of that state of things, hold that that child was entitled to take a life state under the will, notwithstanding the rule against perpetuities? That would be really to say that the estate should remain suspended without any absolute ownership for a longer time than is allowed by the rule against perpetuities.

The case has been put to us in two ways. The argument by leading counsel for the plaintiff and the argument by junior counsel for the plaintiff did not proceed precisely upon the same lines. Leading counsel for the plaintiff's argument was based upon the suggestion that for the purposes of the rule against perpetuities the court ought not to treat a child en ventre sa mère as a living person. **BUCKLEY, J.**, has come to another conclusion. Junior counsel for the plaintiff in his argument really did not dispute the conclusion of **BUCKLEY, J.**, as to how you ought to treat the rule as affecting a child en ventre sa mère, or the statement by **BUCKLEY, J.**, that when the child has been born, and proves to be of the sex to entitle him to take the benefit of the limitation, the operation of that event is retrospective. Junior counsel for the plaintiff, says, however, that if you take this will and you look at the terms of this devise, the result is that you get, besides the description of the sons who had been born and were actually living persons before the death of the testatrix, a description which has no application to any living person whatever, and one which might have been answered by the birth of a child born at a time having no relation whatever to the death of the testatrix in this case. He suggests that this description of the third son of the testatrix's daughter, Anna Maria Moore, would cover a third son who might possibly have been conceived and born long after Oct. 28, 1880, the date of the death of the testatrix. He contends that, if that is so, the rule against perpetuities is infringed, because we have no right to look at the actual events only, and say that as things have turned out there has been no violation of the rule. It is a sufficient violation of the rule if the terms of the gift are such that it might have turned out that the person described might come into existence at a time which would infringe the rule. Those are the two arguments.

The way in which **BUCKLEY, J.**, dealt with the matter is this. He begins his judgment with a statement of the law in a way which at all events I do not understand that junior counsel for the plaintiff quarrels with at all, and having stated the case in a way which expressly recognises the proposition that it is not sufficient, in order to get rid of the effect of the rule against perpetuities, to say that as things have turned out the rule has not been violated, he goes on to say ([1903] 1 Ch. at p. 880):

"If it be a correct rule of law that on the child being born on Feb. 7, 1881, and turning out to be a boy, you must refer back that state of facts to the earlier date, that of the death of the testatrix, and say retrospectively that at that earlier date events had so turned out that the rule against perpetuities could not be infringed because there was a child in existence, although en ventre sa mère, who was a male and who was born alive, then of course it cannot be contested but that the limitation is perfectly good."

Counsel for the plaintiff do not accept that passage, but that portion of the judgment is, in my opinion, perfectly right.

The way in which **BUCKLEY, J.**, deals with the matter is this. He takes all the cases one after another and deals with them. The first case that he takes is *Doe d. Lancashire v. Lancashire* (1), and he cites from the following passage from the judgment of **GROSE, J.** (5 Term Rep. at p. 63):

A "The objection which has been made against this is, that the will speaks from the testator's death; and that it must be decided whether or not at that moment it be a valid will. I agree that it does speak from that time, but the instant the child is born he is considered, by retrospect, as born during the parent's life."

B BUCKLEY, J., accepts that as an accurate statement of the law. It was, however, contended before us, against the application of that statement of the law, that it was not made in a case which raised any question as to the rule against perpetuities, but was made in a case in which the question was whether marriage and birth of a posthumous child amounted to an implied revocation of a will made before marriage. That is quite true; but BUCKLEY, J., goes on to deal with the authorities one after the other, showing that the rule as laid down by GROSS, J., is a rule which
C also applies when you are dealing with the rule against perpetuities. He cites, amongst other cases, *Long v. Blackall* (2).

 With regard to that authority, as counsel for the plaintiff very frankly admitted, that is not an authority in favour of their client, but is not against him. It seems to me that it is an authority plainly against him. The distinction drawn by
D counsel between that case and the present case is, that the child en ventre sa mère in that case was a child of which the mother was known to be pregnant, and was referred to as such in the will of the testator. It seems to me that that distinction is quite immaterial, because it is absolutely plain, when the case is looked at, that the decision of the court was that in dealing with the rule against perpetuities, in order to ascertain what is a life or lives in being the court is bound to hold, and did in that case hold, that a child unborn at the critical moment—the death of the
E testator—was, for the purpose of the rule against perpetuities, to be treated as an existing living child, not from the moment it was actually born into the world, but from the testator's death during the period of gestation.

 Under these circumstances I do not know that it is necessary for me to do more than to say that I entirely agree with BUCKLEY, J., in his summing up of the result
F of the authorities when he says :

 "It appears to me that the doctrine is a general one, and that it is applicable to this particular case. What happened here was this: When the testatrix died there was in existence a fetus, which turned out, when the birth resulted, to be a male child. That was a living thing at the date when the testatrix died. The limitation is perfectly good if that living thing is to be taken to
G have been at the time of her death that which it turned out to be."

 With that conclusion I entirely agree. I do not say and I do not think that BUCKLEY, J., meant to say that for every purpose of the law a child during the period of gestation and before actual birth is to be treated as actually living. It is obviously not so. Take, for instance, a case a little remote from the case now before
H the court, but one which illustrates my meaning. A child in the womb of its mother cannot be murdered. It is a living child, but it must have a separate existence before it can be made the subject of a charge of murder. That is stated in BLACKSTONE'S COMMENTARIES :

 "Life is the immediate gift of God—a right inherent by nature in every
I individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion or otherwise killeth it in her womb; or if anyone beat her whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the antient law homicide or manslaughter."

Then he goes on :

 "But the modern law doth not look upon this offence in quite so atrocious a light, but merely as a heinous misdemeanor. An infant en ventre sa mère, or

in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born. And in this point the civil law agrees with ours."

Thus he states the rule as to a posthumous child being capable of taking an estate in remainder.

I only mention this because part of the argument addressed to us seemed to go on the assumption that, according to BUCKLEY, J., there was a rule that treated a child as existing during the period of gestation, and was a rule of law applicable to all cases. That is not so. But upon the authorities it is manifestly applicable to all cases dealing with the rule against perpetuities. For that purpose, so soon as the child is born and its sex is ascertained and it satisfies the description, it is assumed retrospectively to have been in existence at the death of the testator. I do not propose to say anything more than this. The moment you arrive at that conclusion it seems to me that it is impossible to raise the point which junior counsel for the plaintiff raised. He is quite right as to the general statement of the law. BUCKLEY, J., in his judgment distinctly recognises that in applying the law as to remoteness you cannot look at the events which actually happened, but must look at the events which might have happened; and that is quite true. BUCKLEY, J., says:

"If the limitations are such that events might have so turned out as that the rules as to remoteness would have been infringed, then the limitations fail, although in the events which actually did happen the legal period was not exceeded."

But it seems to me that if we are to properly apply the rule relating to a child *en ventre sa mère*, the moment the child has been born so as to satisfy the limitations of the will in his favour, you must treat the event for all purposes of the rule against perpetuities as having become a fact prior to the death of the testator. If we do that, the argument which has been addressed to us fails, and counsel perfectly well recognised that, because their complaint against BUCKLEY, J.'s, judgment was this—that he assented to the proposition that you must refer back the state of things to the earlier date, but say that, although we are to do that, we are not entitled to say that at the moment of the testatrix's death it was known that the event would happen which did ultimately happen. I confess that I cannot understand that contention. It seems to me that when one talks of the retrospective effect of the subsequent birth, the meaning is that, for all the purposes of the rule, the subsequent fact must be taken to have been an existing fact at the time of the death of the testatrix—that is to say, we must in the present case treat it as an actual fact that the third son was in existence at the death of the testatrix. For these reasons I am of opinion that the judgment of BUCKLEY, J., was perfectly right, and that the appeal must be dismissed.

ROMER, L.J.—I am of the same opinion, and after the judgment of BUCKLEY, J., in the court below, and the judgment which my Lord has delivered, I will only add a few words. For the purpose of deciding a question on the rule against perpetuities of the kind which we have before us, arising on gifts under a will, I think that there is a rule that a child *en ventre sa mère* at the time of the testator's death (who is subsequently born) is to be regarded as living at the death of the testator, and I think that this rule cannot be departed from merely because for some reason or other it may be the interest of the child to contend that the gift is void for perpetuity. That, to my mind, really disposes of the present appeal, for the plaintiff is clearly made tenant for life, and the question whether the limitations to his sons in tail male are void for perpetuity depends upon this—whether the plaintiff is to be regarded as a person who was living at the death of the testatrix. In my opinion, the rule which I have stated applies, and the plaintiff is to be

A recorded in that light. For these reasons I am of opinion that the limitations to his first and other sons in tail male are not void for perpetuity, and that this appeal must be dismissed.

B **STIRLING, L.J.**—I am of the same opinion. The question which we have to decide in the present case, is whether the limitations to the first and other sons of the plaintiff contained in the will of this testatrix are valid or not. The gift is of certain real estate. [His LORDSHIP read the limitations, and continued:]

As regards the rule against perpetuities, it has been stated by BECKLEY, J., with perfect accuracy; and, indeed, it appears from the face of his judgment that his propositions were not disputed. The first proposition which he lays down is that, in applying the law of remoteness, the court

C “must look, not at the events which have actually happened, but at the events which might have happened.”

The second proposition which he states is that the

D “rule of law as to remoteness admits of absolute ownership being suspended for a life or lives in being and twenty-one years afterwards, and that [and this is the important part of the rule for the present case] for the purposes of this rule a child en ventre sa mère is treated as a life in being.”

That statement of the law is in accordance with what is laid down in all the modern text-books, and I do not understand that it is disputed before us. Thus in *JARMAN ON WILLS* (5th Edn.), vol. 1, p. 216, it is said:

E “It seems more proper to say that the rule of law admits of absolute ownership being suspended for a life or lives in being and twenty-one years afterwards, and that for the purposes of the rule a child en ventre sa mère is considered as a life in being.”

F In the work of that learned and most accurate author, MR. CHALLIS, *THE LAW OF REAL PROPERTY*, I find the longest period during which, as the effect of the rule, absolute ownership can be suspended is thus defined:

G “A life or any number of lives in being—the life of a person en ventre sa mère being considered for this purpose as a life in being—and twenty-one years after the dropping of the life, if only one, or the dropping of the last surviving life, if there be more than one;”

and earlier MR. CHALLIS says:

H “It was first settled in *Long v. Blackall* (2) that, for the purposes of the rule, a life in being may be the life of a person en ventre sa mère at the date of the limitation.”

I agree in taking that view of the decision in *Long v. Blackall* (2).

What do we find here? The period to which we have to look, so as to satisfy the rule to which I have referred, is the death of the testatrix. What was the state of facts at that time? The facts were that the testatrix's daughter, Mrs. Anna Maria Moore, had had one son who was then dead, and a second son who was alive, and that she was pregnant of a third son, who is the plaintiff in this action. He was actually born on Feb. 7, 1881, after the death of the testatrix, she having died on Oct. 28, 1880. What is the application of the rule to which I have referred when we look at these facts? The question being whether the limitations in favour of the sons of this particular younger son of the testatrix's daughter are valid or not, we have to inquire whether this particular younger son was in existence at the time of the testatrix's death. That is the point to which our inquiries must be directed. There is no question at all that the third son, the plaintiff in this action, takes a life estate under these limitations; the question is as to the validity of the limitations

over in favour of his own sons. In order to decide this point we must go back to the death of the testatrix and inquire if such third son was in existence at the time of the death of the testatrix. If he was, then the limitations in favour of his sons are perfectly valid; if he was not, then they are admittedly invalid. In point of fact, we know that at the death of the testatrix the third son was en ventre sa mère, and the rule to which I have referred says that for the purposes of the rule such a child is to be treated as a life in being. That being so, it seems to me that the judgment of BUCKLEY, J., was perfectly right, and that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Evans, Foster & Wadham; Tylee & Co.*

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]

HIRST v. WEST RIDING UNION BANKING CO. AND ANOTHER

[COURT OF APPEAL (Sir A. L. Smith, M.R., Vaughan Williams and Stirling, L.JJ.), June 20, 24, 1901]

[Reported [1901] 2 K.B. 560; 70 L.J.K.B. 828; 85 L.T. 3; 49 W.R. 715;
17 T.L.R. 629; 45 Sol. Jo. 614]

Company—Proceedings against—False representation as to credit of third person—Representation signed by agent of company—Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), s. 6.

A company incorporated under the Companies Acts is a "person" within the meaning of s. 6, of the Statute of Frauds Amendment Act, 1828 [Lord Tenterden's Act], and so an action cannot be maintained against such a company upon a false representation as to the credit of a third person made in writing and signed by an agent of the company.

Notes. Approved: *Banbury v. Bank of Montreal*, [1918-19] All E.R. Rep. 1.

As to the liability of a company for misrepresentation as to the credit of a third person, see 6 HALSBURY'S LAWS (3rd Edn.) 422, 433, and for cases see 9 Digest (Repl.) 669 et seq. For s. 6 of the Statute of Frauds Amendment Act, 1828 (Lord Tenterden's Act), see 4 HALSBURY'S STATUTES (2nd Edn.) 660.

Cases referred to:

- (1) *Pharmaceutical Society v. London and Provincial Supply Association* (1880), 5 App. Cas. 857; 49 L.J.Q.B. 736; 43 L.T. 389; 45 J.P. 20; 28 W.R. 957, H.L.; 13 Digest (Repl.) 264, 908.
- (2) *Swift v. Jewsbury (Jewsbury) and Goddard* (1874), L.R. 9 Q.B. 301; 43 L.J.Q.B. 56; 30 L.T. 31; 22 W.R. 319, Ex. Ch.; 1 Digest (Repl.) 321, 59.
- (3) *Williams v. Mason* (1873), 28 L.T. 232; 37 J.P. 264; 21 W.R. 386; 1 Digest (Repl.) 321, 88.

Application by the defendant bank for judgment or a new trial in an action tried by GRANTHAM, J., with a jury at Leeds.

The plaintiff brought this action against the West Riding Union Banking Co., and against Hartley, the manager of their branch bank at Cleckheaton, to recover damages for an alleged fraudulent misrepresentation as to the credit of Blackburn

A & Co., Ltd. The plaintiff having entered into a contract to sell wool to Blackburn & Co., on Sept. 9, 1898, his bankers, at his request, wrote a letter to the defendant bank, who were the bankers of Blackburn & Co., in the following terms :

B "Please say if you consider Messrs. Blackburn & Co., Ltd., respectable and trustworthy to the extent of £2,000 to £3,000. We should be exceedingly obliged if you could say whether the company issued debentures or not."

C On Sept. 10 the defendant Hartley wrote and signed an answer to the plaintiff's bankers in the following terms :

C "Confidential.—For your private use and without any guarantee or responsibility on the part of this bank or the manager.—Gentlemen,—The parties inquired after are respectable, and appear to readily obtain credit for the amount you mention in the trade. The debentures are held privately.—R. B. Hartley."

D The plaintiff's bankers communicated this information to the plaintiff. The plaintiff thereupon delivered a large quantity of wool to Blackburn & Co. upon credit, acting upon the faith, as he alleged, of the information given in the above letter. Blackburn & Co. subsequently went into liquidation, and the plaintiff was unable to recover a large part of the price of the wool which he had sold and delivered to them.

E The plaintiff thereupon brought this action against the defendant bank and their manager to recover as damages the amount which he had been unable to recover from Blackburn & Co. The defendant bank pleaded, among other defences, that the action could not be maintained against them by reason of the provisions of s. 6 of Lord Tenterden's Act, as they had not signed the letter which contained the representations complained of. At the trial the jury found that the plaintiff had suffered loss to the amount of £2,267 through relying on the representations made in the second part of the letter of Sept. 10, that it was within the scope of Hartley's authority, as manager of the branch bank of the defendant company, to answer inquiries as to the credit of customers of the bank, that the representations contained in the second part of the letter were false in fact, and that the representations were made in the interests of the defendant bank. Upon those findings of the jury F GRANTHAM, J., gave judgment for the plaintiff.

Sir R. T. Reid, K.C., Montague Lush, and Compston for the defendants.

E. Tindal Atkinson, K.C., and Longstaffe for the plaintiff.

G SIR A. L. SMITH, M.R.—This action is brought by a woollen trader, named Hirst, against two defendants, the West Riding Union Bank and Hartley, the general manager of the bank, for having deceived him in such a manner that he was induced to deliver wool to Blackburn & Co., Ltd., upon credit. The action was tried before GRANTHAM, J., with a jury, and the jury found that the statements made by the bank through Hartley, their general manager, and by Hartley H were false, and that by relying on them the plaintiff lost £2,267. The defendant company now apply for judgment or for a new trial. The bank ask for judgment upon the ground that they are protected by Lord Tenterden's Act. In my opinion the bank are protected by that Act. It is not true to say that a limited liability company are not protected by that Act, and, therefore, the bank must succeed in escaping liability, and their appeal must be allowed.

I VAUGHAN WILLIAMS, L.J.—I agree, and so far as the case against the bank is concerned I have nothing to add. I agree that the bank is protected by Lord Tenterden's Act.

STIRLING, L.J.—I am of the same opinion. First, as to the case against the bank, I think that the bank, which is a corporation incorporated under the Companies Act, is within the protection of Lord Tenterden's Act, and is a "person" within the meaning of that enactment. Upon that point I will read a passage from the

judgment of LORD BLACKBURN in *Pharmaceutical Society v. London and Provincial Supply Association* (1). He there said (5 App. Cas. at p. 868):

"I own I have no great doubt myself, for instance, that the word 'person' may very well include both a natural person, a human being, and an artificial person or corporation. I think that in an Act of Parliament, unless there be something to the contrary, probably (but that I should not like to pledge myself to) it ought to be held to include both. I have equally no doubt that in common talk, the language of men not speaking technically, a 'person' does not include an artificial person, that is to say, a corporation. . . . It is plain that in common conversation and ordinary speech, a 'person' would mean a natural person; in technical language it may mean the artificial person; in which way it is used in any particular Act, must depend upon the context and the subject-matter. I do not think that the presumption that it does include an artificial person is at all a strong one. Circumstances, and indeed circumstances of a slight nature in the context, might show in which way the word is to be construed in an Act of Parliament, whether it is to have the one meaning or the other. I am quite clear about this, that, whenever you can see that the object of the Act requires that the word 'person' shall have the more extended or the less extended sense, then, whichever sense it requires, you should apply the word in that sense, and construe the Act accordingly."

Therefore, one must look at the context and subject-matter of the Act, and then say which sense the word "person" requires. Lord Tenterden's Act, s. 6, provides:

"No action shall be brought whereby to charge any person upon or by reason of any misrepresentation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon, unless such representation or assurance be made in writing, signed by the party to be charged therewith."

What is the meaning of that enactment? Its meaning is stated shortly and clearly by BRAMWELL, B., in the case which has been so much referred to during the argument, of *Swift v. Jewsbury and Goddard* (2). He there said (L.R. 9 Q.B. at p. 316):

"In my opinion the effect of the statute is this, that a man should not be liable for a fraudulent representation as to another person's means, unless he puts it down in writing and acknowledges his responsibility for it by his own signature. He is neither to have the words proved by word of mouth, nor the authority given to an agent, for whose act it is sought to make him responsible, proved by word of mouth."

It is said that that is limited to persons who can in fact sign. I do not think that is so. Suppose the case of a person so struck by disease that he is physically unable to sign his name, can it be said that he is not within the Act? It has been held that, if one of the partners of a firm signs in the name of the firm, that does not make him personally liable: *Williams v. Mason* (3). In *Swift v. Jewsbury and Goddard* (2) it was decided that a misrepresentation as to credit must be signed by the person to be charged and not by an agent, and that a banking company was not liable for a misrepresentation in writing signed by its manager. I cannot myself see why a corporation, incorporated under the Companies Acts, should not equally have the benefit of the protection given by the Act. It seems to me that the object of the Act extends so far as to include those corporations. I agree, therefore, that the appeal of the bank must be allowed.

Application allowed.

Solicitors: A. M. Bradley, for *Berry & Berry*, Huddersfield; *Rowcliffes, Rawle & Co.*, for *Ramsden, Sykes & Ramsden*, Huddersfield.

[Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.]

A

BRITISH MUTOSCOPE AND BIOGRAPH CO., LTD. v. HOMER

[CHANCERY DIVISION (Farwell, J.), January 18, 24, 1901]

[Reported [1901] 1 Ch. 671; 70 L.J.Ch. 279; 84 L.T. 26; 49 W.R. 277;
17 T.L.R. 213; 18 R.P.C. 177]

B

Distress—For rent—Chose in action—Patent right—Seizure and sale of patented article—Purchaser's right to user—Distress For Rent Act, 1689 (2 Will. & M., c. 5), s. 2.

The owners of a patent relating to mutoscopes granted their licensees the exclusive right to use and to license others to use mutoscopes within their district. The licensees delivered ten mutoscopes to M. for exhibition on certain conditions. M. fell into arrear with his rent, and the landlord distrained and seized the mutoscopes which were put up for sale by auction. H. bought one of the mutoscopes, being informed of the conditions on which M. was authorised to use them, but he continued to use his mutoscope without regard to the conditions. On a motion to restrain H. from so doing,

C

Held: the common law right of distraint did not extend to an incorporeal chattel or chose in action such as a patent right; that right was distinct from the property in the mutoscopes and did not pass to the landlord; and, therefore, H. was in no better position than if M. had been a mere infringer and an injunction would be granted to restrain him from using the mutoscope.

D

Notes. The Patent Act, 1883, s. 16 has been repealed and replaced by the Patents Act, 1949, s. 21 (17 HALSBURY'S STATUTES (2nd Edn.) 653).

Considered: *Edwards v. Picard*, [1909] 2 K.B. 903; *National Phonograph Co. of Australia v. Menck*, [1911] A.C. 336. Referred to: *Barker v. Stickney*, [1918] 2 K.B. 356.

As to what may and may not be distrained, see 12 HALSBURY'S LAWS (3rd Edn.)

F 100 et seq.; and for cases see 18 DIGEST (Repl.) 276 et seq.

Cases referred to:

- (1) *Incandescent Gas Light Co., Ltd. v. Brogden* (1899), 16 R.P.C. 179; 36 Digest (Repl.) 923, 2772.
- (2) *Lyons v. Elliott* (1876), 1 Q.B.D. 210; 45 L.J.Q.B. 159; 33 L.T. 806; 40 J.P. 263; 24 W.R. 296; 18 Digest (Repl.) 278, 253.
- (3) *Jewel's Case* (1588), 5 Co. Rep. 3a; 77 E.R. 51; 31 Digest (Repl.) 234, 3686.
- (4) *Fleet v. Perrins* (1869), L.R. 4 Q.B. 500; 9 B. & S. 575; 38 L.J.Q.B. 257; 20 L.T. 814; 17 W.R. 862.
- (5) *Dundas v. Dutens* (1790), 1 Ves. 196; 2 Cox, Eq. Cas. 235; 30 E.R. 298; 21 Digest (Repl.) 570, 655.

G

H Motion by the plaintiffs in the action for an injunction to restrain the defendant from using, selling, letting, exhibiting, or dealing with a mutoscope coin-operated machine during the continuance of the letters patent. By agreement the motion was treated as the trial of the action.

The plaintiffs the British Mutoscope and Biograph Co., Ltd., were the owners of letters patent for an invention relating to mutoscopes. The co-plaintiffs the London and District Mutoscope Co. were the licensees with the exclusive right to use and license others to use coin-operated mutoscopes for exhibition purposes within the county of London. In October, 1900, the co-plaintiffs delivered to Maynard ten mutoscopes to which their licence applied for exhibition purposes on the following conditions contained in an agreement of Oct. 23, 1900:

I

"(i) The money to be collected fortnightly by your own man and checked by me or someone in my employ; (ii) I am to receive twenty-five per cent. of the gross takings by way of rent payable when the collection is made; (iii) you

are at liberty to move the machines at any time on giving seven days' notice in writing; (iv) the machines are to remain the sole property of yourselves; (v) in the event of any machine ceasing to work I will give you notice at once, and the same is to be rectified by you and at your expense; (vi) if at any time these premises change hands I agree to give you due notice in order that you may remove the machines or arrange with the new tenants; (vii) I undertake to protect the machines from wilful damage so far as I am able; (viii) all coins found in the machines to be the property of yourselves subject to the percentage above mentioned.—(Signed) H. J. Maynard."

These mutoscopes were placed in a shop in Whitecross Street, within the County of London, held by Maynard as tenant on Dec. 23, 1900. Maynard made default in payment of the rent of the premises, and the landlord distrained and seized the ten mutoscopes. On Jan. 5, 1901, the mutoscopes were put up for sale by auction, and the defendant purchased one of them. It was admitted that the notice required by the Distress For Rent Act, 1689, was given, and that the defendant knew before he purchased of the terms and conditions on which Maynard held the mutoscopes.

The plaintiffs commenced their action for an injunction to restrain the defendant and the defendant alleged that he had purchased from the landlord selling under the authority of the Distress For Rent Act, 1689, and that he was entitled to use the machine as he pleased without regard to the conditions on which Maynard held it. No point was raised or argued on the question whether the machine being on the premises for exhibition purposes was within any of the common law exceptions to the general right of distress, and accordingly his Lordship expressed no opinion on that point.

E. E. H. Brydges for the plaintiffs.

The defendant appeared in person.

Cur. adv. vult.

Jan. 24, 1901. **FARWELL, J.**, stated the facts and continued.—A patentee is entitled to restrain any person in whose hands he finds an article which infringes his patent from infringing such patent unless the defendant can show a title direct or derivative from the patentee to use the patent, and it has recently been held in *Incandescent Gas Light Co., Ltd. v. Bregden* (1) that a purchaser who buys with knowledge of conditions under which his vendor is authorised to use the patented invention is bound by such conditions, and that such conditions are not contractual, but are incident to and a limitation of the grant of the licence to use, so that if the conditions are broken there is no grant at all. The defendant, therefore, would be clearly liable in the present case unless the Distress For Rent Act, 1689, protects him. He contends that the Act has this effect. At common law a landlord had no right to sell distresses, but only to detain them as pledges for enforcing payment.

The right of sale, therefore, depends on the construction of the Act. Shortly stated s. 1 provides that where any goods or chattels shall be distrained for any rent reserved due upon any lease, and the tenant or owner of the goods so distrained shall not within five days after such distress taken and notice thereof left at the premises charged with the rent distrained for, replevy the same, the person distraining may in the manner pointed out by the Act appraise the goods and chattels seized, and after such appraisement sell them for the best price. The Act obviously extends to goods and chattels belonging to persons other than the owner of the demised premises, and it is therefore impossible for the plaintiffs to succeed on the short ground that the mutoscope and the right to use it free from conditions were not the tenant's property. In *Lyons v. Elliott* (2) LORD BLACKBURN says (1 Q.B.D. at p. 213):

"The general rule at common law was that whatever was found in the demised premises, whether belonging to a stranger or not, might be seized by the landlord and held as a distress till the rent was paid."

A But it is equally clear that the Act does not extend the common law right to seize, but merely adds a power to sell that which the landlord could seize at common law. The landlord's right to distrain is founded on the principle that the rent reserved by his demise issues out of the land, and he distrains by taking possession in the nature of a pledge of goods and chattels found upon such land: (see CO., LIT. 47a and 144a). And with this accords ROLLE'S ABRIDGMENT, 446 (2) and (4):

B “(2) Un rent ne poet estre reserve hors d'ascun incorporeal inheritance come advowsons, commons, offices, corodies, miltures d'un malyn, dismes, favis, markes, liberties, privileges, franchises, et tiel semble. (4) Un rent ne poet estre reserve hors d'un chose que gist solement en grant pur ceo que nul distresse poet estre.”

See, too, *Jewel's Case* (3).

C In distraining, therefore, the landlord looks to the land demised and to the goods and chattels found thereon. If the demise be of an incorporeal hereditament, no entry can be made on it and no goods and chattels can be found on it. And in like manner if the goods and chattels be of an incorporeal nature they can have no local position upon the land demised and are incapable of seizure into the possession of the landlord. It is essential to a distress that the property distrained should be capable of physical possession. A patent right is a privilege granted by the Crown in the exercise of its prerogative to a first inventor, and is described in STEPHEN'S COMMENTARIES, vol. 2, at p. 8, as an incorporeal chattel. I should be disposed to classify it myself as a chose in action, which has been defined to be

“a right to be asserted on property reducible into possession either by action at law or suit in equity”:

E see *Flect v. Perrins* (4) (L.R. 4 Q.B. at p. 505). I refer to the common form of a patent: (see FROST ON PATENTS at p. 741). Now, this confers necessarily a right to bring an action to restrain infringement and to recover damages; at any rate, it is not a chose in possession. But a chose in action cannot be found upon the demised premises; it has no locality and is incapable of manual seizure, and this is borne out by the fact that for this reason choses in action could not at common law be taken in execution under a writ of fi. fa. (STEPHEN'S COMMENTARIES, vol. 3, at p. 598) or of a *levari facias*: *Dundas v. Dutens* (5).

F The landlord has seized a chattel—viz., the mutoscope—and the plaintiffs raise no claim to any property in this; but the patentees' right is entirely distinct from the right of property in the chattel. It is a right of action to prevent any dealing with that chattel in contravention of the letters patent, and such right is not part of or capable of seizure with the chattel, but is outside and antagonistic to the possessory title to the chattel. The plaintiffs' rights arise out of the grant under the Royal prerogative, coupled with s. 16 of the Patent Act, 1883, [see now s. 21 of the Patents Act, 1949] which enacts that

H “every patent when sealed shall have effect throughout the United Kingdom and the Isle of Man.”

G The landlord has not taken, and would not take, possession of these rights; and the defendant has purchased only such a chattel as the landlord would and did seize. Having regard to the decisions in *Incandescent Gas Light Co. v. Brogden* (1), the defendant is in no better position than if Maynard had been a mere infringer; it is not a question of contract inter partes affecting a chattel seized and sold by a landlord, but of the absence of any licence in the event that has happened to use the patented invention. If the defendant's contention were correct, an infringer might fill his rooms with infringing articles, and pay his rent by allowing the landlord to seize and sell them free from any right of the patentee to complain of the infringement. The plaintiffs are therefore entitled to an injunction as asked, and to the costs of the action.

Solicitors: *Lloyd-George, Roberts & Co.*

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

JENNINGS v. MATHER ; GRAY, CLAIMANT

COURT OF APPEAL (Sir Richard Henn Collins, M.R., Stirling and Mathew, L.J.J.),
October 29, 30, 1901]

[Reported [1902] 1 K.B. 1; 70 L.J.K.B. 1032; 85 L.T. 396; 50 W.R. 52;
18 T.L.R. 6; 46 Sol. Jo. 27; 8 Mans. 329]

Bankruptcy—Property available for distribution—Trust property—Business carried on by trustee for creditors—Liabilities incurred and goods acquired by trustee—Indemnity of trustee—Judgment against trustee—Execution levied on goods—Bankruptcy of trustee—Right of trustee in bankruptcy to goods.

Under a deed of assignment for the benefit of creditors, the trustee carried on a business and incurred debts. Goods belonging to the business were seized in execution under a judgment obtained against the trustee, but before the goods were sold by the sheriff the trustee became bankrupt and his trustee in bankruptcy claimed the goods.

Held: the bankrupt's right of indemnity against the trust property for liabilities incurred by him as trustee passed to his trustee in bankruptcy, and the trustee in bankruptcy was accordingly entitled to the goods as against the execution creditor.

Notes. Section 44, of the Bankruptcy Act, 1883, has been repealed and replaced by s. 38, of the Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 373.

Considered: *Re Jones, Ex parte Official Receiver* (1910), 55 Sol. Jo. 30.

As to property held on trust for another by a bankrupt, see 2 HALSBURY'S LAWS (3rd Edn.) 435, 436; and for cases see 5 DIGEST (Repl.) 726 et seq.

Appeal by the plaintiff from a decision of the Divisional Court (LAWRANCE and KENNEDY, J.J.), reported [1901] 1 K.B. 108, reversing a decision of the county court judge of Bradford.

In June, 1898, Messrs. Smales Bros. & Co., who were carrying on business at Bradford, made a deed of assignment for the benefit of their creditors, by which they assigned all their business and assets to the defendant, Mather, as trustee to carry on the business, and to apply the profits in payment of 15s. in the pound to the creditors. Mather carried on the business in accordance with the trusts of the deed, and incurred debts and liabilities and acquired goods in the course of carrying on the business. Mather had obtained goods upon credit from the plaintiff, Jennings, for the purposes of the business, and Jennings obtained judgment against him in this action for £160. Execution was issued upon that judgment, and the sheriff seized goods which belonged to the business which Mather was carrying on as trustee. Before these goods were sold by the sheriff Mather absconded, and was adjudicated a bankrupt. The claimant, Gray, was appointed trustee in the bankruptcy, and thereupon claimed the goods which were in the possession of the sheriff. The sheriff interpleaded, and the goods were sold by consent, the proceeds, amounting to £120, being paid into court. An interpleader issue, in which Gray was the plaintiff and Jennings the defendant, was directed to try the question whether Gray, as trustee in bankruptcy, was entitled to the proceeds of the goods. The proceedings were ordered to be transferred to the Bradford County Court. The county court judge gave judgment in favour of Jennings upon the ground that the goods, being trust property, did not pass to the trustee in bankruptcy of Mather under s. 44 of the Bankruptcy Act, 1883. [See now s. 38 of the Bankruptcy Act, 1914.]

Muir Mackenzie for the appellant.

J. G. Wood and Carrington for the respondent.

SIR RICHARD HENN COLLINS, M.R.—I think that this appeal must be dismissed. The question arises upon an interpleader issue between the trustee in

A bankruptcy of Mather and the execution creditor of Mather, who seized certain goods in execution. Mather was trustee under a deed of assignment for the benefit of creditors executed by Smiles Bros. & Co., and in his capacity as trustee he incurred personal liabilities in respect of the estate and he became liable to the execution creditor among others, for goods supplied. Although Mather became personally liable, the debts were incurred by him as trustee, and he had, therefore, a right to be indemnified out of the trust estate in respect of those liabilities. That right of indemnity was accompanied by the correlative liability upon the trustee to make good to the trust estate everything that might be due from him to the estate. The goods forming part of the estate were, in equity, not the goods of Mather, but belonged to the trust estate. The goods taken in execution, in fact, belonged to the trust estate. The execution creditor could take in execution only the goods of the execution debtor. In the present case he took trust property, which he had no right to seize. Mather's trustee in bankruptcy says that, although the trust estate did not pass to him as trustee in bankruptcy, he has a right to stand in the place of Mather in respect of Mather's right of indemnity against the trust estate, and that, therefore, the goods are his in respect of that right. It is clear that the execution creditor had not any right to seize the goods, and even if he is allowed the benefit of being in possession that will not give him a right to retain the goods as against the trustee in bankruptcy of Mather, because he has, as trustee in bankruptcy, that right of indemnity out of the trust estate which Mather had. In my opinion the onus of proving a negative is not upon the trustee in bankruptcy, that is, he is not bound to prove that there was not any default on the part of Mather towards the trust estate. Further even if, which I doubt, the creditor had any right to take the objection that Mather was in default, the onus was upon him to prove his objection. I agree entirely with the judgment of the Divisional Court, and this appeal must, therefore, be dismissed.

STIRLING, L.J.—I am of the same opinion. I think that KENNEDY, J., in the court below most accurately stated the legal position of the parties in this case, and really the law, as stated by the learned judge, has not been disputed in this court. The judgment of the Divisional Court held that Mather, as trustee of the deed of assignment for the benefit of creditors, had an equitable right to be indemnified out of the trust property, which is available to his trustee in bankruptcy and ought to be enforced against the execution creditor who has seized the goods which were in the possession of Mather as trustee under the deed. I think that the judgment of the Divisional Court coming to that conclusion was well founded. A trustee, for his own protection, has a right to be paid all his costs and expenses out of the trust property, and has a first charge upon the trust property for his costs and expenses. A court of equity never takes away the property from the trustee unless and until all his costs and expenses have been paid to him and he has been relieved from all personal liability in respect of the trust estate. A trustee, in whom the legal title to the property is vested, can resort to that property without the assistance of any court in order to indemnify himself against any liability which he has incurred in respect of the trust estate. It is important to maintain that right before the courts. The trustee cannot make any profit out of the trust estate. It is no less just that the trustee should be equally protected against all liability in respect of the trust estate. That has not really been disputed by the appellant, but it is said that there is no evidence in point of fact that this right of indemnity is practically available to the trustee because it may turn out that he is liable to the trust estate to such an amount as will take away any right of indemnity. That is a question of evidence. It is perfectly clear that Mather, as trustee under the deed of assignment, has incurred liability to Jennings and to other creditors. *Prima facie*, therefore, a right to indemnity out of the trust estate exists. It seems to me that, if that right is to be rebutted by default on the part of the trustee, the onus is not upon the trustee in bankruptcy but is upon those who assert that there is a default. That question,

in my opinion, cannot be gone into in the absence of the trustee under the deed of assignment. In these circumstances the execution creditor cannot be permitted to sweep away the fund which the trustee in bankruptcy is entitled to retain intact for the purpose of protection against the liabilities of Mather in respect of the trust estate. I think, therefore, that the judgment of the Divisional Court was right and that this appeal must be dismissed.

MATHEW, L.J. I am of the same opinion. When Mather was appointed trustee under the deed of assignment for the benefit of creditors, he was protected in the performance of his duties as trustee in two ways. First, the trust property was protected from execution for any debts of Smales & Co. or of Mather, for, unless that protection was afforded, it would be impossible for the trustee to perform his duties. Secondly, the trustee is protected if he personally incurs any liability in respect of the trust estate. There is given to him a right of indemnity in respect of all such liability so far as the assets of the trust estate are sufficient for that purpose. After Mather had been acting as trustee, he became a bankrupt and absconded. Gray, the claimant, was appointed his trustee in bankruptcy. Meanwhile, Jennings had obtained a perfectly regular judgment against Mather, and proceeded to levy execution. That execution was levied upon the trust property—that is, upon the property of the creditors of Smales & Co. That act of Jennings was a wrongful and tortious act. A claim was immediately made by the trustee in bankruptcy that the goods had been wrongfully seized by Jennings, and an interpleader issue was directed to be tried. The facts are not in dispute. It is admitted that Jennings had no right to levy execution upon these goods; but it is said that these goods, being trust property, did not pass to Gray as trustee in bankruptcy, and that therefore Gray cannot succeed in this claim. Jennings forgot this right of Mather to be indemnified out of the trust property. In respect of that right Mather had a right to hold the goods until the amount of his liability was ascertained and discharged, and it seems to me that this right was an asset of Mather which passed to his trustee in bankruptcy. It would be impracticable and impossible to take the account as between Mather and the trust estate in these proceedings. The trustee in bankruptcy is entitled to say that that account is to be taken afterwards, and that he has an equitable lien which the court will recognise and will enforce, which entitles him to possession of the goods. For these reasons, and for the reasons so clearly given in the judgment of the Divisional Court, I agree that this appeal fails and must be dismissed.

Appeal dismissed.

Solicitors: *G. R. Stubbs*, for *Gaunt, Hines & Bottomley*, Bradford; *Wrensted & Hind*, for *Scott & Holmes*, Bradford.

[*Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.*]

WAKEFIELD CORPORATION v. COOKE AND OTHERS

[HOUSE OF LORDS (The Earl of Halsbury, L.C., Lord Macnaghten, Lord Shand, Lord Davey, Lord Robertson and Lord Lindley), December 15, 1903]

Reported [1904] A.C. 31; 73 L.J.K.B. 88; 89 L.T. 707; 68 J.P. 225; 52 W.R. 321; 20 T.L.R. 115; 48 Sol. Jo. 130; 2 L.G.R. 270]

Estoppel—Estoppel by record—Judgment in rem—Decision by justices that a street a highway repairable by the inhabitants at large—Private Street Works Act, 1892 (55 & 56 Vict., c. 57), s. 8.

Street—Private street works—Estoppel—Street found by justices to be highway repairable by inhabitants at large—Local authority estopped from further proceedings.

The frontagers on a street objected to the proposals of a local authority to execute private street works under the Private Street Works Act, 1892, on the ground that the street was a highway repairable by the inhabitants at large. The justices determined, under s. 8 of the Act of 1892, that the objection was a good and valid objection.

Held: the decision of the justices as to the validity of the objection was in the nature of a judgment in rem, and, the matter having thus been finally and absolutely determined, the local authority was estopped from any subsequent proceedings in respect of that street.

Decision of the Court of Appeal, [1903] 1 K.B. 417, affirmed.

Notes. The Private Street Works Act, 1892 (11 HALSBURY'S STATUTES (2nd Edn.) 181) has been repealed and replaced by the Highways Act, 1959; for s. 8 of the Act of 1892 see now s. 178 of the Act of 1959 (39 HALSBURY'S STATUTES (2nd Edn.) 604). Section 150 of the Public Health Act, 1875 (19 HALSBURY'S STATUTES (2nd Edn.) 70) has been repealed and replaced by the Highways Act, 1959; for the comparative table of provisions, see 39 HALSBURY'S STATUTES (2nd Edn.) 786.

Considered: *I.R. Comrs. v. Sneath*, [1932] All E.R. Rep. 739. Referred to: *Society of Medical Officers of Health v. Hope (Valuation Officer)*, [1960] 1 All E.R. 317.

As to judgments in rem giving rise to an estoppel by record, see 15 HALSBURY'S LAWS (3rd Edn.) 178 et seq., and for cases see 21 DIGEST (Repl.) 218 et seq.

Case referred to:

(1) *R. v. Hutchins* (1881), 6 Q.B.D. 300; 50 L.J.M.C. 35; 41 L.T. 364; 45 J.P. 504; 29 W.R. 724, C.A.; 21 Digest (Repl.) 309, 694.

Appeal from a decision of the Court of Appeal (VAUGHAN WILLIAMS, STIRLING, and MATHEW, L.JJ.), reported [1903] 1 K.B. 417, reversing a decision of the Divisional Court (LORD ALVERSTONE, C.J., DARLING and CHANNELL, JJ.), upon a Special Case stated by justices.

The respondents were owners of property fronting, adjoining, or abutting on a street known as Sludge Lane, in the city of Wakefield. By the Wakefield Corporation Act, 1887 (50 & 51 Vict., c. lxxi), Part 4, s. 27 to s. 45 inclusive, the appellants obtained power to deal with private street works within the city. The provisions of this Act are (mutatis mutandis) identical with the provisions of the Private Street Works Act, 1892. Some time before March, 1897, the appellants by resolution determined to exercise in relation to part of Sludge Lane the powers conferred upon them by the Act of 1887, and by a further resolution of Mar. 9, 1897, they approved a specification of the private street works required to be carried out therein, together with the plans and sections of such works, the estimate of the probable expenses thereof, and the provisional apportionment of the estimated expenses among the properties liable to be charged therewith, which had been

prepared by the city surveyor in accordance with instructions given to him. The resolution was duly published and was served on the owners and occupiers of Sludge Lane, most of whom were respondents. In accordance with the provisions of s. 30 of the Act, most of the owners and occupiers served upon the appellants notices objecting to the proposals of the appellants on the ground (inter alia) "that Sludge Lane is a highway repairable by the inhabitants of the city of Wakefield at large." In accordance with the application of the appellants, the respondents' objections were heard by three justices for the city on Jan. 6, 1898, and after hearing both parties, and upon the evidence of a large number of witnesses, the justices made an order whereby they determined that the objection "that Sludge Lane is a highway repairable by the inhabitants of the city of Wakefield at large" was a good and valid objection. This order had not been appealed against and was still in full force and effect.

In November, 1900, the appellants by resolution determined to exercise the powers conferred upon them by the Act of 1887 in relation to the same part of Sludge Lane which was the subject of their previous resolution of Mar. 9, 1897, but with an additional length of eighty yards in a straight line and continuous therewith. This addition was throughout treated as immaterial. By a further resolution of Feb. 12, 1901, the appellants approved a specification, together with the plans and sections of such works, the estimate of the probable expenses, and the provisional apportionment of such expenses among the properties liable to be charged therewith, which had been prepared by the city surveyor. The appellants published this resolution and served notices thereof on the owners of the properties pursuant to the provisions of s. 29 (2) (3) of the Act of 1887. In accordance with the provisions of s. 30 of the Act, most of the persons liable to be charged under the resolution of Feb. 12, 1901, served upon the appellants notices objecting to the proposals of the appellants on the ground "that Sludge Lane was a highway repairable by the inhabitants of the city of Wakefield at large," the respondents the County Council for the West Riding of Yorkshire adding to their objection that the same had been previously so found by the justices for the city of Wakefield at a court of summary jurisdiction held at Wakefield on Jan. 6, 1898. The objections were heard by four justices for the city on July 25, 1901, who determined that the objection "that Sludge Lane is a highway repairable by the inhabitants of the city of Wakefield at large" was the same objection as was decided on Jan. 6, 1898, and was therefore *res judicata*, and the justices declined to hear any evidence or to go into the merits of the objections.

A Special Case was stated, and the King's Bench Division held that the matter was governed by *R. v. Hutchins* (1) and that, therefore, the objection taken that there had been a previous determination that the street in question was a highway repairable by the inhabitants of the city at large was no bar to the proceedings in this case. The court, therefore, ordered that the judgment of the justices of July 25, 1901, should be reversed, and the matter remitted to the justices to proceed with the hearing. The Court of Appeal, however, held that the finding of the justices on Jan. 6, 1898, was conclusive evidence of the matters therein stated, and if not in form a judgment in rem was at all events in all its essentials a judgment in rem, and that the decision in *R. v. Hutchins* (1) did not require the justices sitting on July 25, 1901, to inquire again into the merits, and the court therefore allowed the appeal of the respondents and reversed the order of the King's Bench Division.

C. A. Russell, K.C., and W. Senior for the appellants.

Danckwerts, K.C., and J. C. Compston for the respondents.

THE EARL OF HALSBURY, L.C.—Although I do not deny the local importance of this case, and indeed the importance of it generally, it seems to me that it lies within a comparatively short compass. I think that the matter becomes clear if

A we look at the corresponding section of the Public Health Act, 1875 (s. 150), and
discuss what has been the question in doubt in some of the cases under that Act,
and then compare it with the local Act with which your Lordships are dealing
here. In the Public Health Act the mode in which the matter is dealt with is this:
B "All streets being or which at any time become highways repairable by the
inhabitants at large," are by s. 119 given to the jurisdiction of the urban authority.
Then s. 150 gives the urban authority jurisdiction in certain cases over "any street
within any urban district (not being a highway repairable by the inhabitants at
large)." The urban authority is empowered to give notice to the owners of property
in a private street which requires them to flag, channel, and so forth, to deal with
the particular place which is under their authority by reason of s. 150, and if the
owner does not do what he is ordered to do by the urban authority they can do it
C themselves; whereupon the magistrates are empowered to enforce by a proper
order the payment of those expenses.

In *R. v. Hatchins* (1) what happened was this. The magistrates before whom
the question came whether or not certain expenses (£400 odd) had been incurred,
thought proper to enter into the question of whether or not it was properly proved
D that this was not a public street, but a private road within s. 150. I have looked
to find some jurisdiction given to the magistrates to enter into that question, and I
can find none. The only thing which I can suppose is that it was argued that,
inasmuch as this power given under s. 150 depends upon the question of the street
with which they are dealing not being a highway repairable by the inhabitants
at large, that was one of the necessary facts to be proved to give the magistrates
jurisdiction in order to issue their process and enforce the payment of those
E expenses. I must say, so far as that case is concerned, I entirely concur with the
judgment. The magistrates had no such jurisdiction at all; they were not invested
with any such power at all. The only thing which the legislature confided to
them was that they should issue process to compel payment of something which the
urban authority had themselves paid by reason of the disobedience of persons
upon whom the notice had been served. As to that case, I think it was quite
F rightly decided.

Let us turn for a moment to the statute which is before your Lordships, and
the distinction will be at once apparent. Instead of its being left to the determina-
tion of the local authority to give notice, and when that notice is disobeyed to do
the work themselves, and thereupon when they have done the work them-
selves to sue for the amount against the person who disobeyed their
G order—instead of that, a whole machinery is created by which the
question of whether or not the street is repairable by the parish shall be determined
by a particular tribunal—a tribunal erected for this express purpose; and when we
look to see what that particular forum erected for that purpose is to determine, it
is sufficient to see the number of objections which can be made and what has to be
H determined: "(a) That an alleged street or part of a street is not or does not
form part of a street within the meaning of this Act" (that is a question which
relates to a different class of things that the urban authority have got to do).
"(b) That a street or part of a street is (in whole or in part) a highway repairable
by the inhabitants at large." So that, instead of being, as it is, under the Public
Health Act, 1875, something removed from the jurisdiction of the justices, who
I have only power to issue process and enforce the payment of a sum of money
payable under the circumstances stated in s. 150 in this Act, the very question
whether or not a particular road is or is not a highway repairable by the parish
is expressly remitted to that tribunal for the purpose of determination. For my
own part, I am wholly unable to see anything more in the nature of a judgment
in rem than that; and although I desire not to be bound by it, because I think it
unnecessary after what I have said to enter into that question, yet I must say that,
where you have a corporation on the one side and objectors capable of coming in,
and receiving notice to come in, in respect of a particular matter, on the other

side, it comes very near to showing that it is a proceeding between the same parties—an adjudication between the same parties.

For my own part, I am quite prepared to base my opinion upon the subject upon the hypothesis that it is a judgment in rem. It is a judgment as to the status of that street; and that judgment as to the status of that street is, it is said, subject to appeal. Counsel for the appellants, I think, told us that it was subject to appeal to quarter sessions. He has not pointed out to us where the appeal comes, and I have not found it; but whether it is subject to appeal or not seems to me to be immaterial. If there is no appeal, it is a final adjudication and determination. If there is an appeal, I presume, from what has happened, the question was in this case determined adversely to those who are at present the appellants against the judgment of the Court of Appeal. In any case it appears to me that this question has been finally and absolutely determined; and I must say that I rather concur with what has been suggested by VAUGHAN WILLIAMS, L.J., that the probability is that a section of this character or a statute of this character was introduced by reason of the difficulty that had arisen under the Public Health Act. If you look carefully into the matter you find that there is no one who has any power of litigating the question when once the local authority has thought proper to give the notices. There is no forum that I can see created by the statutes before whom that question can come, and all that is to be done is that they are to recover the expenses against any person who has disobeyed the order. Probably there must be some method of removing the order if made without jurisdiction—perhaps it might be removed by a certiorari to the King's Bench; but certainly no such proceeding is contemplated by the Public Health Act as is created by the Wakefield Act.

Under these circumstances it appears to me that it is an order made by the justices who are called on by the provisions of the statute to exercise that jurisdiction. They have exercised that jurisdiction. They have acted within their powers, and it seems to me that the adjudication which they have made is conclusive, and properly conclusive, getting rid of a great many awkward questions which might otherwise be raised. This appeal, therefore, ought to be dismissed with costs, and I move your Lordships accordingly.

LORD MACNAGHTEN.—I am of the same opinion.

LORD SHAND.—I am of the same opinion. I entirely concur in what has been said by the Lord Chancellor. I desire only specially to add that I think that VAUGHAN WILLIAMS, and MATHEW, L.JJ., have stated clearly the distinction which exists between this case and *R. v. Hutchins* (1), which deprives that case of any authority in the present case.

LORD DAYEY.—I am of the same opinion. The point on which I differ from the judgment of LORD ALVERSTONE, C.J., may be put very shortly, and it is this: He seems to have thought that the primary jurisdiction of the justices under s. 31 of the Act of 1887 was either to quash or to amend the proceedings, and that the power to determine the matter of the objection was merely incidental and leading up to that jurisdiction. I take a wholly different view of the construction of that section. I think that their primary jurisdiction is to proceed to hear and determine the matter of all the objections—that is their first and their main duty; and then, as a consequential upon that, they may, but they are not bound to do so, on the application either of the objectors or the corporation, proceed either to quash in whole or in part or to amend the resolutions, etc., which form the subject of the proceeding. This view shows the distinction between the present case and *R. v. Hutchins* (1), which the Lord Chief Justice thought governed the present case. I cannot put the distinction between the present case and that more clearly than it has been put by VAUGHAN WILLIAMS, L.J. Shortly stated, it is, in my

A opinion, this—that in *R. v. Hutchins* (1) Lord SELBORN, L.C., and the learned judges who sat with him thought that the matter on which the decision of the magistrates was said to be *res judicata* was one which they had no jurisdiction to interfere *per se*—that they had no jurisdiction whatever to decide whether a road was or was not a highway; they had jurisdiction to decide whether a sum of money was due from a particular individual to the corporation, and for the purpose of determining that question it might be necessary for them incidentally to express an opinion upon the question of whether a road was a highway repairable by the inhabitants at large or not; but, supposing that to be so, that would not make an incidental determination of that kind *res judicata* in a subsequent proceeding in which that question came into prominence.

I doubt very much indeed whether the justices had any jurisdiction at all even to deal incidentally in that way with the question whether or not it was repairable by the inhabitants at large, or whether they ought not merely to have ordered a sum of money—the contribution—to be paid. However, that question is not before your Lordships, and it is unnecessary to express an opinion upon it. I agree with VAUGHAN WILLIAMS, L.J., also that this decision of the magistrates, if not in form a judgment *in rem*, was at all events in all its essentials a judgment *in rem*. And I also agree that if it be not strictly a judgment *in rem* so as to make it conclusive upon all the world, all persons who were called by being served with notice of the proceedings and had an opportunity of attending and supporting or opposing the objection, must be bound by the decision of the magistrates, and none the less because they did not think fit to attend, but left the objection to be fought by other people.

LORD ROBERTSON.—I was at first inclined to share the doubts of STIRLING, L.J., but the argument of counsel for the respondents has satisfied me that the judgment of the Court of Appeal is right. The question is whether the local Act has given the justices jurisdiction to determine whether the street in dispute is a highway repairable by the inhabitants, as a substantive issue *in rem*, or merely as a medium *concludendi* of the liability or non-liability of the objectors. If the former be the true view, then a decision on that issue, raised by one of the class interested, is good against all the rest. There is nothing contrary to principle, and much convenience, in a local tribunal being so authorised to adjudicate on a local matter with full notice to all concerned, and the question is merely whether in this instance that has been done by the legislature. On the whole, I have come to think that it has, and that the appeal, therefore, fails.

LORD LINDLEY.—I am entirely of the same opinion. It appears to me that the question turns entirely on the fact which occurs in this case, and did not occur in *R. v. Hutchins* (1), that the objection raised for the purpose of being decided in accordance with the Act, and the question which was decided in accordance with the Act, was whether Sludge Lane was a street repairable by the inhabitants at large or not. If there had been no such matter raised, *R. v. Hutchins* (1) would have had an important bearing on the present case; but as it is, I have not the slightest doubt that this appeal ought to be dismissed.

Appeal dismissed.

Solicitors: *Sharpe, Parker, Pritchards, Barham & Lawford*, for C. J. Hudson, Town Clerk of Wakefield; *Seaton F. Taylor*, for J. B. Cooke, Wakefield.

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

BEYFUS AND ANOTHER v. LAWLEY AND ANOTHER

[HOUSE OF LORDS (The Earl of Halsbury, L.C., Lord Macnaghten and Lord Lindley),
July 21, August 6, 1903]

[Reported [1903] A.C. 411; 72 L.J.Ch. 781; 89 L.T. 309]

Administration of Estates—Debts—Property available for payment—Property appointed under a general power.

Property appointed by will under a general power is assets available for the payment of the debts of the appointor.

Power of Appointment—General power—Exercise by will in favour of mortgagee—Covenant in mortgage deed to exercise power to secure loan in priority to other creditors—Effect of covenant.

The donee of a general testamentary power of appointment exercised the power in favour of a mortgagee in pursuance of a covenant in the mortgage deed that he would do so in order to secure the mortgage loan in priority to all other debts. At the death of the donee of the power, his estate proved to be insolvent.

Held: the mortgagee had no priority over the general creditors of the estate as against the appointed fund.

Notes. Real and personal estate of which a deceased person in pursuance of any general power disposes by his will, are assets for payment of his debts; see s. 32 of the Administration of Estates Act, 1925 (9 HALSBURY'S STATUTES (2nd Edn.) 733).

Considered: *O'Grady v. Wilmot*, [1916] 2 A.C. 231. Referred to: *Re Purdie's Settlement*, *Rose v. Hill* (1904), 48 Sol. Jo. 524; *Stamp Duties Comr. v. Stephen*, [1904] A.C. 137; *Re Hadley*, *Johnson v. Hadley*, [1909] 1 Ch. 20; *Re Whitehead*, *Whitehead v. Street* (1913), 108 L.T. 368; *Re Wernher*, *Wernher v. Beit*, [1918] 2 Ch. 82.

As to formalities in the exercise of powers, see 30 HALSBURY'S LAWS (3rd Edn.) 231 et seq., and for cases see 37 DIGEST 474 et seq.

Case referred to:

(1) *Fleming v. Buchanan*, *Downs v. Buchanan* (1853), 3 De G.M. & G. 976; 1 Eq. Rep. 186; 22 L.J.Ch. 886; 22 L.T.O.S. 8; 43 E.R. 382, L.J.J.; 23 Digest (Repl.) 533, 5982.

Also referred to in argument:

Robinson v. Ommanney (1883), 23 Ch.D. 285; 52 L.J.Ch. 440; 49 L.T. 19; 31 W.R. 525, C.A.; 37 Digest 509, 1014.

Re Huddleston, *Brano v. Eyston*, [1894] 3 Ch. 595; 64 L.J.Ch. 157; 43 W.R. 139; 8 R. 462; 37 Digest 447, 504.

Lord Townshend v. Windham (1750), 2 Ves. Sen. 1; 28 E.R. 1, L.C.; 37 Digest 474, 726.

Powell v. Robins (1802), 7 Ves. 209; 32 E.R. 84; 23 Digest (Repl.) 513, 5774.

George v. Milbanke (1803), 9 Ves. 190; 32 E.R. 575, L.C.; 23 Digest (Repl.) 357, 4257.

Daubeny v. Cockburn (1816), 1 Mer. 626; 35 E.R. 801; 37 Digest 510, 1026.

Re Roper, *Roper v. Doncaster* (1888), 39 Ch.D. 482; 58 L.J.Ch. 215; 59 L.T. 203; 36 W.R. 750; 23 Digest (Repl.) 339, 4040.

Re Power, *Re Stone*, *Ackworth v. Stone*, [1901] 2 Ch. 659; 70 L.J.Ch. 778; 85 L.T. 400; 45 Sol. Jo. 707; 49 W.R. 678; 17 T.L.R. 709; 21 Digest (Repl.) 69, 287.

- A** *Re Harvey's Estate, Gidley v. Harben* (1879), 13 Ch.D. 216; 28 W.R. 73; sub-nom. *Re Harvey's Estate, Gilbert v. Harben*, 49 L.J.Ch. 3; 27 Digest (Repl.) 127, 934.
- Re Armstrong, Ex parte Gilechrist* (1886), 17 Q.B.D. 521; 55 L.J.Q.B. 578; 55 L.T. 538; 51 J.P. 292; 34 W.R. 709; 2 T.L.R. 745, C.A.; 37 Digest 388, 28.
- B** *Re Earl of Devon's Settled Estates, White v. Earl of Devon, Re Steer, Steer v. Dobell*, [1896] 2 Ch. 562; 65 L.J.Ch. 810; 75 L.T. 178; 45 W.R. 25; 40 Sol. Jo. 685; 44 Digest 526, 3434.
- Duke of Marlborough v. Lord Godolphin* (1750), 2 Ves. Sen. 61; 28 E.R. 41, L.C.; 37 Digest 387, 22.
- Hassall v. Smithers* (1806), 12 Ves. 119.
- Re Parkin, Hill v. Schwarz*, [1892] 3 Ch. 510; 62 L.J.Ch. 55; 67 L.T. 77; 41 W.R. 120; 36 Sol. Jo. 647; 3 R. 9; 37 Digest 509, 1017.
- C** *Etsum v. Appleford* (1840), 5 My. & Cr. 56; 10 L.J.Ch. 81; 4 Jur. 981; 41 E.R. 292, L.C.; 37 Digest, 465, 654.
- Re Thurston, Thurston v. Evans* (1886), 32 Ch.D. 508; 55 L.J.Ch. 564; 54 L.T. 833; 34 W.R. 528; 37 Digest 464, 650.
- D** *Drake v. A.-G.* (1848), 10 Cl. & Fin. 257; 1 L.T.O.S. 382; 8 E.R. 739, H.L.; 21 Digest (Repl.) 99, 481.
- Ewart v. Ewart* (1853), 11 Hare, 276; 1 Eq. Rep. 536; 17 Jur. 1022; 1 W.R. 466; 68 E.R. 1278; 37 Digest 431, 379.
- Patch v. Shore* (1862), 2 Drew. & Sm. 589; 1 New Rep. 157; 32 L.J.Ch. 185; 7 L.T. 554; 9 Jur.N.S. 63; 11 W.R. 142; 62 E.R. 743; 37 Digest 439, 435.
- E** *Tatnall v. Hankey* (1838), 2 Moo. P.C.C. 342; 12 E.R. 1036, P.C.; 37 Digest 412, 217.
- Re D'Angibau, Andrews v. Andrews* (1879), 15 Ch.D. 228; 49 L.J.Ch. 182; 41 L.T. 645; 28 W.R. 311; affirmed (1880), 15 Ch.D. 236; 43 L.T. 135; 49 L.J.Ch. 756, C.A.; 37 Digest 385, 9.

F **Appeal** from a decision of the Court of Appeal (VAUGHAN WILLIAMS, STIRLING, and COZENS-HARDY, L.J.J.) reported [1902] 2 Ch. 799, affirming a decision of JOYCE, J.

G F. C. Lawley had a general power of appointment under the will of his mother, Lady Wenlock, over a sum of £10,000, which, in default of appointment, was to go as part of her residuary estate. In 1892 he borrowed the sum of £1,000 from George Frederick Perkins, and executed a mortgage deed to secure that sum with interest. The mortgage deed contained a covenant that he would forthwith make a will exercising his power of appointment, so that the trustees of Lady Wenlock's will should stand possessed of the £10,000 and the investments representing the same, upon trust to pay the mortgagee £1,000 and interest in preference and priority to all other payments. He further covenanted not to revoke or alter his will without the consent in writing of the mortgagee. He made his will, dated **H** April 7, 1892, and died in September, 1901, without having revoked or altered it. George Frederick Perkins died in 1895. The estate of F. C. Lawley proved to be insolvent, and the appellants, who were the legal personal representatives of G. F. Perkins, the mortgagee, asked that the sum of £1,000 with arrears of interest and costs should be paid to them. The general creditors opposed the claim, and JOYCE, J., and the Court of Appeal decided in their favour.

I *Badcock, K.C.*, and *E. Ford* for the appellants, the personal representatives of the mortgagee.

Hughes, K.C., and *H. Wace* for the respondents, the executors of F. C. Lawley.

THE EARL OF HALSBURY, L.C.—Your Lordships have listened to a much protracted argument in this case, and the only answer which I have to give to that argument is that, whatever merits it might have had half a century ago, it is too late now. The language which was used by KNIGHT BRUCE, L.J., in *Fleming v.*

Buchanan (1) (3 De G.M. & G. at p. 980) is in accordance with the judgments delivered by each of the three learned Lords Justices of Appeal, and, beyond some abstract reasoning which, as it appears to me, would get rid of the rule altogether. I have seen no reason to think that the judgment of the Court of Appeal is wrong. I content myself with saying that, in view of that language of KNIGHT BRUCE, L.J., which has not been challenged for half a century, this appeal against the decision of the Court of Appeal is hopelessly unarguable, and therefore, I invite your Lordships to dismiss the appeal with costs.

LORD MACNAGHTEN. I agree. I am of opinion that the passage from the judgment of KNIGHT BRUCE, L.J., in *Fleming v. Buchanan* (1), which has been already referred to in this case, is an accurate statement of the law on the subject, and that it does not require any such qualification as VAUGHAN WILLIAMS, L.J., seems to suggest. Whatever the origin of the rule may be, it is, in my opinion, much too late to question it now, or to attempt to cut it down.

LORD LINDLEY.—I am of the same opinion. The doctrine that an appointee under a power derives title from the instrument conferring the power and not from the appointment is well established; but a qualification or exception has been long grafted upon it, and is equally well established. For it cannot now be denied that property appointed by will under a general power is assets for payment of the debts of the appointor, and is not to be regarded as property of the donor of the power distributable by the donee thereof. The property appointed is in such a case treated as assets of the testator exercising the power, and the assets so appointed are regarded as property bequeathed by him. When I say "assets" I do not mean general assets, but assets nevertheless applicable to the payment of the appointor's debts after all his own property has been exhausted. Again, personal property appointed by will under a general power, although not a legacy for all purposes, is treated as personal estate bequeathed by the testator. It settled that, except by making a creditor an executor, a person disposing of his own property by will cannot by his will prefer one creditor to another, or make a gift by will payable before a debt. A covenant to bequeath property by will does not alter the character of the property bequeathed in accordance with the covenant. What is so bequeathed is still a gift by will, and not a preferential debt. The attempt to confine the rule to volunteers cannot, I think, now be supported when speaking of powers to appoint by will. The decision appealed from is right, but I reserve the question which may be raised when an appointment by will is made to a wife or child pursuant to a covenant on marriage. Possibly that may require further consideration.

Appeal dismissed.

Solicitors: *Beyfus & Beyfus; Dangerfield & Blythe.*

[Reported by C. E. MALDEN, ESQ., Barrister-at-Law.]

Re HUXTABLE. HUXTABLE v. CRAWFURD

COURT OF APPEAL (Vaughan Williams, Stirling and Cozens-Hardy, L.J.J.,
October 27, 1902]

[Reported [1902] 2 Ch. 793, 71 L.J.Ch. 876; 87 L.T. 415; 51 W.R. 282]

Will—Evidence to supply omission—Gift to A. “for the charitable purposes agreed upon between us”—Evidence of A. as to such purposes.

By her will, dated in 1899, a testatrix, who died in 1901, bequeathed the sum of £4,000 to A. “for the charitable purposes agreed upon between us.” A summons was taken out by the trustees to ascertain the effect of the bequest, and in support thereof A. filed an affidavit in which he stated what were the charitable purposes so agreed upon, and that they were to come to an end with his own lifetime.

Held: the evidence of A. was admissible to prove matters not defined by the will—i.e. to ascertain what were the charitable purposes agreed upon between the testatrix and A.—but not to contradict the plain words of the will; accordingly, evidence the effect of which would be to alter the gift bequeathed to the income derived from that sum during the lifetime of A. could not be admitted; there being a general charitable intention, there ought to be an order for a scheme not limited to the income of the fund, but extending to the whole fund.

Decision of FARWELL, J., ([1902] 1 Ch. 214), reversed.

Notes. Approved: *Blackwell v. Blackwell*, [1929] All E.R. 71. Referred to: *Re Hetley*, *Hetley v. Hetley*, ante p. 292; *Re Keen*, *Erversch v. Griffiths*, [1937] Ch. 236.

As to the ascertainment of the objects of a charitable trust, see 4 HALSBURY'S LAWS (3rd Edn.) 275 et seq., and for cases see 8 DIGEST (Repl.) 405 et seq.

Cases referred to in argument:

A.-G. v. Syderfen (1683), 1 Vern. 224; cited in 7 Ves. 43, n.; 23 E.R. 430; 8 Digest (Repl.) 465, 1655.

Re White, *White v. White*, [1893] 2 Ch. 41; 62 L.J.Ch. 342; 68 L.T. 187; 4 W.R. 683; 37 Sol. Jo. 249; 2 R. 380, C.A.; 8 Digest (Repl.) 334, 150.

Re Rymer, *Rymer v. Stanfield*, [1895] 1 Ch. 19; 64 L.J.Ch. 86; 71 L.T. 590; 43 W.R. 87; 39 Sol. Jo. 26; 12 R. 22, C.A.; 8 Digest (Repl.) 420, 1108.

Appeal against the decision of a judge of the Chancery Division, as to the effect of a charitable bequest.

By her will, dated Aug. 7, 1899, Susannah M. Huxtable, who died on Mar. 8, 1901, and whose will was duly proved by two of the executors therein named, bequeathed a number of pecuniary legacies, among which was the following:

“To my friend the Rev. Charles Hubert Payne Crawford, vicar of Milbourn Port, I leave the sum of £4,000 sterling for the charitable purposes agreed upon between us.”

On July 3, 1901, an originating summons was taken out by the executors, in which the court was asked to determine the question whether the legacy of £4,000, or any and what part thereof, was given to the Rev. C. H. P. Crawford beneficially, or on any and what charitable or other trusts; or whether the same or any part thereof had failed. On July 8, 1901, the Rev. C. H. P. Crawford filed an affidavit in which, after stating that he had known the testatrix on terms of intimate friendship for many years, continued:

“To the best of my recollection it was about the year 1891, but certainly while I was still at Sydenham (the parish in which the testatrix resided), that she first

and me of her intention to bequeath me a legacy. I cannot, at this distance of time, remember the exact words she used, but I am clear as to the substance of her communication and intentions—viz., that she meant to leave me a sum of £4,000, the income of which I was to apply during my life primarily for the relief of sick and necessitous persons, being members of the Church of England, and also towards the support of charities connected with the Church of England, and that I was to dispose of the principal after my death as my own private property."

The deponent added that on subsequent occasions the testatrix had declined to give him more specific directions about the income, stating that she was unwilling to fetter his discretion in the matter; and that at no time had she indicated any intention that the principal of the fund should be applied for charitable purposes. The right of the deponent to dispose of the principal of the fund, after his death, as his own private property was not pressed at the Bar. The summons was adjourned into court, and came on to be heard before FARWELL, J., on Nov. 22, 1901, when his Lordship decided ([1902] 1 Ch. 214), first, that the evidence of the Rev. C. H. P. Crawford was admissible; and, secondly, that it disclosed a limited charitable intention only, and that on his death the fund fell into the testatrix's residuary estate. From that decision the Attorney-General now appealed.

R. J. Parker (the Attorney-General, Sir Robert Finlay, K.C., with him) for the Attorney-General.

Butcher, K.C., and Christopher James for the residuary legatees.

Ashworth James for the Rev. C. H. P. Crawford.

Errington for the plaintiffs.

VAUGHAN WILLIAMS, L.J.—I regret to say that I cannot agree with the conclusion at which FARWELL, J., has arrived in this case. Here we have got the will of Mrs. Huxtable, and the words we have to deal with are these:

"To my friend the Rev. Charles Hubert Payne Crawford . . . I leave the sum of £4,000 sterling for the charitable purposes agreed upon between us."

The affidavit of Mr. Crawford is only admissible in evidence for the purpose of proving matters that are not defined by the will of the testatrix. The evidence is admissible to show what in fact were the charitable purposes agreed upon between the testatrix and Mr. Crawford, but not to show what was the amount of the legacy. That is a matter which, to my mind, is disposed of by the plain words of the will. Then, when one looks at the affidavit and asks oneself what were the charitable purposes which were agreed upon between the testatrix and Mr. Crawford, those are perfectly plainly defined. They were primarily

"for the relief of sick and necessitous persons, being members of the Church of England, and also towards the support of charities connected with the Church of England."

To that extent this affidavit is admissible, and does define those purposes. But the affidavit deals with other matters which are plainly dealt with in the will by Mrs. Huxtable herself, and which, to my mind, contradict her will in a very plain manner. By the will, what was left for these charitable purposes was a sum of £4,000. There is not a word about the subject-matter of the legacy being only the income of that £4,000. But in the affidavit of Mr. Crawford, after stating the will, he says: "She meant to leave me a sum of £4,000, the income of which I was to apply during my life." Then he goes on to say: "I was to dispose of the principal after my death as my own private property." It seems to me that the effect of that statement thus made by the deponent is plainly to contradict the will of the testatrix. He substitutes for the £4,000, which was the subject-matter

A of the legacy, the income of that sum. And, therefore, when I find in the judgment of FARWELL, J., these words ([1902] 1 Ch. at p. 216):

"I do not see that there is any contradiction of the will in saying that 'the charitable purposes agreed upon' exhausted the whole income of the fund, but lasted only for a limited time, and did not go on for ever."

B I cannot agree with that statement. It seems to me that it does contradict the words of the will in which the subject-matter of the legacy for this purpose is the £4,000, and not the income of the £4,000. A good deal has been said about the question of whether there is a general charitable purpose here.

C It seems to me that here in this will, supplemented by so much of the evidence of Mr. Crawford as defines the object, you have a charitable purpose so defined which in the absence of anything in the will to show the contrary, is one which would go on for ever. If there was a difficulty as to how the money was to be applied, or anything else of that sort, I take it that there is amply sufficient definition here of the charitable purpose to make a court take care that that purpose should be carried out, notwithstanding any deficiencies there might be in the statement of the mode of application. I think, therefore, that the decision of D FARWELL, J., must be reversed, and I think that there ought to be an order for a scheme here, not limited to the income of the fund, but dealing with the whole of the money.

E STIRLING, L.J.—I am of the same opinion, and really in substance I have nothing to add. In fact I should say nothing were it not for the most unfeigned respect I feel for any judgment of FARWELL, J., from whom on this occasion I am constrained to differ. We have before us the will of a testatrix who gives a legacy to her friend the Rev. Chas. Crawford of £4,000 sterling for the charitable purposes which she says have been agreed upon between them. If there is anything which is plain on the face of that will it is that the subject-matter of this legacy was £4,000 and not any limited interest in £4,000. The whole sum of £4,000 was F to be devoted to the charitable purposes referred to, whatever they might be. In the face of that, FARWELL, J., has made an order by which he has held that what is applicable for charitable purposes is only the income of the fund during the lifetime of Mr. Crawford. I confess I am unable to see how that is consistent with the will. The question arises in this way: Mr. Crawford has made an affidavit to which I understand the Attorney-General makes no objection. Mr. Crawford says that G conversations took place between the testatrix and himself with reference to the legacy of £4,000 which the testatrix said that she meant to leave him; and that he was to apply the income of that £4,000 during his own life for certain charitable purposes which he names, and at his death he was to be at liberty to dispose of it as his own private property. It seems to me that that affidavit is only admissible for the purpose of ascertaining what the charitable purposes were which are referred H to in the will and no further.

The fact that those charitable purposes were only to continue during the lifetime of Mr. Crawford, and that on his death the fund was to cease to be a charitable fund, is entirely irrelevant for the purpose for which this evidence is admissible. If the affidavit had said that a conversation had taken place with reference to £2,000 and by her will the testatrix had left £4,000 for charitable purposes, it never I could be contended that the legacy was to be cut down, and the charitable purposes were only to have £2,000 because the conversation related to £2,000, whereas by her will she expressly said that £4,000 was to be applied to charity. It seems to me, in like manner, that as the will says that the capital sum of £4,000 was to be applied to charitable purposes, it is not competent for the court to look at this evidence for the purpose of cutting down the charitable interest to the income of £4,000 during the life of the legatee. For those reasons I entirely agree with what has been said by my Lord, and I think that this appeal ought to be allowed.

COZENS-HARDY, L.J.—I agree. It seems to me that the will fixes absolutely the subject-matter of the gift—viz., £4,000—and that Mr. Crawford's affidavit may be referred to for one purpose only—i.e., to ascertain what are the charitable purposes. Looking at that affidavit, those charitable purposes are perfectly clearly defined. I think, therefore, that the order of FARWELL, J., must be reversed so far as it is complained of. There must be a declaration that the corpus and income of the £4,000 are held upon the charitable trusts mentioned in the affidavit of Mr. Crawford. The order as drawn up is entirely vague, and it does not say what the charitable trusts are. But the matter can be put into proper form, and a scheme can be settled in chambers.

Appeal allowed.

Solicitors: *Solicitor to the Treasury; H. S. Clutton & Johnson; Waltons, Johnson, Bubb & Whatton; Bridges, Sawtell & Co.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

Re NORRIS

[CHANCERY DIVISION (Swinfen Eady, J.), January 24, 1902]

[Reported [1902] 1 Ch. 741; 71 L.J.Ch. 187; 86 L.T. 616;
50 W.R. 316; 46 Sol. Jo. 248]

Solicitor—Costs—Non-contentious business—Mortgage—Negotiation.

A solicitor arranged that a mortgage on a client's property should be paid off, and that he (the solicitor) should lend his own money on the security of the property.

Held: the solicitor was entitled to the scale fee for negotiating the loan.

Notes. Section 2 of the Mortgagees' Legal Costs Act, 1895, has been repealed. See now the Solicitors' Act, 1957, s. 58 (1), 37 HALSBURY'S STATUTES (2nd Edn.) 1100.

As to costs for non-contentious business of solicitors, see 36 HALSBURY'S LAWS (3rd Edn.) 107 et seq., and for cases see 42 DIGEST 232 et seq.

Cases referred to in argument:

Re Macgowan, Macgowan v. Murray, [1891] 1 Ch. 105; 60 L.J.Ch. 118; 63 L.T. 793; 39 W.R. 227, C.A.; 42 Digest 239, 2716.

Re Eley (1887), 37 Ch.D. 40; 56 L.J.Ch. 905; 57 L.T. 253; 36 W.R. 96; on appeal, 37 Ch.D. 42, C.A.; 42 Digest 191, 2074.

Summons concerning the fees of a solicitor-mortgagee.

While acting as solicitor for Mrs. Davies, the personal representative of her husband, A. J. Norris arranged for payment off of a mortgage on certain lands belonging to the estate. After the property had been re-conveyed to Mrs. Davies, she executed a mortgage to Norris to secure the repayment of a sum of £1,041 and interest advanced by him. A fee of £10 10s. for negotiation of the loan was struck out by the taxing master on the taxation of Norris' costs.

A By the Mortgagees' Legal Costs Act, 1895, s. 2:

B "(1) Any solicitor to whom either alone or jointly with any other person a mortgage is made, or the firm of which such solicitor is a member, shall be entitled to receive for all business transacted and acts done by such solicitor or firm in negotiating the loan, deducing and investigating the title to the property, and preparing and completing the mortgage, all such usual professional charges and remunerations as he or they would have been entitled to receive if such mortgage had been made to a person not a solicitor, and such person had retained and employed such solicitor or firm to transact such business and do such acts; and such charges and remuneration shall accordingly be recoverable from the mortgagee. (2) That section applies only to mortgages made after the commencement of this Act."

C This was a summons to vary the taxing-master's certificate.

Stokes for Norris.

Gatey for Mrs. Davies.

D **SWINFEN EADY, J.**—On behalf of the client it is said that the disallowance is right. Did the solicitor in this case arrange and obtain the loan? The property was already mortgaged, and he arranged that the property should be re-conveyed to Mrs. Davies, and that he should lend her the money on a mortgage of it. In my judgment, Norris did arrange and obtain the loan. But he did not obtain the loan from any other person, and it is contended that the Mortgagees' Legal Costs Act, 1895, does not apply where a solicitor who is not in partnership himself lends the money. That is too narrow a construction of the section. Norris would have been entitled to a negotiation fee if he had obtained a loan from a client. Then the Act says that a solicitor mortgagee shall be entitled to such remuneration as he would have been entitled to if the mortgage had been to someone else who had employed him as his solicitor to transact the business. The summons to vary

E must be allowed.

Solicitors: *Norris & Norris; Prestons, for Ivor Harris, Rhayader.*

[*Reported by G. B. HAMILTON, Esq., Barrister-at-Law.*]

THOMSON v. LORD CLANMORRIS

COURT OF APPEAL (Sir Nathaniel Lindley, M.R., Rigby and Vaughan Williams, L.JJ.), March 22, 23, 26, 1900]

Reported [1900] 1 Ch. 718; 69 L.J.Ch. 337; 82 L.T. 277; 48 W.R. 488;
16 T.L.R. 296; 44 Sol. Jo. 346; 8 Mans. 51]

Company—Prospectus—Untrue statement by director—Compensation—Limitation of action—Directors' Liability Act, 1890 (53 & 54 Vict., c. 64), s. 3—Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 3.

An action brought under s. 3 of the Directors' Liability Act, 1890 [see now s. 43 of the Companies Act, 1948] to recover compensation from a director for loss sustained by reason of an untrue statement in a prospectus **held** not to be an action for "penalties, damages, or sums of money" within the meaning of the Civil Procedure Act, 1833, s. 3 [see now s. 2 (5) of the Limitation Act, 1939], and so it could be brought after the expiration of two years from the date of accrual of the action.

Per Curiam: Time begins to run in such a case when the public subscribe for and take shares on the faith of the untrue statements in the prospectus.

Notes. The Directors' Liability Act, 1890, has been repealed and replaced by s. 43 of the Companies Act, 1948. The Civil Procedure Act, 1833, s. 3, has been repealed. See now the Limitation Act, 1939, s. 2 (5). An action for compensation for loss due to an untrue statement in a prospectus must now be brought under s. 2 (1) (d) of the 1939 Act within six years from the date on which the cause of action accrued.

Considered: *Jarvis v. Surrey County Council*, [1925] All E.R. Rep. 297; *Gutsell v. Reece*, [1935] All E.R. Rep. 117. Referred to: *Shinman v. Lyons* (1922), 38 T.L.R. 560; *Aylott v. West Ham Corpn.*, [1927] 1 Ch. 30; *Pratt v. Cook Son & Co. (St. Paul's), Ltd.*, [1938] 4 All E.R. 356; *Watkinson v. Hollington*, [1943] 2 All E.R. 573.

As to statutory liability for misstatements in a prospectus, see 6 HALSBURY'S LAWS (3rd Edn.) 193 et seq.; and for cases see 9 DIGEST (Repl.) 130 et seq. For the Companies Act, 1948, s. 43, see 3 HALSBURY'S STATUTES (2nd Edn.) 493 et seq. For the Limitation Act, 1939, s. 2, see *ibid.*, vol. 13, p. 1160 et seq.

Cases referred to:

- (1) *Saunders v. Wiel*, [1892] 2 Q.B. 321; 62 L.J.Q.B. 37; 67 L.T. 207; 40 W.R. 594; 8 T.L.R. 650; 36 Sol. Jo. 591; 4 R. 1, C.A.; 43 Digest 263, 1009.
- (2) *Adams v. Bulley*, *Cole v. Francis* (1887), 18 Q.B.D. 625; 56 L.J.Q.B. 393; 56 L.T. 770; 35 W.R. 537; 3 T.L.R. 511, C.A.; 14 Digest (Repl.) 30, 25.
- (3) *Cork and Bandon Rail. Co. v. Goode* (1853), 13 C.B. 826; 1 C.L.R. 345; 22 L.J.C.P. 198; 21 L.T.O.S. 141; 17 Jur. 555; 1 W.R. 410; 138 E.R. 1427; 10 Digest (Repl.) 1229, 8634.

Also referred to in argument:

- Robinson v. Currey* (1881), 7 Q.B.D. 465; 50 L.J.Q.B. 561; 45 L.T. 368; 46 J.P. 148; 30 W.R. 39, C.A.; 32 Digest 530, 1844.
- Darley Main Colliery Co. v. Mitchell* (1886), 11 App. Cas. 127; 55 L.J.Q.B. 529; 54 L.T. 882; 51 J.P. 148; 2 T.L.R. 301, H.L.; 32 Digest 341, 238.
- Gibbs v. Guild* (1882), 9 Q.B.D. 59; 51 L.J.Q.B. 313; 46 L.T. 248; 30 W.R. 591, C.A.; 32 Digest 526, 1819.
- Howell v. Young* (1826), 5 B. & C. 259; 2 C. & P. 238; 8 Dow. & Ry.K.B. 14; 4 L.J.O.S.K.B. 160; 108 E.R. 97; 32 Digest 342, 250.

A Appeal by the defendant from a decision of KIRKWICH, J., reported [1899] 2 Ch. 523.

The action was brought by the plaintiff, Joseph Thomson, a shareholder in the British Goldfields of West Africa, Ltd., a company in liquidation, against the defendants Lord Clanmorris, Colonel A. Bravo, and Messrs. B. C. Hargreaves, I. Kinnick, D. Mackenzie, and J. W. Wilson as the directors of the company, and

B Sir Alfred Kirby as the promoter of the company.

The plaintiff obtained compensation under the Directors' Liability Act, 1890, for loss or damage sustained by the plaintiff by reason of alleged misrepresentations in the prospectus of the company on the faith of which the plaintiff subscribed for shares in the company. By his statement of claim the plaintiff alleged that on Aug. 22, 1895, the defendants issued a prospectus with a map, inviting applications for shares. It stated (a) that the company had been formed to acquire and work valuable concessions for gold, timber, etc., in the district of Appolonia, in the Gold Coast Colony, of about 7,000 square miles in extent; (b) that the properties comprised in the concessions were situate within the British Protectorate; (c) that the concessions included the whole of the lands indicated in the map as belonging to the company; (d) that the vendors, the British West Africa Syndicate, Ltd., were the promoters of the company and had fixed the purchase money, and in so doing had shown great faith in the prospects of the company; and (e) that the Colonial Office List stated that yellow fever was unknown. The plaintiff said that on Aug. 28, 1895, on the faith of such statements, he applied for 100 shares in the company, and paid the sum of £12 10s., being 2s. 6d. per share due on application, in accordance with the terms of the prospectus; that on Aug. 29 100 shares were allotted to him in pursuance of the application; and that on Sept. 7 he paid the further sum of £37 10s., being the amount due on allotment. He eventually paid up the shares in full, the final call of £25 being paid in November, 1898.

As to the statements in the prospectus, the plaintiff alleged (a) that the concessions were not valuable, only a portion of them were in Appolonia, and that, instead of being 7,000 square miles in extent, there were only about 600; (b) that only a portion of the property was within the British Protectorate; (c) that only half the land indicated in the map as included in the concessions was so included; (d) that the syndicate was not formed till long after the company was formed, that it was not the promoter, did not fix the purchase price, and did not show any such faith in the prospects of the company as the prospectus alleged; and (e) that the Colonial Office List did not state that yellow fever was unknown. The plaintiff further said that though the nominal vendors to the company were the syndicate, the real vendor was the defendant Sir Alfred Kirby, who was the promoter both of the company and of the syndicate, and that the syndicate was formed for the purpose of concealing the fact that he was the promoter of, and vendor to, the company; that the prospectus concealed that fact, and also the fact that the defendant Kirby was selling to the company for £195,000 property which he had agreed to purchase for £92,000; also the fact that E. L. Walsh, to whose report the subscribers were referred, was a member of the syndicate, and a vendor to and promoter of the company.

I On Jan. 12, 1898, the company, being insolvent, was ordered to be wound-up. On Dec. 9, 1898, the plaintiff issued the writ in this action. He said that the alleged misrepresentations were made by the defendants recklessly, and without knowing or caring whether the same were true or false, and that they had no reasonable ground for believing the statements to be true. The defendants, the directors, denied the plaintiff's allegations, and submitted that the statement of claim disclosed no cause of action against them; that it did not allege any fraud; and that in the absence of fraud the plaintiff was not entitled to the relief claimed. They also contended that in respect of each of the statements in the prospectus the facts and conditions required by sub-ss. (a), (b), and (c) of s. 3 of the Directors' Liability Act, 1890, as necessary to absolve them from liability, all

expired and had been complied with. They also pleaded that the action had not been commenced within two years after the plaintiff's cause of action (if any) arose, and that therefore the claim was barred by the Civil Procedure Act, 1833, s. 3. The defendant Sir Alfred Kirby did not appear in the action.

Section 3 of the Civil Procedure Act, 1833, provided (inter alia) that

"... all actions for penalties, damages, or sums of money given to the party grieved, by any statute now or hereafter to be in force . . . shall be commenced . . . within two years after the cause of such actions or suits, but not after . . . provided that nothing herein contained shall extend to any action given by any statute where the time for bringing such action is or shall be by any statute specially limited."

Section 3 of the Directors' Liability Act, 1890, provided that

"Every person who is a director of the company at the time of the issue of a prospectus inviting persons to subscribe for shares shall be liable to pay compensation to all persons who shall subscribe for any shares . . . on the faith of such prospectus . . . for the loss or damage they may have sustained by reason of any untrue statement in the prospectus, unless it is proved . . . that he had reasonable ground to believe, and did up to the time of the allotment of the shares believe, that the statement was true."

The action came on for trial before KEKEWICH, J., on July 26 and 27, 1899, when his Lordship decided that one important statement at least in the prospectus was untrue in fact, and that the defendants had not reasonable ground for believing it to be true; that the plaintiff must be taken to have subscribed for shares on the faith of this statement as much as any other statements in the prospectus; that s. 3 of the Civil Procedure Act, 1833, dealt with damages or sums of money in the nature of a penalty, and not with sums of money claimed as compensation under the Directors' Liability Act, 1890, for "loss or damage sustained by reason of any untrue statement in a prospectus"; and that the cause of action arose on the loss or damage being sustained by actual payment of the money, so that, as to the last payment of £25 in December, 1898, the statute, even if it applied, was no answer. From that decision the defendant J. W. Wilson now appealed. The question as to the applicability of s. 3 of the Civil Procedure Act, 1833, to an action brought under the Directors' Liability Act, 1890, was first argued.

Lawson Walton, Q.C., and *T. Willes Chitty* for the defendant.

Renshaw, Q.C. (with him *George Henderson*) for the plaintiff.

SIR NATHANIEL LINDLEY, M.R.—The point is a new one to all of us, and no doubt there is a difficulty about it. The first thing that I will deal with is s. 3 of the Civil Procedure Act, 1833, which has been so much relied upon. In construing that enactment, as in construing any other enactment, you must look, not only at the words used, but at the history of the Act, and consider what were the reasons which led to its being passed. You must look at the mischief which had to be cured as well as the cure afforded. And when you have looked at the state of the law previous to the Civil Procedure Act, 1833, you see pretty well what it was that had to be dealt with. There were certain causes of action as to which there was no defined time of limitation. Some of them were alluded to in the earlier part of the section—actions for debt on specialties and other things which are there enumerated. They were not provided for by the existing statutes of limitations, and they are brought in. That was defect number one. There was another class of actions as to which there was no definite time for suing. Those were actions for penalties and damages and sums of money given by various Acts of Parliament by way of penalty or punishment and not by way of compensation. But as was pointed out by LORD ESHER, M.R., when commenting in *Saunders v.*

A What (1) on *Atwood v. Batley* (2), the punishment was there an object. And, whether you call it penalty, damages, or sum of money, it was not assessed with a view to compensate the plaintiff, although he might put some of it in his own pocket. That is the class of action. In other words, they were what are popularly called "penal actions." You get at that from the history of the legislation, and from knowing what the state of the law was and what the defect was.

B If we take that as our guide, it is quite obvious to my mind that the Directors' Liability Act, 1890, does not come within that class at all. If you leave out any ~~some~~ of the history there is some difficulty in saying that the language of the Civil Procedure Act, 1833, does not cover cases arising under the Directors' Liability Act, 1890. If you look at the words very critically I do not think that they do, because, if you look at the frame of the Directors' Liability Act, 1890, you do not find that an action is given, or that damages are given, or that a penalty is given. Nothing is given. This is rather, to my mind, hypercritical. But it is true all the same. What you find in the Directors' Liability Act, 1890, is a liability imposed—a liability to make compensation; and the money payable under the Directors' Liability Act, 1890, is obviously compensation to the plaintiff for the loss which he had sustained. It must be estimated and awarded with reference to that. It is not in the least like a penalty, damages, or sum of money imposed by statute as a punishment without referring at all to the injury sustained by the person who sues for it. Therefore, it appears to me that whether you look at it hypercritically—which I never like to do—or whether you look at the good sense of the thing and the history of the legislation, it is plain to my mind, although there is a little difficulty about the language, that it is not an action for a penalty, damages, or sum of money within the meaning of s. 3 of the Civil Procedure Act, 1833.

E That brings us to the next question, What time, if any, is limited? If we get rid of the question of two years under the Act of 1833 we can reserve that for further consideration. My own impression—I speak now of my own view only—is this, that the true view to take of this enactment, the Directors' Liability Act, 1890, is that if we were in the old days of pleadings not under the Judicature Acts, an action on the case for breach of duty would be the proper remedy, and six years would be the time. But we need not decide that, because, whether twenty years or six years is the period which is limited, this writ has been issued in plenty of time to avail the plaintiff. In other words, there can be no statute of limitations which can be pleaded, having regard to the dates, the cause of action having arisen, if at all, at the outside three years before the issue of the writ, and the writ being issued as late as December, 1898.

G Passing that over, we come, I think, to this conclusion, that whatever the Statute of Limitations may be, if there is one applicable at all, there is none applicable to this action. And, if so, we need not trouble ourselves much about the cause of action or the time when that accrued. There, again, as the case has been argued and the point is new, I may say at once my own view is that counsel for the defendant is right and that the cause of action accrues and the time begins to run from the time when the shares were subscribed for. I get at that rather by an exhaustive process. I cannot adopt counsel for the plaintiff's suggestion that you must wait till the company is wound-up to see what loss is sustained. The company may never be wound-up at all and yet there may be an action. Then I do not think it is at all in accordance with ordinary rules of procedure and ordinary views respecting the Statute of Limitations to say that there is a separate action every time a man has to pay a call. That would bring about a state of things to which we are not accustomed. It is foreign to our habits of thought. I cannot help thinking that the true view is that the limitation is six years by analogy to the old actions; and that the time begins to run when the public subscribe for and take shares on the faith of the untrue statements in the prospectus. Those are my own views. It is quite sufficient to say here that the

only point that we have to decide is whether this particular action is barred by any statute of limitations. To my mind it is plain that it is not. Therefore we must hear the case on the merits.

RIGBY, L.J.—I agree that there is no statutory limitation which applies to this case.

VAUGHAN WILLIAMS, L.J.—I agree. As the point is a new one, I should like to say a word or two upon it myself. One has to consider what really is the nature of the enactment contained in the Directors' Liability Act, 1890. I wish to say with regard to that, that, if one reads s. 3, it seems to me that what that section does is this: Although it does not in form give a new action—all that it does being to say that persons who have done certain things shall be liable to pay compensation to all persons who shall subscribe for any shares, debentures, or debenture stock on the faith of such prospectus or notice

"for the loss or damage they may have sustained by reason of any untrue statement in the prospectus or notice or in any report or memorandum appearing on the face thereof"

—yet what really is done by the section is to give a new action on the case. It really creates a new negative duty. These persons, be they directors, or promoters, or whatever class they come under which is included in this section, have really cast upon them a new duty in respect of prospectuses and similar notices. That duty one finds in sub-ss. (a), (b), and (c) of the section. Speaking generally, one may say that this Act of Parliament creates a new statutory duty as to accuracy—a new statutory duty to abstain from inaccurate and untrue statements. Then, in effect, it gives a new action on the case to those persons who may have been injured by the neglect of that statutory duty. And it seems to me, therefore, that really this is a case which is provided for by the Limitation Act, 1623. It is an action on the case, and, of course, if it is an action on the case, the six years' limitation would apply.

But then it is said that this is not an action on the case—that this is an action on the statute; and *Cork and Bandon Rail. Co. v. Goode* (3) is relied on for that proposition. But it is to be remembered that that was an action for a statutory debt, and the sole question there was whether that debt was within the terms of the Limitation Act, 1623, founded on specialty or not. It does not seem to me that the decision in that case really is material to the case that we have here to decide. **MAULE, J.**, points out that there is a difference between an action which is given by a statute and an action on the statute. *Cork and Bandon Rail. Co. v. Goode* (3) was an action of debt on the statute, and, as I have already pointed out, the only real question in the case there was whether that action of debt came within the words of the Limitation Act, 1623—"contract not founded on specialty." In the present case it seems to me that you have merely a new duty created of accuracy in respect of the preparation and issue of prospectuses, and an action on the case given to those persons who are injured by it. It is said that this is a new form of statute. But it does not seem to me that in substance this statute differs from the statute of Marlbridge—a very old statute—because there in respect of not only illegal but irregular and excessive distresses, notwithstanding the liability to punishment, it is provided in the earlier part of the section that there shall be full amends made to those who have sustained loss—I will give the exact words of the section—it says,

"nevertheless amends shall be made fully and sufficiently to them that have sustained loss by such distress."

And it seems to me that here the effect of this section is that amends shall be made to those that have sustained loss by being induced to subscribe for shares or debentures by reason of the misstatements in the prospectus or other similar document.

A Under these circumstances it is not really necessary to go on and decide the question from what time the statute is to run. But I agree with the Master of the Rolls that the statute does not run from the sustaining of each piece of damage; neither does it run from the time of the wrongful act, whether the preparation or issue of the document containing the untrue statements. It cannot run from that time by reason of two well-known principles of law regarding all statutes of limitation. The Statute of Limitations cannot begin to run unless you have two things present—a party capable of suing and a party liable to be sued. In the case of this Act of Parliament it is perfectly plain that, inasmuch as the compensation is given to those persons who have subscribed for shares in respect of the damage sustained thereby by them, you cannot have any cause of action whatever until you have had the subscriptions for the shares. That, to my mind, decides the first point—that is, that the statute does not run from the time of the preparation or issue of the incorrect document.

Then it is said that even if it does not, inasmuch as the compensation is given for the loss, must not a fresh cause of action accrue as each fresh item of loss accrues? It seems to me that it is untrue to suggest that in fact the whole loss is not assessable the moment that the subscription for the shares has been made upon the faith of the prospectus. Generally speaking, obviously you can assess that loss by going into the market and selling the shares for which the subscription has so been made. It is said that in some instances the shares may not be saleable, or that the shares may carry such a liability for uncalled capital that you positively have to pay somebody to relieve you of those shares. It is further suggested that, if there is a winding-up, there may be a liability to be put upon the B. list of contributories within twelve months of the sale of the shares. But all those matters, supposing they appear in any case, although they may not be capable of perfectly exact computation of the damage, are clearly so capable of computation that, according to the well-established principles of the English law in favour of finality of litigation, you would have amply sufficient evidence and means of proof such as to not only make it a duty to claim in respect of those more difficult matters at the time when you bring your action, but also to debar you from any further action if you did not so claim.

The appeal was then heard upon the merits and was dismissed.

Solicitors: Morten, Cutler & Co.; Herbert Toomer.

[Reported by E. A. SCRATCHLEY, ESQ., Barrister-at-Law.]

Re QUEEN'S HOTEL CO., CARDIFF, LTD.
Re VERNON TIN PLATE CO., LTD.

[CHANCERY DIVISION (Cozens-Hardy, J.), March 16, 1900]

[Reported [1900] 1 Ch. 792; 69 L.J.Ch. 414; 82 L.T. 675; 48 W.R. 567; 7 Mans. 23-]

Company—Debenture holders' action—Costs—Orders for realisation of securities—Proceeds sufficient to satisfy claims of plaintiffs' class, not claims of all debenture holders.

In two debenture-holders' actions, brought by the same plaintiffs on behalf of themselves and all other debenture-holders of the same class, judgments were obtained for the realisation of the respective securities, and it appeared that the proceeds would be sufficient to satisfy the claims of the holders of the class of debentures which included the plaintiffs, but not the claims of all the debenture holders. On the question of costs,

Held: the plaintiffs were only entitled to party and party costs, and not to solicitor and client costs.

Notes. Distinguished: *Re New Zealand Midland Rail. Co., Smith v. Lubbock*, [1901] 2 Ch. 357. Referred to: *Re Horne, Horne v. Horne*, [1906] 1 Ch. 271.

As to costs in debenture-holders' actions, see 3 HALSEBURY'S LAWS (3rd Edn.) 523; and for cases see 10 DIGEST (Repl.) 842-843.

Cases referred to:

- (1) *Industrial and General Trust, Ltd. v. South American and Mexican Co.* (1895), Jan. 28, unreported.
- (2) *Re McRea, Norden v. McRea* (1886), 32 Ch.D. 613; 55 L.J.Ch. 708; sub nom. *Re McRea, Narden v. McRea*, 54 L.T. 728; 24 Digest (Repl.) 915, 9199.

Also referred to in argument:

Thomas v. Jones (1860), 1 Drew. & Sim. 134; 29 L.J.Ch. 570; 2 L.T. 77; 6 Jur.N.S. 391; 8 W.R. 328; 62 E.R. 329; 24 Digest (Repl.) 916, 9218.

Re Continental Oxygen Co., Elias v. Continental Oxygen Co., [1897] 1 Ch. 511; 66 L.J.Ch. 273; 76 L.T. 229; 45 W.R. 313; 13 T.L.R. 224; 41 Sol. Jo. 296; 10 Digest (Repl.) 838, 5493.

Debenture Holders' Actions in which the plaintiffs, the London and Provincial Bank, who were holders of first debentures sued on behalf of themselves and all other debenture-holders of the same class. Judgments had been obtained for the realisation of the respective securities, and the master's certificates had been filed.

In the first action there were two series of debentures, each secured by a covering deed, by which the property charged by the debentures was vested in trustees in trust for the debenture-holders. Some of, but not all, the property comprised in the debentures had been realised and the money paid into court, and it appeared that the proceeds were sufficient to satisfy the claims of the holders of the first series of debentures, but not of the second series.

In the second action there were three series of debentures charged directly on the assets of the company. All the property comprised in the debentures had been realised and the money paid into court. The amount was sufficient to pay the holders of the first series of debentures in full and possibly the holders of the second series, but not the holders of the third series of debentures.

The actions now came on together on further consideration; and the question was raised whether the plaintiffs were entitled to costs as between solicitor and client by analogy to the rule in administration actions, or as between party and party only.

Stewart Smith for the plaintiffs in the first action.

J. G. Wood for the plaintiffs in the second action.

- A *Hunter Smith* for the holders of the second series of debentures in the first action.
 J. S. Green for the trustees of the covering deed in the first-mentioned action.
 G. S. Alexander for the holders of the second and third series of debentures in the second action.

COZENS-HARDY, J.—The question is, What are the rights of a mortgagee plaintiff in dealing with the mortgaged property in an action? It is clear that a mortgagee plaintiff is only entitled to party and party costs of action; there is no vestige of authority to the contrary, nor does it make any difference, so far as I am aware, if he asks for sale and not foreclosure. There might be a mortgagee entitled only to a sale, and in such case he would be entitled only to party and party costs. If the mortgaged property were realised by sale, the plaintiff would only be entitled to principal and interest and party and party costs. Does it make any difference that the plaintiff is suing on behalf of himself and all others of the same rank? I cannot see what difference that can make. The plaintiff, after all, is only a person entitled to an equitable charge.

The point came before ROMER, J., when sitting in chambers for WRIGHT, J., in *Industrial and General Trust, Ltd. v. South American and Mexican Co.* (1). There application was made for solicitor and client costs, and also for taxation on the higher scale. I have been furnished by the master with the following note of the decision:

"I will not depart from the usual practice which it is admitted before me is this—tax the costs between party and party; and I see no reason for taxing costs on a higher scale. If I made any exception in this case, and gave solicitor and client costs and costs on a higher scale, I should have to do so in every case."

That seems to me a decision exactly in point.

But it is said that I ought to treat these debenture-holders' actions, not as ordinary mortgagees' actions, but as analogous to *Re McRea*, *Norden v. McRea* (2) and other cases in which it was held that where the estate of a dead person is not sufficient to pay all creditors in full, although sufficient to pay in full creditors of a particular class, a plaintiff creditor is entitled to solicitor and client costs, and that I ought to follow the principle established there. I do not think that has any application. The rules applicable to the administration of the estate of a deceased person have, I think, no relation to a mortgagee's suit, whether by an individual mortgagee or by one of a class suing on behalf of all. There is a sense in which every mortgaged property realised in an action is realised for the benefit of the puisne mortgagees and the mortgagor. I cannot make an exception in favour of the plaintiffs in these actions which, so far as I am aware, would be novel.

Solicitors: *Manns & Langden*; *Smiles & Co.*; *Bell, Brodrick & Gray*, for *Cousins*, *Botsford & Phoenix*, Cardiff; *Tamplin, Taylor & Joseph*.

[Reported by J. TRUSTAM, Esq., Barrister-at-Law.]

BULLIVANT AND OTHERS *v.* ATTORNEY-GENERAL FOR VICTORIA

[HOUSE OF LORDS (The Earl of Halsbury, L.C., Lord Shand, Lord Davey, Lord Brampton and Lord Lindley), April 30, May 2, 1901]

[Reported [1901] A.C. 196; 70 L.J.K.B. 645; 84 L.T. 737, 50 W.R. 1; 17 T.L.R. 457; 45 Sol. Jo. 483]

Discovery—Privilege—Legal professional privilege—Displacement—Advice of solicitor sought by client for purpose of carrying out fraud—Need for specific allegation of fraud or illegality—Death of client—Privilege not thereby lost.

Communications between solicitor and client are not privileged if they are in themselves part of a criminal or unlawful proceeding. To displace the privilege which would otherwise exist, there must be some definite allegation of fraud or illegality. Hence an allegation that certain conveyances were prepared "with intent to evade the payment of duty" will not result in the privilege for the communications between solicitor and client being displaced, since the allegation may only amount to a claim that the client intended lawful tax avoidance, and does not necessarily involve an imputation of fraud or illegality.

The death of the client will not destroy a privilege existing for communications between himself and his solicitor.

Decision of the Court of Appeal, [1900] 2 Q.B. 163, reversed.

Notes. Considered: *O'Rourke v. Darbishire*, [1920] All E.R. Rep. 1. Referred to: *Minter v. Priest*, [1929] 1 K.B. 655.

As to legal professional privilege, see 12 HALSBURY'S LAWS (3rd Edn.) 39 et seq.; and for cases see 18 DIGEST (Repl.) 116-118.

Cases referred to:

- (1) *Simms v. Registrar of Probates*, [1900] A.C. 323; 69 L.J.P.C. 51; 82 L.T. 433; 16 T.L.R. 331, P.C.; 42 Digest 630, 325.
- (2) *Russell v. Jackson* (1851), 9 Hare, 387; 21 L.J.Ch. 146; 18 L.T.O.S. 166; 15 Jur. 1117; 68 E.R. 558; 18 Digest (Repl.) 116, 976.

Also referred to in argument:

- Follett v. Jefferyes* (1850), 1 Sim. N.S. 3; 20 L.J.Ch. 65; 15 Jur. 118; 61 E.R. 1; 18 Digest (Repl.) 115, 974.
- Gartside v. Outram* (1856), 26 L.J.Ch. 113; 28 L.T.O.S. 120; 3 Jur.N.S. 39; 5 W.R. 35; 18 Digest (Repl.) 115, 973.
- Minct v. Morgan* (1873), 8 Ch. App. 361; 42 L.J.Ch. 627; 28 L.T. 573; 21 W.R. 467, L.C. & L.J.; 18 Digest (Repl.) 96, 793.
- R. v. Cox and Railton* (1884), 14 Q.B.D. 153; 54 L.J.M.C. 41; 52 L.T. 25; 49 J.P. 374; 33 W.R. 396; 1 T.L.R. 181; 15 Cox, C.C. 611, C.C.R.; 18 Digest (Repl.) 116, 980.
- Re Postlethwaite, Re Rickman, Postlethwaite v. Rickman* (1887), 35 Ch.D. 722; 56 L.J.Ch. 1077; 56 L.T. 733; 35 W.R. 563; 3 T.L.R. 604; 18 Digest (Repl.) 118, 1005.
- Williams v. Quebrada Railway, Land and Copper Co.*, [1895] 2 Ch. 751; 65 L.J.Ch. 68; 73 L.T. 397; 44 W.R. 76; 18 Digest (Repl.) 152, 1369.
- Gresley v. Moysley* (1856), 2 K. & J. 288; 2 Jur.N.S. 156; 60 E.R. 789; 18 Digest (Repl.) 91, 749.

Appeal from a decision of the Court of Appeal (HENN COLLINS and ROMER, L.JJ.), reported [1900] 2 Q.B. 163, affirming an order of MATHEW, J., made at chambers, ordering the production of documents by one of the appellants, who were defendants in the proceedings.

- A An information had been filed by the Attorney-General for Victoria claiming £20,000 duty alleged to be due under the Administration and Probate Act, 1890, of the colony (54 Vict., No. MLX) in respect of certain property alleged to form part of the estate of James Austin, who died in March, 1896, having by his will, dated May 28, 1895, appointed one Edward Bath (since deceased) and the appellant, Stanley Austin, executors of his will as to his property in England, and the appellants, Bullivant and Grey, executors as to his property in Australia. The firm of Bath and Austin, solicitors, of Glastonbury, were employed by the testator in the preparation of certain settlements, conveyances, and assignments, and Stanley Austin was the surviving partner. These instruments were alleged in the information to have been executed with intent to evade payment of duty, and were (i) a conveyance dated Nov. 9, 1894, of certain lands and hereditaments known as the Avalon estate, near Lara, and situate in the colony of Victoria, by James Austin, deceased, to the appellants, Frank Austin and Stanley Austin, and one Edward Bath (since deceased), called in the conveyance the trustees; (ii) a conveyance dated Nov. 9, 1894, of certain lands and hereditaments known as the Yeo estate, near Colac, and situate in the colony of Victoria, by James Austin, deceased, to the appellants, Bullivant and Henry Grey, called in the conveyance the trustees; (iii) an assignment dated Nov. 6, 1894, of a sum of £24,000 secured on mortgage of an estate known as Longerenong, in the colony of Victoria, by James Austin to the appellants, Grey and Frank Austin, called in the assignment the trustees; (iv) a conveyance dated Mar. 20, 1895, of certain other lands and hereditaments situate in the colony of Victoria, by James Austin to the appellants, Stanley Austin and Frank Austin, as tenants in common. The commission was issued by HOOD, J., one of the judges of the Supreme Court of Victoria, on Oct. 19, 1899. By the order of MATHEW, J., affirmed by the Court of Appeal, Stanley Austin was ordered to produce before the commissioners aforesaid the following documents—that is to say (i) the letter-books of the late firm of Bath and Austin containing copies of any letters written by the firm on behalf of the late James Austin to the trustees or beneficiaries under any of the settlements or assignments referred to in the information in the said action and relating to such settlements or assignments, and whether bearing date before or after the execution of the same; (ii) the journals, day-books, or other record kept by the late firm of the instructions given by James Austin to the late firm with reference to the preparation, execution, or carrying into effect of the settlements or assignments, or any of them.
- G Section 115 of the Administration and Probate Act of Victoria, 1890, provides that if any person makes any conveyance or assignment, gift, delivery, or transfer of any estate, real or personal, or of any money or securities for money “with intent to evade the payment of duty,” such property shall still be liable to duty.

Sir R. Reid, K.C., Upjohn, K.C., and Ernest Pollock for the appellants.

Haldane, K.C., and Rowlatt for the respondent.

H

THE EARL OF HALSBURY, L.C.—It appears to me that the judgment appealed from ought to be reversed. I do not think it desirable to express any opinion with reference to the true construction of the Victorian statute beyond this: We are not here upon the question of sufficiency of pleading at all. I think it fallacious to suppose that we are to ascertain for the purpose of this inquiry whether or not the pleadings do mean or do not mean one or the other of the two different sets of meanings which have been attributed to them.

I think that the broad propositions may be very simply stated—for the perfect administration of justice, and for the protection of the confidence which exists between a solicitor and his client, it has been established as a principle of public policy that those confidential communications shall not be subject to production. But to that, of course, this limitation has been put, and justly put, that no court can be called upon to protect communications which are in themselves parts of a

criminal or unlawful proceeding. Those are the two principles, and of course A
it would be possible to make both propositions absurd, as is very often the case
with all propositions, by taking extreme cases on either side. If you are to say,
"I will not say what these communications are because until you have actually
proved me guilty of a crime they may be privileged as confidential," the result
would be that they could never be produced at all, because until the whole thing
is over you cannot have the proof of guilt. On the other hand, if it is sufficient
for the party demanding the production to say, as a mere surmise or conjecture,
that the thing into which he is endeavouring to inquire may have been illegal, the
privilege in all cases disappears at once. The line which the courts have hitherto
taken, and will, I hope, preserve, is this: That, in order to displace the *prima*
facie right of silence by a witness who has been put into the relation of professional
confidence with his client, before that confidence can be broken you must have C
some definite charge either by way of allegation or affidavit or what not. I do not
at present go into the modes by which that can be made out, but there must be
some definite charge of something which displaces the privilege.

When I look at all that is to be found here, I find no such definite charge at all.
If, for the purpose of evading the payment of duty to which the man was liable,
he entered into some secret and covinous arrangement whereby, although he should D
still retain the property during his lifetime, nevertheless colourable deeds should
be executed which would show that the property was not liable to duty, that would
undoubtedly be a fraud and I think that there would be no doubt that a person
who was engaged in such a transaction could be compelled either to produce
the correspondence or to state the conversation showing how it was intended to
carry out that alleged fraud. But there is no such allegation.—there is nothing E
here which any court can regard as an allegation of fraud sufficient to displace the
privilege. If the fact were merely that the person did execute voluntary deeds
the effect whereof was that the tax never fell upon the property at all, I do not
know that there is any offence in that either in Victoria or in this country. People
are not bound to continue in the same condition of things, either as regards their F
direct or indirect taxation, which will render either the consumption of articles in
the one case or the property they have in the other always liable to the tax, and
I decline to believe that the colony has made such an enactment until it is estab-
lished that that is the enactment which they have made. In the parallel, but
not exactly similar, case in the Privy Council where the word "evade" was used,
the Privy Council held (I myself was a party to that judgment) that it must be G
understood that where it was intended to be an allegation that a fraud had been
committed you must allege it and prove it, and that it was no fraud for a man
to make a voluntary conveyance of his estates, not having any secret trust, and
not having any arrangement whereby the deed could say one thing and the
voluntary arrangement mean another; that the fact that he did intend to make a
gift during his lifetime was no offence and no breach of the Act of Parliament,
and nothing that could be considered tainted with the character of fraud: *Simms* H
v. Registrar of Probates (1). That being so, it appears to me that it would be an
abandonment of the principle which has been held sacred in this country if, when
a person has done that which in itself may be innocent, you should simply, because
you choose to suggest that it was done with the view of evading the payment of a
tax, require the witness to disclose the whole of his affairs, and enable the private
communications between himself and his solicitor to be displayed to the court. I

I cannot help thinking that if this question had arisen in the ordinary course,
the error which has been committed would not have been committed; but we
have got into a somewhat artificial condition of things by the method in which we
are endeavouring to apply the procedure here, which would be a proceeding in open
court. Here there is a commission, and to fortify such commission a statute has
been passed for the purpose of giving the judges in this country power to enforce
the attendance of witnesses just as if the cause of action had arisen in this country.

A If you construe the statute, bearing its object in mind, it is simple enough. The statute was passed for the purpose of assimilating the administration of justice all over Her Majesty's dominions. What you would have to do when you got to trial and the privilege was pleaded would be this—the judge would have to satisfy himself whether there was really established to his satisfaction a charge of fraud or something that would displace the privilege—I do not say that it must be proved—but

B that it would be a reasonable and proper thing under the circumstances to establish the proposition that the issue to be tried was whether there was really a fraud or not, and that this was a piece of evidence relevant to establish the fraud. In this case it is obvious that nobody can suggest there is any evidence of it, nor, as it appears to me, any allegation of it, and, upon the broad proposition that there is neither proof nor allegation, nor anything which would displace the privilege,

C it appears to me that the orders made in this case were wrong, and that your Lordships ought to reverse them.

LORD SHAND.—If the respondent had made a relevant averment of fraud or of a fraudulent contrivance to defeat the right of the government to death duty, to which in the actual circumstances the government was entitled, I should have

D held the order made by MATHEW, J., and the Court of Appeal to be right. Privilege could not be pleaded as a protection to fraud, and the averment of fraud or fraudulent contrivance with a specification of particulars would, in my opinion, be enough. In this case I agree that there is no averment of fraud or even of illegality having regard to the decision of the Privy Council in *Simms' Case* (1). The statement is merely that the deeds in question were granted to "evade" pay-

E ment of death duty due, using the word which occurs in the statute. If that term merely means to "avoid" the duty, as was held in *Simms' Case* (1), then there is here no averment of fraudulent contrivance, or indeed of any illegal proceedings, and in the absence of this I agree that the alleged want of privilege fails.

LORD DAYEY.—I am of the same opinion. I do not dissent from what was

F said by counsel for the respondent, that it must be assumed for the present purpose that the case stated in the pleadings is true for the purpose of testing the right of production. But that renders it, of course, of extreme importance to see what is stated in the pleadings, and what are the issues upon which the trial is now presumed to be proceeding. I also agree with what was said by counsel for the

G appellants, that if a man in his pleading, whether he be the Attorney-General or anybody else, merely sets out a sentence from a statute which is capable of two meanings without saying which he means, the one being consistent with the absolute innocence of the transaction and the other meaning involving a charge of either fraud or illegality, he must say which he means, and if he intends to charge

H illegality he must state facts for the purpose of showing what the illegality is. I agree with the Lord Chancellor that it is not a question of pleadings as between the parties, but that what we have to see is whether a witness who is called upon to produce privileged documents is bound to produce them or not, and for that purpose we must look to see what are the issues which are raised by the pleadings.

The information states only certain voluntary deeds, and then contains an allegation that these voluntary deeds were executed for the purpose of evading

I payment of certain death duties which are imposed upon property passing upon the death of the testator. The section under which it is sought to say that it was an illegal transaction is this—I will read it shortly :

"If any person has made, or shall hereafter make, any conveyance," and so forth, "with intent to evade the payment of duty under this part of the Act."

If the duty never attached, if there is no section of the Act which imposes a duty upon voluntary inter vivos transactions, I cannot see how a person who is a party to such a transaction can be said to do it with intent to evade payment of a duty

which the Act does not impose upon the transaction itself. I do not mean to give any definite opinion upon the construction of this clause. It is, however, certainly capable of that meaning, and if it is capable of that meaning, the witness is entitled to say that if you mean to say that the executing of these voluntary conveyances which, upon the face of them, purport to be a parting by the testator with the property comprised in them out and out, a parting with the whole *jus disponendi* of it, so that it would become no longer his property but the property of somebody else, and would be property of somebody else at his death—if you mean to say that the executing of those conveyances was an illegal transaction, you must tell us in what respect it was illegal; and if you merely quote the words of the statute to which I have already referred, if they are capable, as I think they are at least capable—I do not put it higher than that—of a perfectly innocent meaning which would render those transactions perfectly innocent in themselves, then I do not think that is stating such a case or raising such an issue for trial between the parties as would enable you to call upon a witness to produce documents which would otherwise be privileged from production.

I think that the fallacy of the Court of Appeal, if I may respectfully say so, is in treating the statute as if it made the execution of voluntary deeds with or without the intention to put property in such a position as not to incur liability to the tax as being an improper or an illegal act. In my opinion it is nothing of the kind. It is a perfectly legal act, and there is nothing upon this information which to my mind clearly states any such case of illegality as would overrule the privilege on the part of a witness.

LORD BRAMPTON.—I entirely concur.

LORD LINDLEY.—I also concur; but I will add a few words out of respect to the learned lords justices, from whom I differ. The question arises in this way: In May, 1896, a gentleman died, and under the colonial law his estate had to pay certain duty. Some time before he died he executed some voluntary conveyances, and it is said that under the law of the colony the property comprised in those voluntary conveyances was subject to duty. In order to obtain evidence about those documents a commission was sent over here, and under the statute to which reference has been made (22 Vict., c. 20) witnesses were called before that commission, and we have to consider the matter from the point of view of an action or information in this country raising certain definite issues, in support of which witnesses were called and examined. When the witnesses were called they were asked to produce these documents, and, above all, the instructions given to the solicitor who prepared them. The answer was at once set up by the witnesses, "Those are privileged documents," the privilege being founded upon the ordinary professional confidence which has been held in this country to be a good ground for the nonproduction of documents.

Starting there, I observe that the grounds, whatever they are, are legal as well as equitable. There is no equitable doctrine, as distinguished from a legal doctrine, involved in the matter. *Prima facie* if a witness swears, as this witness did, to circumstances which give rise to the privilege, the privilege must prevail unless there is a good answer. What we have to consider, therefore, is the answer to the privilege so raised. There are two answers. The first is a very short one, if it is good for anything. It is said that, the testator being dead, the privilege is gone. I am satisfied that that answer is insufficient. It struck one at first as curious. I never heard it stated before; but it does appear that in *Russell v. Jackson* (2) it was considered, and in the judgment of TURNER, V.-C., there are some passages which have been invoked in favour of that being a good answer; but they are easily explicable when one comes to look at them. The mere fact that a testator is dead does not destroy the privilege. The privilege is founded upon the views which are taken in this country of public policy, and that privilege

A has to be waived, and unless the people concerned in the case of an ordinary controversy like this waive it, the privilege is not gone—it remains. In the case *James Turner, V.-C.*, for reasons which were given by counsel for the respondent, and are apparent in the judgment, the privilege could not be set up. One person was trying to set it up against the other, both claiming under the testator, and the Vice-Chancellor held that it could not be set up. So much for that answer.

B The next answer given to this claim of privilege is that there was illegality or fraud or trickery, and that this solicitor, or those concerned, cannot set up the privilege because there is no privilege involved in consulting a solicitor as to how you are to do an illegal act. That raises the question whether there was any illegality at all involved in the preparation of these deeds. As to that, the case stands in this way. The whole claim for this duty is based upon a colonial Act

C of Parliament which renders the duty payable upon any conveyance with intent to evade the payment of duty. The word “evade” is ambiguous. There are various ways of evading a statute. The discussion and the decision which took place in the Privy Council in *Simms v. Registrar of Probates* (1) show the ambiguity of the expression. The pleadings follow the Act of Parliament. I do not see

D that the witness can quarrel with that in any way, and the affidavit made in support of the application for an order for the production of these documents follows the Act of Parliament—they both use the ambiguous expression “evade.”

As I have said, there are two ways of construing the word “evade”: one is, that a person may go to a solicitor and ask him how to keep out of an Act of Parliament—how to do something which does not bring him within the scope of it. That

E is evading in one sense, but there is nothing illegal in it. The other is, when he goes to his solicitor and says, “Tell me how to escape from the consequences of the Act of Parliament, although I am brought within it.” That is an act of quite a different character. When we look at the answer given to the witnesses who set up this privilege, we find that the answer says: “You are evading the Act of Parliament.” What does that mean? Do you mean to say that I, as a solicitor, have been conspiring to do that which is illegal? That is not said—there is no

F pretence for it. If you mean that, you have not said so; if you mean the other thing, your answer does not destroy the privilege.

That is the short answer. It appears to me that the Court of Appeal have overlooked the fact that the word “evade” has the double meaning to which I have referred. They seemed to have assumed that what was done here must have been a conspiracy to avoid the consequences of the Act. Under these circumstances

G I think that the appeal ought to succeed, and that the order appealed from should be reversed.

Appeal allowed.

Solicitors: *Crowders, Vizard & Oldham; Freshfields.*

[Reported by C. E. MALDEN, ESQ., Barrister-at-Law.]

BAILEY v. THURSTON & CO., LTD.

[COURT OF APPEAL (Sir Richard Henn Collins, M.R., Stirling and Cozens-Hardy, L.JJ.), November 18, 24, 1902]

[Reported [1903] 1 K.B. 137; 72 L.J.K.B. 36; 88 L.T. 43; 51 W.R. 162; 19 T.L.R. 75; 47 Sol. Jo. 91; 10 Mans. 1]

Bankruptcy—Property available for distribution—Damages received by bankrupt for wrongful dismissal occurring after bankruptcy—Bankrupt's right to sue—Trustee's right to intervene.

Bankruptcy—Property available for distribution—Sum due to bankrupt for services rendered before bankruptcy—Vesting of right of action in trustee.

A bankrupt can sue in his own name to enforce rights accruing to him after the date of bankruptcy in respect of his personal services, and so can sue for wrongful dismissal occurring after the bankruptcy. The trustee can intervene at any time and claim the proceeds except in so far as they may be necessary for the maintenance of the bankrupt. It, however, at the date of bankruptcy a sum of money is due in respect of services already rendered under a contract, the right of action vests in the trustee.

Decision of PHILLIMORE, J., [1902] 2 K.B. 397, affirmed.

Notes. Considered: *Affleck v. Hammond*, [1912] 3 K.B. 162. Approved: *Hamilton v. Caldwell* (1919), 88 L.J.P.C. 173.

As to rights of action vesting in the trustee in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 397-400; and for cases see 5 Digest (Repl.) 1002, 1070-1071.

Cases referred to:

- (1) *Drake v. Beckham* (1843), 11 M. & W. 315, Ex. Ch.; affirmed sub nom. *Beckham v. Drake* (1849), 2 H.L.Cas. 579; 13 Jur. 921; 9 E.R. 1213, H.L.; 5 Digest (Repl.) 1042, 8421.
- (2) *Emden v. Carter* (1881), 17 Ch.D. 169; 50 L.J.Ch. 492; 44 L.T. 344; 29 W.R. 600; affirmed, 17 Ch.D. 768; 51 L.J.Ch. 41; 44 L.T. 636, C.A.; 5 Digest (Repl.) 1045, 8452.
- (3) *Wadling v. Oliphant* (1875), 1 Q.B.D. 145; 45 L.J.Q.B. 173; 33 L.T. 837; 24 W.R. 246; 5 Digest (Repl.) 784, 6654.
- (4) *Gibson v. Carruthers* (1841), 8 M. & W. 321; 11 L.J.Ex. 138; 151 E.R. 1061; 5 Digest (Repl.) 1058, 8547.
- (5) *Wright v. Fairfield* (1831), 2 B. & Ad. 727; 9 L.J.O.S.K.B. 309; 109 E.R. 1314; 5 Digest (Repl.) 1045, 8446.

Also referred to in argument:

- Stanton v. Collier* (1854), 3 E. & B. 274; 23 L.J.Q.B. 116; 22 L.T.O.S. 240; 18 Jur. 650; 2 W.R. 197; 2 C.L.R. 1151; 118 E.R. 1143, C.A.; 5 Digest (Repl.) 1046, 8455.
- Re Byrne, Ex parte Henry* (1892), 67 L.T. 230; 8 T.L.R. 581; 9 Morr. 213; 5 Digest (Repl.) 1052, 8495.
- Osman v. Raphael* (1896), 12 T.L.R. 376, C.A.; 5 Digest (Repl.) 1046, 8456.
- Herbert v. Sayer* (1844), 5 Q.B. 965; 2 Dow. & L. 49; Dav. & Mer. 723; 13 L.J.Q.B. 209; 8 Jur. 812; 114 E.R. 1512, Ex. Ch.; 5 Digest (Repl.) 1068, 8606.
- Williams v. Chambers* (1847), 10 Q.B.D. 337; 17 L.J.Q.B. 230; 11 Jur. 798; 116 E.R. 130; 5 Digest (Repl.) 1053, 8504.
- Jameson & Co. v. Brick and Stone Co., Ltd.* (1878), 4 Q.B.D. 208; 48 L.J.Q.B. 249; 39 L.T. 594; 27 W.R. 672; 5 Digest (Repl.) 1070, 8623.
- Re Carter, Ex parte Carter* (1876), 2 Ch.D. 806; 45 L.J.Bey. 145; 35 L.T. 388, C.A.; 5 Digest (Repl.) 794, 6723.

A *Drake v. Mitchell* (1870), 25 Q.B.D. 262; 59 L.J.Q.B. 409; 63 L.T. 206; 38 W.R. 551; 6 T.L.R. 326; 7 Morr. 207, C.A.; 5 Digest (Repl.) 790, 6699.

Re Roberts, (1900) 1 Q.B. 122; 69 L.J.Q.B. 19; 81 L.T. 467; 48 W.R. 132; 16 T.L.R. 29; 44 Sol. Jo. 44; 7 Mans. 5, C.A.; 5 Digest (Repl.) 784, 6680.

Elliot v. Mayton (1851), 16 Q.B. 581; 20 L.J.Q.B. 217; 17 L.T.O.S. 26; 15 Jur. 293; 117 E.R. 1002; 5 Digest (Repl.) 785, 6653.

B *Re Pauloka, Ex parte Dechurst* (1871), 7 Ch. App. 185; 41 L.J.Bay. 18; 25 L.T. 731; 29 W.R. 172, L.J.J.; 5 Digest (Repl.) 789, 6697.

Clark v. Wadlock (1890), 24 Q.B.D. 658; 59 L.J.Q.B. 329; 62 L.T. 675; 38 W.R. 584; 6 T.L.R. 314, C.A.; 5 Digest (Repl.) 1076, 8677.

Appeal by the defendants from a decision of PHILLIMORE, J., upon further consideration after the trial of the action with a jury.

C The plaintiff brought this action against the defendants to recover damages for wrongful dismissal. In 1899 an agreement in writing was made between the plaintiff and the defendants by which the defendants agreed to employ the plaintiff as their traveller for a period of five years from April 17, 1899, at a weekly salary and a commission upon all orders obtained by him for them. In the early part of June, 1901, the plaintiff was adjudicated a bankrupt. On June 29, 1901, the defendants **D** dismissed the plaintiff from their employment. Thereupon the plaintiff brought this action, claiming damages for wrongful dismissal, being at the time an undischarged bankrupt. The defendants, among other defences, pleaded that the plaintiff had been adjudicated a bankrupt before action, and was still undischarged, and that, therefore, he could not maintain the action. At the trial before PHILLIMORE, J., with a jury, the jury found a verdict for the plaintiff with £100 damages. **E** Upon further consideration, PHILLIMORE, J., ordered judgment to be entered for the plaintiff ([1902] 2 K.B. 397). The trustee in bankruptcy of the plaintiff did not at any time intervene. The defendants appealed.

Kemp, K.C., and E. W. Hansell, for the defendants.

Lord Coleridge, K.C., Macoun, and Bovill W. Smith, for the plaintiff.

Cur. adv. vult.

F Nov. 24, 1902. **SIR RICHARD HENN COLLINS, M.R.**—This is an appeal from the judgment of PHILLIMORE, J. The defendants set up the defence that, being a bankrupt, the plaintiff cannot maintain the action in his own name alone, and that the trustee in bankruptcy is a necessary party to the action. The question is whether that is a good defence; that is, whether the action can be maintained by **G** the plaintiff in his own name. PHILLIMORE, J., held that it was not a good defence, and in my opinion his decision was right.

It appears to me that the principle which is applicable to this case was decided in *Beckham v. Drake* (1). The present case, in my opinion, falls within that class of cases in which the labour of the bankrupt is the only consideration given by him for the contract, the contract being a contract to employ him and pay him a salary. **H** In return for the labour of the bankrupt, the defendants promised to pay him a salary. For any breach of that contract, which was a complete breach at the date of the bankruptcy, the trustee in bankruptcy would be entitled to any money payable to the bankrupt, and the trustee would be the right person to sue. So far, however, as the contract was still in fieri, I think that it is clear from the decision in *Beckham v. Drake* (1) that the trustee in bankruptcy could not claim anything **I** as having passed to him upon the bankruptcy. The trustee could only intervene and intercept, if he could, such money as might come to the bankrupt, but he could not sue upon the contract and allege that he was ready and willing to perform it.

I think that that view was clearly stated in more than one of the opinions of the judges in *Beckham v. Drake* (1). I will read one passage from the opinion of CRESSWELL, J. He says (2 H.L.Cas. at p. 615):

“I agree that a contract for the future work and labour of the bankrupt cannot be made by the assignees; they cannot hire him out, as was said by

LORD MANSFIELD, and, as a consequence, the assignees cannot after bankruptcy adopt and enforce a contract made before the bankruptcy, for the application of the personal skill or labour of a bankrupt, but I do not think it thence follows that where a contract to employ a trader has been broken before his bankruptcy, the assignees cannot sue upon that breach, it having been established that rights of action in general are vested in the assignees."

There is also a passage to the same effect in the opinion of PARKE, B., who says (*ibid.* at p. 625):

"This contract, if unexecuted, would clearly not have passed to the assignees.

But the question is, not whether the contract, but whether the right of action for breach of it before the bankruptcy, passed."

The contention, therefore, of the defendants, that this contract with all its incidents passed to the trustee in bankruptcy in the same way as the rights under a contract for the sale of goods, is not justified. The cause of action in that case was for a breach of the contract which occurred after the bankruptcy, and it was held, therefore, that the bankrupt had a right to sue in respect of it.

It is a well established rule of law that, in respect of rights accruing to a bankrupt after he has been adjudged bankrupt in respect of his personal earnings, although he has a right to sue in his own name, his trustee in bankruptcy may at any time intervene and claim the proceeds, except so far as those proceeds may be necessary for the maintenance of the bankrupt. Therefore, in an action of that kind by a bankrupt, the trustee has a right to any sum claimed by the bankrupt which is more than is required for his maintenance.

Whether the trustee can intervene and claim the proceeds of an action by the bankrupt is a different question from the question whether the bankrupt can sue alone when the trustee does not intervene. The question here is whether this action can be maintained by the bankrupt alone without his trustee in bankruptcy, and I think that the decision of PHILLIMORE, J., was right. It has been contended on behalf of the defendants that this point has been clearly decided in their favour in *Emden v. Carte* (2) and *Wadling v. Oliphant* (3).

In *Emden v. Carte* (2) the plaintiff, an architect, sued for remuneration in respect of employment under a contract made in 1877, and for damages for wrongful dismissal from that employment in 1880. He had been adjudged a bankrupt in 1878, and was undischarged. In that case the bankruptcy took place before the contract was made, and before the wrongful dismissal. FRY, J., decided, upon an application by the trustee in bankruptcy to be substituted as plaintiff instead of the bankrupt, that under the then practice the trustee could not be substituted as plaintiff, but that he could be joined as a co-plaintiff. The trustee was added as a plaintiff, and the conduct of the action was given to him. The Court of Appeal affirmed that decision. That case was considered by PHILLIMORE, J., and I agree with him that it did not involve the decision that the action could not be maintained by the bankrupt alone, but that it did decide that the trustee had a right to intervene. It was pointed out by FRY, J., in that case, that the action was not simply in respect of the personal services of the bankrupt, but that there were other claims, such as for plans.

Wadling v. Oliphant (3) is even more easily distinguishable. In that case a bankrupt, who had never obtained his discharge, was employed as editor of a newspaper without the knowledge of his trustee in bankruptcy; six years after the commencement of the bankruptcy he recovered the sum of £104 for wrongful dismissal from his post of editor; and it was held that the trustee could claim this money before it was paid to the bankrupt, as against creditors subsequent to, and without notice of, the bankruptcy. There the amount due to the bankrupt had been already ascertained, and it was held that the trustee could intervene and obtain it. That was not, however, a decision that the bankrupt could not sue for the money. In both these cases the decision was that the trustee in bankruptcy had a right to intervene

A and claim the money due to the bankrupt. In this action, however, unless and until the trustee intervenes the bankrupt is the proper person to sue; and that is the only question. The judgment of PHILLIMORE, J., was, therefore, right, and this appeal must be dismissed.

B **STIRLING, L.J.**—I am of the same opinion. In this case it is important to observe the sequence of events. There was a contract for a term of years between the plaintiff and the defendants, by which the plaintiff agreed to serve the defendants as a traveller. Then came the bankruptcy of the plaintiff. Then there was the breach of contract by the wrongful dismissal of the plaintiff. Thereupon this action was brought by the plaintiff alone to recover damages for the wrongful dismissal, which has resulted in a verdict in his favour.

C The question now is whether his bankruptcy is an answer to the plaintiff's claim, it not being alleged that the trustee in bankruptcy has in any way intervened. It has been contended for the defendants that the benefit of the contract vested in his trustee upon the bankruptcy of the plaintiff. The question as to what contracts pass to the trustee in bankruptcy was considered in *Gibson v. Carruthers* (4). In that case **PARKE, B.**, said (8 M. & W. at p. 333):

D "There can be no doubt that the effect of the assignment under 6 Geo. 4, c. 16, ss. 12 and 63, is to vest in the assignees, to use the language of **LORD TENTERDEN** in *Wright v. Fairfield* (5), every beneficial matter belonging to the bankrupt's estate, and, amongst the rest, the right of enforcing unexecuted contracts, by which benefit may accrue to that estate, and such as may be performed on the part of the bankrupt by the assignees—such, in short, as would pass as part of his personal estate to his executors if he died, which would not include that description of contract where the personal skill or conduct of the bankrupt would form a material part of the consideration."

E There it was laid down that contracts, in which the personal skill or conduct of the bankrupt formed a material part of the consideration, were excepted from the assignment under the then Bankruptcy Act. If that is good law, there is nothing in any of the later Bankruptcy Acts, or the present Act, to alter that rule. The question, therefore, is whether the law was correctly stated in the judgment of **PARKE, B.**, in that case.

F Not long after the decision in *Gibson v. Carruthers* (4), *Beckham v. Drake* (1) came before the House of Lords. In that case the sequence of events was different; there was first the contract, then the breach of the contract, and then the bankruptcy. It was held in the House of Lords that the cause of action vested in the assignees. The House of Lords was advised by a large number of the judges, many of whom expressed a clear opinion to the same effect as that of **PARKE, B.**, in *Gibson v. Carruthers* (4). In addition to those to which the Master of the Rolls has referred, I would refer particularly to the opinions of **WILLIAMS, J.**, **ERLE, J.**, and **WILDE, C.J.** None of the judges expressed any opinion to the contrary, and, in my opinion, the view expressed by **PARKE, B.**, is correct in principle. This contract was unexecuted; it could not be executed by the trustee in bankruptcy without the co-operation of the bankrupt; and the trustee had no power to compel him to co-operate. It is, therefore, in my opinion, impossible to hold that a contract of this kind vests in the trustee in bankruptcy.

G *Wadling v. Oliphant* (3) and *Emden v. Carte* (2) seem to me to have decided only that the trustee in bankruptcy may intervene and claim the damages which the bankrupt could recover. The trustee in bankruptcy has not intervened. The plaintiff, therefore, was entitled to recover judgment in the action, and this appeal fails.

H **COZENS-HARDY, L.J.**—Upon the question of fact I agree that the verdict cannot be disturbed. Upon the other question, it has been established for many years that, notwithstanding the generality of the language used in the Bankruptcy Acts,

there are some contracts and some rights of action which do not vest in the trustee. For the present purpose it is sufficient to mention contracts for purely personal service. Such unexecuted contracts are not assignable by deed, and they are not, by virtue of the statute, vested in the trustee. If, however, at the date of the bankruptcy a sum of money is due in respect of services rendered under the contract, the trustee will take the money, and not the bankrupt. But as to future services, the bankrupt can sue for his remuneration under the contract, subject only to the right of the trustee to intervene and claim the fruits of the litigation. It is clear that the plaintiff's contract of service did not pass to the trustee. The plaintiff continued to act as traveller after the bankruptcy. The judgment of the Exchequer Chamber in *Beckham v. Drake* (1), and the opinions of the judges who advised the House of Lords in that case, place this beyond doubt. And there was not at the date of the bankruptcy any accrued right of action under the contract which might have vested in the trustee, as in *Beckham v. Drake* (1). So far as I am aware, there is no authority inconsistent with this view. I think that PHILLIMORE, J.'s, decision was correct, and that the appeal fails.

Appeal dismissed.

Solicitors: *Gush, Phillips, Walters & Williams; C. G. Champion.*

[*Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.*]

Re SMITH'S SETTLEMENT. WILKINS v. SMITH

[CHANCERY DIVISION (Swinfen Eady, J.), December 3, 1902]

[Reported [1903] 1 Ch. 373; 72 L.J.Ch. 184; 87 L.T. 740; 41 W.R. 217]

Settlement—Marriage settlement—Construction—Provision for wife's next of kin as if she had died intestate and unmarried—Wife's infant children who survived her—Wife's next of kin.

By a marriage settlement made in 1882, the wife's trust funds were settled on the usual trusts for the wife, husband, and children of the marriage as the husband and wife should jointly appoint, or as the survivor should appoint, or, in default of any appointment, upon the children who being sons attained twenty-one or being daughters attained that age or married, and, in default of children or a child attaining a vested interest, upon trust, if the wife predeceased the husband, for her testamentary appointees, and, in default of such appointment, upon trust for such persons of the blood and kindred of the wife as under the statutes for the distribution of the estates of intestates would have been her next of kin in case she had died intestate and "without ever having been married." The wife died in 1886 intestate, and the husband died in 1899. No joint or several appointment of the wife's trust funds was ever made. There were three children of the marriage, all of whom died infants and unmarried, one in the wife's lifetime, another in the husband's lifetime, and the third in 1901. On a summons taken out for the determination of the question whether the wife's trust funds devolved upon the children who survived the wife, or upon the person who would have been her next of kin if she had never been so married,

Held: the words "without ever having been married" must be construed in their natural sense, and, therefore, her children were excluded.

A Notes. Considered *Dogget v. Washbrough*, [1922] All E.R. Rep. 593. Referred to: *Re Brydone's Settlement*, *Cobb v. Blackburne*, [1903] 2 Ch. 84.

As to trusts in default of issue, see 34 HALSBURY'S LAWS (3rd Edn.) 613-617; and for cases see 40 DIGEST (Repl.) 632-635.

Cases referred to:

- B** (1) *Clarke v. Colls* (1861), 9 H.L. Cas. 601; 11 E.R. 861, H.L.; 40 Digest (Repl.) 634, 1266.
- (2) *Wilson v. Atkinson* (1861), 4 De G.J. & Sm. 455; 4 New Rep. 451; 33 L.J.Ch. 576; 11 L.T. 220; 46 E.R. 995, L.J.J.; 40 Digest (Repl.) 633, 1252.
- (3) *Re Ball's Trust* (1879), 11 Ch.D. 270; 48 L.J.Ch. 279; 40 L.T. 880; 27 W.R. 409; 40 Digest (Repl.) 633, 1254.
- C** (4) *Upton v. Brown* (1879), 12 Ch.D. 872; 48 L.J.Ch. 756; 41 L.T. 340; 28 W.R. 38; 40 Digest (Repl.) 602, 1040.
- (5) *Emmins v. Bradford*, *Johnson v. Emmins* (1880), 13 Ch.D. 493; 49 L.J.Ch. 222; 42 L.T. 45; 28 W.R. 531; 40 Digest (Repl.) 632, 1248.
- (6) *Stoddart v. Saville*, [1894] 1 Ch. 480; 63 L.J.Ch. 467; 70 L.T. 552; 42 W.R. 381; 10 T.L.R. 120; 38 Sol. Jo. 79; 8 R. 372; 40 Digest (Repl.) 633, 1255.
- D** (7) *Re Deane's Trusts*, *Dudley v. Deane*, [1900] 1 L.R. 332; 10 Digest (Repl.) 634, *245.
- (8) *Re Mare*, *Mare v. Howey*, [1902] 2 Ch. 112; 71 L.J.Ch. 649; 87 L.T. 41; 46 Sol. Jo. 230; 40 Digest (Repl.) 633, 1256.

Also referred to in argument:

E *Re Arden's Settlement* (1890), 25 L.J.N.C. 147; 40 Digest (Repl.) 634, 1262.

Originating Summons to determine the construction of the words "without ever having been married."

By a settlement dated Feb. 15, 1882, and made in consideration of the marriage then intended and shortly afterwards solemnised between George William Cook, since deceased, and Harriet Cook, then Harriet Smith, spinster, the sum of £3,000, **F** to which Harriet Cook was entitled on the death of her father, contingently upon her surviving him, was assigned to trustees upon trust, after the death of the survivor of George William Cook and Harriet Cook

G "For all or such one or more exclusively of the other or others of the children or issue of the said Harriet Smith to be born during the lives of the said Harriet Smith and George William Cook or the survivor of them or within twenty-one years after the death of such survivor at such age or time or respective times or ages if more than one and in such shares and with future executory or other trusts for the benefit of such children or issue or some or one of them or with such restrictions, limitations, and provisions for the respective maintenance, education, and advancement or benefit of such child or children or issue as the said Harriet Smith and George William Cook shall by any deed or writing with or without power of revocation or new appointment jointly appoint, and in default of such appointment, and so far as the same shall not extend, then as the survivor of them shall in like manner or by his or her will or codicil and as to the said Harriet Smith notwithstanding any future succeeding coverture appoint, but so that no child or issue shall take an absolute interest under any such **H** appointment (unless being a male he shall attain the age of twenty-one years or being a female she shall attain that age or marry), and in default of any such appointment and so far as any such appointment shall not extend in trust for all the children or any the child of the said Harriet Smith who being sons or a son shall attain the age of twenty-one years or being daughters or a daughter shall attain that age or marry under that age, and if more than one in equal shares as tenants in common. . . . Provided also and it is hereby declared and agreed that if there shall be no child of the said Harriet Smith who being a son or sons shall attain the age of twenty-one years or being a daughter or **I**

daughters shall attain that age or marry, then, subject and without prejudice to the trusts hereinbefore declared, the said trustees shall stand possessed of the said trust funds and the annual income thereof, or so much thereof respectively as shall not have become vested or applied under any of the trusts or powers herein contained, upon trust if the said Harriet Smith shall survive the said George William Cook for herself, her executors, administrators, and assigns, but if the said Harriet Smith shall die in the lifetime of the said George William Cook, then upon trust to pay and transfer the same to such person or persons for such estate or estates and with, under, and subject to such powers, provisions, and declarations as the said Harriet Smith notwithstanding her coverture shall by will direct or appoint, and in default of any such direction or appointment and so far as any such (if made) shall not extend upon trust for such person or persons of the blood and kindred of the said Harriet Smith as under the statutes for the distribution of the estates of intestates would have been the next of kin of the said Harriet Smith in case she had died intestate and without ever having been married."

On Feb. 22, 1882, William Smith died, and the sum of £3,000 comprised in the marriage settlement was paid to the trustees thereof, and was now in the hands of the surviving trustee. On June 6, 1885, Harriet Cook died intestate without having concurred with her husband in exercising the joint power of appointment conferred by the marriage settlement. In December, 1899, George William Cook died without exercising the power of appointment vested in him as survivor. There were issue of the marriage three children and no more, all of whom died infants and unmarried—viz., Mabel Cook, who died in the lifetime of Harriet Cook; George William Cook the younger, who survived Harriet Cook and died in his father's lifetime; and Elsie Maud Cook, who died in October, 1901.

This was an originating summons taken out under Ord. 55, r. 3, by the surviving trustee of the marriage settlement for the determination of the question whether upon the true construction of the marriage settlement and in the events which had happened the trust funds comprised therein devolved on the death of George William Cook the elder on George William Cook the younger and Elsie Maud Cook, or upon the persons who would have been the next of kin under the statutes of distribution of Harriet Cook if she had never been married or upon whom the property devolved, and in what shares and proportions.

F. Thompson for the plaintiff.

G. R. Northcote for the representative of the children of Harriet Cook.

Rolt for the next of kin of Harriet Cook.

SWINFEN EADY, J., stated the facts and continued.—I shall construe the words of the settlement "without ever having been married" in their ordinary natural sense, as meaning as if the lady had no children, unless I am compelled to place a technical construction on those words as possessing a fixed technical meaning.

It is said that a rule is established by *Wilson v. Atkinson* (2), that in the case of a marriage settlement these words must not be so construed as to exclude children of the marriage. There the settlement after the trust for such person or persons as under the Statutes for the Distribution of the Effects of Intestates would have become entitled to the trust fund at the decease of the wife, if she had died possessed thereof intestate and without having been married, contained a declaration that an illegitimate daughter of the wife should for the purposes of that trust be deemed to be a lawful child of the wife. I do not understand either **Knight-Bruce, L.J.**, or **TURNER, L.J.**, to lay down any general rule of construction of the words "without having been married" applicable to all marriage settlements irrespective of their other provisions. Then in *Re Ball's Trust* (3), **Fry, J.**, felt himself constrained by the decision of the Court of Appeal in *Wilson v. Atkinson* (2) to decide that the words "without having been married" did not exclude the lawful child of the marriage.

A In *Re Ball's Trust* (3) the marriage settlement did not contain any provision for the children of the marriage, nor any indication that they were to take under it. In his judgment in *Upton v. Brown* (4) FRY, J., said (12 Ch.D. at pp. 878, 879):

B "It is true that in the present case there is that which did not occur in *Wilson v. Atkinson* (2), viz., an express provision for the children of the marriage and the child of the former marriage in the event of their attaining twenty-one. But there is nothing inconsistent in first giving a child an interest if he attains twenty-one, and then afterwards giving him an interest if he dies under twenty-one, contingently upon his mother's not making a will in favour of someone else. Moreover, if I were to hold that this child is excluded, I must equally have held that his children were excluded if he had married and had died under twenty-one leaving children, and I must equally have excluded children of a third marriage of the mother for whom the settlement makes no express provision. Such considerations as these have influenced the courts in holding that under similar limitations children of the marriage are not excluded, and I think I should not be giving effect to the real principle of the decision of the Court of Appeal in *Wilson v. Atkinson* (2) if I were to hold that George Upton is excluded."

D These two cases before FRY, J., were considered by SIR GEORGE JESSEL, M.R., in *Emmins v. Bradford*, *Johnson v. Emmins* (5), who said that in them FRY, J., came to the conclusion that in *Wilson v. Atkinson* (2) the Court of Appeal laid down a general rule of construction which he was bound to follow, whereas that decision depended upon the context, and no general rule was there laid down, and
E stated that until some higher court laid down some general principle of construction he should not interfere with unambiguous words. The decision of SIR GEORGE JESSEL, M.R., in *Emmins v. Bradford*, *Johnson v. Emmins* (5) was a very strong one, because it excluded the children of the lady by her former marriage, although the settlement contained a recital that she had those children, but made no other reference to them. In *Stoddart v. Saville* (6) CHITTY, J., followed FRY, J., but it
F will be observed that there the settlement contained no trusts for children or issue of the marriage as in the present case. In addition to these cases and *Re Deane's Trusts* (7), there is the recent decision of KEKEWICH, J., in *Re Marc*, *Marc v. Howey* (8), who held that the point was concluded by *Wilson v. Atkinson* (2), and that he was bound to follow that decision.

G These cases do not lay down any general rule binding me to construe the words "without ever having been married" as excluding the husband only and not the children. Where, as here, the settlement contains a provision for children of the marriage who being sons attain twenty-one or being daughters attain that age or marry under that age, and then a gift over in default of such children, it was difficult to say that the intention was only to exclude the husband, and that children not taking a vested interest under the gift to them were intended to take under the
H gift over, a construction which would sometimes merely carry the property to the husband and defeat the supposed object of the gift over—namely, to exclude the husband as well in his own right as in right of his children. I should be departing from the plain language of the gift over if I construed the words "without ever having been married" as not excluding the children of the marriage. And, under the circumstances, as I am not compelled by any rule of construction to interpret
I the words of the gift over in such a way as to include the children of the marriage, I shall construe them in their natural sense, and hold that the children of the marriage are excluded.

Solicitors: Field, Roscoe & Co., for Griffiths, Ryland & Co., Cheltenham.

[Reported by J. TRUSTAM, ESQ., Barrister-at-Law.]

STOCK v. MEAKIN

[COURT OF APPEAL (Sir Nathaniel Lindley, M.R., Rigby and Vaughan Williams, L.JJ.), February 27, 28, March 5, 19, 1900]

[Reported [1900] 1 Ch. 683; 69 L.J.Ch. 401; 82 L.T. 248; 48 W.R. 420;
16 T.L.R. 284]

Street—Private street works—Expenses—Apportionment—Charge on premises—Date from which charge operates—Private Street Works Act, 1892 (55 & 56 Vict., c. 57), s. 13.

A claim by a local authority for expenses in respect of works under the Private Street Works Act, 1892, is a charge on the premises in respect of which an apportionment is made dating from the completion of the works and not from the date of the final apportionment of the expenses by the local authority.

Notes. Section 13 (1) of the Private Street Works Act, 1892, has been repealed and replaced by s. 181 (2) of the Highways Act, 1959. The section as re-enacted, though drafted in similar terms to the repealed provision, contains no reference to the provision of the Highways Act, 1959, which corresponds to s. 257 of the Public Health Act, 1875, i.e., s. 264 (1) of the 1959 Act. It is submitted, however, that this does not affect the validity of this decision.

Followed: *Surtess v. Woodhouse*, [1903] 1 K.B. 396. Applied: *Re Allen and Driscoll's Contract*, [1904] 2 Ch. 226. Distinguished: *Re Farrer and Gilbert's Contract*, [1914] 1 Ch. 125. Referred to: *Re Leyland and Taylor* (1900), 69 L.J.Ch. 764; *Re Waterhouse's Contract* (1900), 44 Sol. Jo. 645; *Lumby v. Faupel* (1903), 88 L.T. 562; *Dennistrey v. Prestwich U.D.C.*, [1929] All E.R. Rep. 647; *Chivers & Sons, Ltd. v. Secretary of State for Air*, [1955] 2 All E.R. 607.

As to recovery of expenses by local authority, see 19 HALSEBURY'S LAWS (3rd Edn.) 434, 447, 448; for cases see 26 DIGEST (Repl.) 607, 619. For the Highways Act, 1959, ss. 180, 181, 189, 190, 264, see 39 HALSEBURY'S STATUTES (2nd Edn.) 606, 607, 612, 613, 682.

Case referred to:

(1) *Re Bettlesworth and Richer* (1888), 37 Ch.D. 535; 57 L.J.Ch. 749; 58 L.T. 796; 52 J.P. 740; 36 W.R. 544; 4 T.L.R. 248; 26 Digest (Repl.) 607, 2618.

Appeal from a decision of KEREWICH, J., reported [1899] 2 Ch. 496, in an action brought by the purchaser of freehold property sold by the vendor as beneficial owner and free from incumbrances to be indemnified by the vendor against the sum of £130 14s. claimed by the urban sanitary authority under the Private Street Works Act, 1892.

On July 27, 1897, the council of the county borough of West Ham passed a resolution authorising the execution of certain works under the Private Street Works Act, 1892, in a street within their district called Queen's Road. The works were completed on July 26, 1898. By an agreement dated Oct. 10, 1898, the vendor agreed to sell certain freehold property abutting on Queen's Road to the purchaser. The date fixed for the completion of the purchase was Nov. 11, 1898, and the purchase money was paid by the purchaser and the conveyance completed on Nov. 22, 1898. The vendor conveyed as beneficial owner and the conveyance recited that the vendor had agreed to sell to the purchaser free from incumbrances.

The final apportionment of expenses in respect of the works was made on Nov. 29, 1898, and on Dec. 29, 1898, notice of the final apportionment was sent to the purchaser. The purchaser paid the sum charged on the property and brought this action to recover the said sum from the vendor. KEREWICH, J., held that the apportioned sum became a charge on the property from the date of the completion of the works and was, therefore, an encumbrance existing at the date of the con-

A very much to the purchaser which the vendor was, under his implied covenant against encumbrances, bound to discharge. The vendor appealed.

By the Private Street Works Act, 1892, s. 1 :

"This Act may be cited as the Private Street Works Act, 1892, and shall be construed as one with the Public Health Acts . . . and this Act and the Public Health Acts may be cited together as the Public Health Acts."

By s. 13 (1) :

"Section 13 (1). Any premises included in the final apportionment, and all estates and interests from time to time therein, shall stand and remain charged [to the like extent and effect as under s. 257 of the Public Health Act, 1875] with the sum finally apportioned on them, or, if objection has been made against the final apportionment, with the sum determined to be due as from the date of the final apportionment with interest. . . ."

By the Public Health Act, 1875, s. 257 :

"Section 257. Where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred, is made liable under this Act or by any agreement with the local authority, such expenses may be recovered together with interest . . . from the date of service of a demand for the same till payment thereof from any person who is the owner of such premises when the works are completed for which such expenses have been incurred and until recovery of such expenses and interest, the same shall be a charge on the premises in respect of which they were incurred. . . ."

Warrington, *Q.C.*, and *Vaughan Hawkins* for the vendor.

P. O. Lawrence, Q.C., and *P. F. Wheeler* for the purchaser.

Cur. adv. vult.

F Mar. 19, 1900. **VAUGHAN WILLIAMS, L.J.**, read the following judgment of the court.—The question is whether the vendor of a piece of land at West Ham is liable to indemnify the purchaser against the sum of £130 14s. claimed by the urban sanitary authority as expenses of works executed by such authority under the Private Street Works Act, 1892.

G If the charge had been a charge for expenses incurred by the local authority under the Public Health Act, 1875, there is no doubt but that such a charge would, having regard to the dates of the agreement to purchase and the conveyance on the one hand and the date of the execution of the works on the other, have been a charge against which the vendor would have had to indemnify the purchaser. The charge under the Public Health Act, 1875, however, is a charge which can only arise on failure of the owner of the land to comply with the notice of the urban authority and the execution by the urban authority of such works by reason of such default by the landowner, and is, moreover, a charge taking effect from the date of the completion of the works, whereas the charge under the Private Street Works Act, 1892, certainly is not a charge arising on default of the landowner, and it is argued is not a charge from the date of the completion of the works. It becomes necessary, therefore, to consider from what date the charge under the Act of 1892 takes effect, and whether the fact that the charge does not arise on default of the landowner makes any difference in the obligations of the vendor towards the purchaser, and this makes it necessary to consider the terms of the material sections of the Acts of 1875 and 1892.

I Under s. 257 of the Public Health Act, 1875, the expenses incurred by the local authority, for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable by that Act (i.e., by s. 150 [now ss. 189, 190 (1) of the Highways Act, 1959]), may be recovered from any person who is the

owner of such premises when the works are completed for which such expenses have been incurred, and until recovery such expenses are made a charge on the premises in respect of which they were incurred, and it was held in *Re Belleanworth and Richer* that the expenses became a charge upon the completion of the works, and that this was so notwithstanding the fact that the owner could not be compelled to pay until the cost had been made out and apportioned. In other words, the charge was held to be subsisting although it could not be enforced until the provision in the last paragraph but one of s. 257 had been worked out, i.e., until the apportionment of the expenses had become binding by the lapse of three months after notice of apportionment without any written notice of dispute being given by the owner.

This decision turned entirely on the words of ss. 150 and 257, which plainly gave a charge so soon as the works had been completed and the expenses incurred by the local authority on the failure of the owner of the land to execute the works in compliance with a notice served in pursuance of the powers given by s. 150. The charge which has to be considered in the present case is given by s. 13 of the Private Street Works Act, 1892, and we have to determine if this charge, like the charge under the Public Health Act, 1875, takes effect from the time of the completion of the works. We think it does. The Act of 1892 is by s. 1 to be read as one with the Public Health Acts, of which the Act of 1875 is the principal Act, and the charge created by s. 13 of the Act of 1892 is to be a charge to the like extent and effect as under s. 257 of the Act of 1875. It seems to us to follow, unless there is in s. 13 or some other section of the Act of 1892 something clearly to the contrary, the charge under s. 13 will take effect, like a charge under the Act of 1875, from the time of the completion of the works the expenses of which are charged; but it is said that s. 13 itself makes express provision to the contrary, because it says,

"any premises included in the final apportionment, and all estates and interests from time to time therein shall stand and remain charged . . . with the sum finally apportioned on them, or if objection has been made against the final apportionment with the sum determined to be due as from the date of the final apportionment, with interest at the rate of 4 per cent. per annum."

It is said that the effect of these words is that there is no charge until the date of the final apportionment, and therefore not from the date of the completion of the works. We cannot agree to this contention. We think that the effect of these words is, first, to provide that the amount of the charge shall be that fixed by the final apportionment or in case of objection by the determination of the objection; and, secondly, interest is to run on the sum ultimately fixed from the date of the final apportionment. In other words, that the owner of the land is not by his objection to the final apportionment to escape interest on the sum finally fixed between the date of the final apportionment and the date of the final determination of the objection. We think, therefore, that there is nothing in s. 13 to prevent the charge taking effect from the completion of the works, and when the whole Act of 1892 is considered we find a great deal to lead to the conclusion that the Act means that the charge shall date from the completion of the works, and not from the final apportionment.

In the first place, there is the general consideration that it is not likely that the legislature should have intended the charge to date from the final apportionment, because the final apportionment is an event the date of which can be fixed quite arbitrarily by the officers of the local authority. Moreover, to make the charge commence with the completion of the works is to make the charge coincide with the benefit. In the next place, the whole scheme of the Act points to a charge being intended prior to the final apportionment. First, there is the provisional apportionment of the estimated expenses on the premises liable to be charged. This, subject to objections to be made within a month, fixes the premises to be charged and the proportions to be borne. All this has to be done before the works are executed. Then s. 12 (now s. 180 of the Highways Act, 1959) provides :

A "When any private street works have been completed, and the expenses thereof ascertained, the surveyor shall make a final apportionment by dividing the expenses in the same proportions in which the estimated expenses were divided in the original or amended provisional apportionment (as the case may be)."

B These words are, in our judgment, strong to show that on the completion of the works the expenses become a charge on ascertained premises in ascertained proportions. There is no appeal against this, and the final apportionment is a mere arithmetical process for the purpose of dividing these expenses in these proportions. The final apportionment is not a condition precedent to the obligation to bear these expenses in these proportions. The obligation exists before the final apportionment is made. The final apportionment merely works out the division of these expenses in these proportions amongst the premises charged. The objections which, by C sub-s. (2) of s. 12 (now s. 180 (2) of the Highways Act, 1959) can be taken after final apportionment are not objections to the proportions or to the inclusion or exclusion of particular premises amongst those charged (all these objections have to be made before the works are executed), but are either objections that the proportions have not been followed or are objections to the totals of the expenses to be divided. All this statutory machinery seems to us to point to the charge taking D effect from the completion of the works. The charge takes effect under the Act of 1875 before the apportionment is made, and in our judgment it is intended that it shall be so under the Act of 1892. If this view is right, we have no doubt but that this charge is an outgoing which the vendor was bound by his contract to discharge. We also have no doubt but that the charge is an incumbrance claim or demand E suffered by the vendor, notwithstanding the fact that the expenses were incurred without any default on his part, and that the time for payment had not arrived before the conveyance was executed; nor have we any doubt but that this charge is inconsistent with the express terms of the conveyance. We think, therefore, that this appeal should be dismissed with costs.

Appeal dismissed.

F Solicitors : Farrer & Co.; George Brown, Son & Vardy.

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]

NOTTINGHAM PERMANENT BENEFIT BUILDING SOCIETY v. THURSTAN

[House of Lords (The Earl of Halsbury, L.C., Lord Shand, Lord Davey and Lord Robertson), November 13, 1902]

[Reported [1903] A.C. 6; 72 L.J.Ch. 134; 87 L.T. 529; 67 J.P. 129; 51 W.R. 273; 19 T.L.R. 54]

Building Society—Member—Capacity of infant to be a member—Mortgage by infant to secure advances—Validity—Society's lien in law.

An infant became a member of a building society and obtained an advance, part of which was paid by the society to the vendor of a piece of land which the infant had agreed to purchase, the remainder being expended on improvements on the land. The infant gave a mortgage in the ordinary form of a building society's mortgage to secure the advances and interest.

Held: an infant might be a member of a building society the rules of which did not prohibit such admission, but he could not execute a valid mortgage to secure advances made to him by the society, and, therefore, under the Infants' Relief Act, 1874, s. 1, such a mortgage was void as against the infant; the society, however, had a lien on the land for that portion of the advance which had been paid to the vendor.

Decision of the Court of Appeal, [1901] 1 Ch. 1, affirmed.

Notes. As to advances in general by building societies, see 3 HALSBURY'S LAWS (3rd Edn.) 591; and for cases see 7 DIGEST (Repl.) 495-497. For s. 38 of the Building Societies Act, 1874, see 2 HALSBURY'S STATUTES (2nd Edn.) 644. and for s. 1 of the Infants' Relief Act, 1874, see *ibid.*, vol. 12, p. 940.

Cases referred to in argument:

Dennison v. Jeffs, [1896] 1 Ch. 611; 65 L.J.Ch. 435; 74 L.T. 270; 44 W.R. 476; 12 T.L.R. 251; 40 Sol. Jo. 335; 7 Digest (Repl.) 530, 325.

North Western Rail. Co. v. McMichael, *Birkenhead, Lancashire and Cheshire Junction Rail. Co. v. Pilcher* (1850), 5 Exch. 114; 6 Ry. & Can. Cas. 618; 15 Jur. 132; 155 E.R. 49; sub nom. *London and North Western Rail. Co. v. McMichael*, *Birkenhead, Lancashire and Cheshire Junction Rail. Co. v. Pilcher*, 20 L.J.Ex. 97; 16 L.T.O.S. 440; 28 Digest (Repl.) 503, 194.

Davey v. Durrant, *Smith v. Durrant* (1857), 1 De G. & J. 535; 26 L.J.Ch. 830; 6 W.R. 405; 44 E.R. 830, L.J.J.; 35 Digest 489, 2216.

Appeal from a decision of the Court of Appeal (VAUGHAN WILLIAMS, ROMER, and COZENS-HARDY, L.J.J.), reported [1902] 1 Ch. 1, who had varied a decision of JORCE, J., reported [1901] 1 Ch. 88, in favour of the appellants, the defendants in the action.

The respondent, who was plaintiff in the action, was married to Alfred Thurstan, a builder, on Mar. 9, 1898. She was then a minor, and did not attain her majority until Mar. 25, 1900. In June, 1898, she had become a member of the appellants' society—which did not exclude minors from membership—in respect of twelve shares, on which, under the rules, an advance of £1.200 could be claimed from the society. On Mar. 21, 1898, Mrs. Thurstan signed an agreement with Horatio Davis Davies and others for the purchase from them for £276 18s. 9d. of a piece of land at West Bridgford, Nottingham. The land was conveyed to Mrs. Thurstan by an indenture of July 21, 1898, and the total amount required was £397. This money was provided by the appellants, and was expressed to be paid by the respondent out of her separate estate. On July 22, 1898, the respondent executed a mortgage to the society of the land purchased and the buildings in course of erection thereon

A amount of £1,200. This money, under the provision for redemption, was to be repaid, not in the usual form of a mortgage, but by monthly subscriptions of £10 4s. each.

B It was not until October, 1898, that the society discovered that Mrs. Thurstan was still under age, and thereupon they entered into possession of the property. No default had been made by the respondent in performing her obligations under the rules of the mortgage. The appellant society went on with the completion of the buildings and alleged that they had expended upwards of £1,300. Ineffectual attempts were made for a settlement between the society and the respondent, and the latter on April 7, 1900, brought an action in the Chancery Division for a declaration that the mortgage was void and not binding upon her, and that she was entitled to have it delivered to her and cancelled. She did not, however, dispute the claim of the appellants that they were entitled to a lien for £397, the purchase money and expenses.

C *JOYCE, J.*, being of opinion that the whole series of events constituted one transaction, and that she was attempting to keep property which had been entirely purchased by the money of the society, dismissed the action. The Court of Appeal, while giving effect to the lien, held the mortgage void and directed the appellants to deliver it up to the respondent to be cancelled.

D The Infants' Relief Act, 1874, s. 1, enacts that contracts entered into by infants, except for necessaries, are to be void, and that no action is to be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy. The Building Societies Act, 1874, s. 38, enacts :

E "Any person under the age of twenty-one years may be admitted as a member of any society under this Act, the rules of which do not prohibit such admission, and may give all necessary acquittances, but during his non-age he shall not be competent to vote or hold any office in the society."

There was no cross-appeal.

F *Hughes, K.C.*, and *G. Broke Freeman* for the appellants.
Badcock, K.C., and *E. Ford*, for the respondent.

THE EARL OF HALSBURY, L.C.—I cannot doubt that the judgment of the Court of Appeal was right, and I move your Lordships that the appeal be dismissed with costs.

G The question seems to me to turn entirely upon the Infants' Relief Act, 1874. That Act has, in terms, made the instrument which is put forward by the society as their security, and the foundation of their claim, absolutely void. The result is that there is no such obligation as has been insisted on at the Bar against the respondent. *JOYCE, J.*, would not have disagreed with that proposition, but he gets out of the application of it by using a phrase which covers up the weakness of the argument. He says that what the court below, and your Lordships here, are disposed to affirm, the right of the society to stand in the shoes of the vendor because they, as agents for the lady, paid the purchase money, is a transaction which is not set aside and rendered void by the Act of 1874, and that is true. But then, in order to justify the judgment which he gave entirely against the respondent, he says: "But it is all one transaction, and this" (what I have now been describing) "being perfectly valid notwithstanding the Act, the whole claim must be rejected."

I That seems to be covering up in language things which are in their nature distinct. It is not true to say that it is one transaction. If it were meant that all the parties contemplated the things that were afterwards done, it is possible that it may be true, although there is not much evidence of it; but I will assume that it was so. What then? In order to make it one transaction so as to avoid the vice of infringing the Act of 1874, the transaction you are dealing with must be one which avoids that vice. The transaction is a totally different transaction,

according to the history of the matters as they occurred. There is one transaction in which, on behalf of the respondent, the building society buys from a stranger—I mean a stranger in the legal sense—land which belonged to that stranger. That stranger, at the instance of the society, conveys to this lady that land. Putting your finger upon that part of the transaction, what is there done is an absolutely separate transaction. The parties to it are different, and the nature of the transaction is different. It is a purchase of land. Then, in order to build upon that land, in order to make it available for the purpose for which the respondent desired it, money is borrowed from the society, and that money is secured by a mortgage on that which, by the transaction which I have just described, has become the property of the respondent. You cannot help analysing the transaction for this purpose, and, so far as this part of the money now claimed is concerned, the only thing that one can say is that it is money borrowed. I agree that it is money borrowed for a particular purpose, but it is money borrowed, and the claim, in substance as well as in form, is that that money should be repaid. Therefore, it is money borrowed by a minor; whether it is secured by a mortgage deed, or whether it is by mere parol, it is money lent by one of the parties to the other, a minor, and now reclaimed from the minor. That is within the express language of the Infants' Relief Act, and how it can be suggested that it is the same transaction as that which I have previously described, so as to cure the illegality of that part of it, I am not able to follow.

Then if we come to that which is the substance of the matter, what can be clearer than this, that if the original thing without the mortgage is in itself void, you can neither make it better nor worse by the fact of there being a mortgage? Nor can you dismiss the mortgage, which is the only security that this society possessed, and say that simply as a member of the society the lady is liable to pay. The answer to that is in a word—there is no necessity for a member of the society to borrow at all. It is not a necessary part of a member's function as a member of the society to borrow, and therefore, the two Acts of Parliament, the Building Societies Act, 1874, which legalises a minor becoming a member, and the Infants' Relief Act, 1874, which renders the transaction of a minor borrowing money and having to repay it absolutely void, are quite reconcilable. The minor might be a member without having any necessity to borrow. Under those circumstances there is no answer to the judgment of the Court of Appeal, which affirms the subrogated right of the society to be repaid the money which they, standing in the shoes of the vendor, would have a right to claim as a lien upon the property conveyed. On the other hand, it is hopeless to attempt to get rid of the express language of the statute, which renders the loan, and the mortgage which was the security for the loan, absolutely and entirely void. For these reasons the appeal must be dismissed, and the judgment appealed from affirmed.

LORD SHAND.—I am of the same opinion. I am scarcely justified in interposing to add anything to what has been already said; but in the vendors' lien to which this society succeeded, and had a right to succeed, in respect of the payment which they originally made, there was good ground of judgment so far as regards the sum paid for the purchase of the property, and the judgment in the appellants' favour is right, so far as that goes. But I agree with your Lordships that, while the society will take the benefit of that payment in succeeding to the vendor's lien, they cannot succeed on any other part of the case. I agree with the unanimous view of the Court of Appeal, that the money which was got and used for the purpose of making improvements on the property, or rather of adding buildings on the solum of the property, was really an advance to this lady during her minority, and consequently that she was not liable for the repayment of it, and, further, that the mortgage which she granted was bad, and not in any sense a good security for the repayment of that money. These advances are expressly struck at by the provision in the Infants' Relief Act, which was passed a few

A days after the Building Societies Act. That being so, I see no answer, as ROMER, L.J., has said, to the Infants' Relief Act. The language of that Act is too strong for the suggestion that the building society is to take the benefit of these advances. I do not see any possible answer to that Act. Therefore, I agree with your Lordships; and, for the reasons clearly stated by the judges in the court below, I am of opinion that this judgment ought to be affirmed.

B

LORD DAVEY.—The opinions which have just been delivered by your Lordships who have preceded me, and the judgments delivered in the Court of Appeal, have entirely exhausted the subject, and I will only add this, that JOYCE, J., if he had not been misled by the impression that the transactions in question in this litigation could all be treated as parts of one transaction, would have been of the same opinion also. The learned judge thought that the transactions of purchase and of mortgage were all parts of one transaction, and that the lady, the minor, could not repudiate the mortgage transaction without repudiating in toto. It has already been pointed out that the transaction between the vendor and the purchaser is one thing, and the transaction between the purchaser who acquires the property and the mortgagee is another thing. The transaction is simply this: a person without any means of her own contracts to buy a property; before the purchase is completed she is called upon to pay the purchase money, and she goes to a money-lender, or, as in the present instance, to a building society, persons willing to advance the money on some terms, and she obtains a sufficient advance to enable her to complete the purchase. That seems to be a very simple transaction. Then the loan is so framed as to include a further sum of money to enable the purchaser to commence building operations on the land also. The transaction with the vendor was complete when the purchase money was paid to him, and the transaction between the purchaser and the mortgagee was one with which the vendor had no concern whatever.

E

The only question of general importance in the case is the question how far the permission which s. 38 of the Building Societies Act, 1874, gives for an infant to be a member of a building society authorises the infant to do in relation to his or her membership everything which an adult could do. It is argued that the Act having enabled an infant to become a member has, by implication, enabled and empowered an infant to contract to pay his or her fines, and to enjoy all the privileges of membership, including that of obtaining an advance, and it is said, on the principle, I suppose, that *generalia specialibus non derogant*, that this is so notwithstanding the absolute and positive declaration in the Infants' Relief Act of the same year that contracts by an infant for the repayment of money borrowed are void. I am not of that opinion. It is not necessary, as has been pointed out in the judgments in the court below, that a member of a building society should obtain an advance. He may be a member without obtaining an advance; it is entirely in his own option whether he will obtain an advance or not, and that option, as has been pointed out by ROMER, L.J., can only be exercised on the condition that he is able to comply with the requirements or conditions on which alone an advance is given, one of which is that he shall be able to make an effectual mortgage to the society. He may possibly obtain an advance by giving a mortgage by some friend or relation, but if he cannot do that inasmuch as the law prevents an infant from entering into a contract for the repayment of money borrowed, he cannot exercise that particular privilege of obtaining an advance until he becomes of age, simply because he is unable by law to comply with the conditions upon which alone that advance can be made.

F

H

I

It is said that the mortgage is not for the repayment of money borrowed, but for the repayment of instalments in respect of the shares. In form it is so, but when the value of the share, as it is called, has been advanced, those payments on the share assume and bear the character of repayment of money borrowed; and it would be trifling with the plain words of the Infants' Relief Act, 1874, if we

said that an infant might contract for the repayment of a loan in that form by calling it payments on the share. On the whole, I agree so entirely with the judgments which have been delivered, and I am so well satisfied with the reasoning of ROMER, L.J., in his judgment, with every word of which I agree, that I ought not to trouble your Lordships at any greater length. A

LORD ROBERTSON.—I entirely agree. B

Appeal dismissed.

Solicitors: Peacock & Goddard, for Rothera & Sons, Nottingham; Benjuss & Benjuss.

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.] C

GREENOCK STEAMSHIP CO. v. MARITIME INSURANCE CO. D

[COURT OF APPEAL (Vaughan Williams, Romer and Stirling, L.JJ.), August 4, 5, 6, 1903]

Reported [1903] 2 K.B. 657; 72 L.J.K.B. 868; 89 L.T. 200; 52 W.R. 186;
19 T.L.R. 680; 47 Sol. Jo. 761; 9 Asp.M.L.C. 463; 9 Com. Cas. 41] E

Insurance—Marine insurance—Voyage policy—"Held covered in case of any breach of warranty at premium to be hereafter arranged"—Breach of warranty of seaworthiness—No premium arranged—Liability of insurers.

The plaintiffs, shipowners, insured their steamship with the defendants, a marine insurance company, for a round voyage from the United Kingdom to the west coast of South America with leave to stop for any purpose at any port or ports on the east coast. The perils insured against were perils of the seas, etc., subject to clauses annexed to the policy, which provided, inter alia, that the insurance was "also to cover loss through the negligence of master, mariners, engineers or pilots. . . . Held covered in case of any breach of warranty, deviation, and/or any unprovided incidental risk . . . at a premium to be hereafter arranged." During the voyage the ship called at M. and through the negligence of the master sailed thence without sufficient coal on board to take her to S., her next place of call, where normally she would refuel. It was necessary to burn as fuel some of the fittings, spars and cargo to avoid a total loss of the ship and cargo. The plaintiffs did not know of the lack of fuel until the ship had reached S. and no premium had been arranged under the "held covered" clause. In an action by the plaintiffs on the policy to recover in respect of the loss of the fittings, spars and cargo, F

Held: the policy was a "voyage policy" and the voyage was divisible into stages for the purpose of refuelling and fulfilling the implied warranty of seaworthiness; as the ship had insufficient coal to carry her to the next stage of her journey, the plaintiffs had broken the implied warranty that she was seaworthy for that stage; and the "held covered" clause did not come into operation as no premium had been arranged. G

The Vortigern (1), [1899] p. 140, applied. H

Notes. The statutory provisions as to warranties of seaworthiness are now contained in the Marine Insurance Act, 1906, s. 39. I

Referred to: *Northumbrian Shipping Co. v. E. Timm & Son, Ltd.*, [1939] 2 All E.R. 648; *Marine Insurance Co. v. Grimmer*, [1944] 1 All E.R. 353.

- A As to warranties in marine insurance policies, see 22 HALSBURY'S LAWS (3rd Edn.) 29 et seq.; and for cases, see 29 DIGEST 186 et seq. For the Marine Insurance Act, 1906, s. 39, see 13 HALSBURY'S STATUTES (2nd Edn.) 33.

Case referred to:

- (1) *The Yortigco*, (1899) P. 140; 68 L.J.P. 49; 80 L.T. 382; 47 W.R. 437; 15 T.L.R. 259; 8 Asp.M.L.C. 523; 4 Com. Cas. 152, C.A.; 29 Digest 192, 1517.

Appeal by the plaintiffs from a decision of BIGHAM, J.

The action was tried before the learned judge, sitting in the Commercial Court, upon the following statement of facts agreed by the plaintiffs and the defendants:—

- C The plaintiffs were the owners of the steamship *Gulf of Florida*, and the defendants were a marine insurance company who had insured the steamship by a policy dated July 19, 1897. The more important terms of the policy were as follows:

- D "For £3,000 on the *Gulf of Florida* valued at £30,000. At and from . . . to port or ports in any order in the United Kingdom and/or Continent between Bordeaux and Hamburg, both inclusive, and while there and thence to port or ports, place or places on west coast of South America, backwards and forwards, and forwards and backwards, in any order or rotation, while there and thence to port or ports of call and/or discharge in any order in the United Kingdom and/or Continent between Bordeaux and Hamburg, both inclusive, and while there, however employed, until expiry of thirty days after arrival or until sailing on next voyage, whichever may first occur; with
- E leave to call at any ports and places for all purposes, and any ports and places on the east coast of South America and/or Falkland Islands, both outwards and homewards. The risk not to commence before the expiration of previous policies; against the risk of total loss only but including collision clause, general average and salvage charges. Perils insured against of the seas, etc. Subject to and including Gulf Line voyage clauses as annexed."

- F Such clauses were, so far as material, as follows:

- G "This insurance also to cover loss through the negligence of master, mariners, engineers, or pilots. Including all risks incidental to steam navigation. General average salvage and special charges payable as per official foreign adjustment, if so made up, or per York-Antwerp Rules, 1890, if in accordance with the contract of affreightment. Held covered in case of any breach of warranty, deviation, and/or any unprovided incidental risk or change of voyage, at a premium to be hereafter arranged. It shall be lawful to the assured, their factors, servants, and assigns, to sue, labour and travel for, in and about the defence, safeguard, and recovery of the said ship, etc., and any part thereof without prejudice to this insurance, to the charges whereof we, the assurers,
- H will contribute each according to the rate or quantity of this sum herein insured. In the event of any inaccuracy in the description of voyage, interest, name of vessel, clauses, or conditions, it is agreed to hold the assured covered at a premium to be arranged."

- I The previous policies, before the expiration of which the risk was not to commence, were all in similar terms. One of them was dated Jan. 1, 1897, and was subscribed by the defendants.

The events giving rise to disputes between the parties took place after the *Gulf of Florida* left Monte Video on Dec. 18, 1897. Stated shortly, they were as follows:—On arrival at Monte Video the *Gulf of Florida* had on board 232 tons of bunker coals. She took on board a further 330 tons, and sailed on Dec. 18 with 562 tons in the bunkers, the bunkers being full and the quantity, apparently, more than sufficient for the passage to St. Vincent, where in the ordinary course she would coal again. On the same day that she left Monte Video she put back in

consequence of an accident to the condenser door. This was renewed, and the voyage resumed on Dec. 23. By this time about 20 tons of the bunker coals had been used, but those on board considered she had still sufficient for the passage to St. Vincent. After leaving Monte Video the *Gulf of Florida* experienced strong head winds and seas. On Jan. 7, 1898, the coal was found to be burning very quickly, at a rate equal to 36 tons per day. As the rate of consumption continued to be high, the speed was reduced on Jan. 9, and to save steam the steam steering gear and electric light were shut off. On Jan. 10 some of the ship's fittings were used for fuel, and on subsequent days further fittings and spars, and portions of the cargo were burnt to assist in keeping up steam. If this had not been done the *Gulf of Florida* would have been unable to reach port without assistance, and without such assistance would have been helpless and in danger of being totally lost.

The quantity of coal with which the *Gulf of Florida* left Monte Video, both on Dec. 10 and 23, was, in fact, insufficient for the passage to St. Vincent. This insufficiency happened owing to the negligence of the master and engineers. The value of the ship's fittings and spars burnt was £312 4s. The plaintiffs had paid the consignees of cargo for the cargo used as fuel £662 1s. 11d. The plaintiffs claimed that they were entitled to the defendant company's proportion of the value of the ship's fittings and spars burnt, and of the sums paid for cargo burnt. Alternatively they claimed the defendant company's proportion of the value of the fittings and spars burnt, and of the ship's contribution in general average of the value of the cargo burnt. In the further alternative, the plaintiffs claimed to be entitled, as above, on payment of an additional premium to be fixed by the court, or as the court might direct. The defendants denied that the plaintiffs were entitled to any of the said sums, or any part thereof, even on payment of an additional premium.

It was decided by BIGHAM, J., that an implied warranty of seaworthiness existed when the ship left Monte Video, and that there was a breach of that warranty in not there providing her with sufficient coal, so that the policy then ceased to attach to the risks insured against; also that the clause with respect to loss through the negligence of the master did not apply, because his negligence was not the proximate cause of the loss; and that the implied warranty of seaworthiness was a warranty to which the "held covered" clause applied, but that, as the premium which the defendants might reasonably have charged if they had known of the breach of warranty before the loss occurred was at least equal to the amount of the loss, the plaintiffs were not entitled to recover anything. From that decision the plaintiffs now appealed.

Carver, K.C., and *D. C. Leck* for the plaintiffs.

J. A. Hamilton, K.C. (with him *R. I. Simey*) for the defendants.

VAUGHAN WILLIAMS, L.J.—In my opinion, this case is covered by the decision in *The Vortigern* (1). Counsel for the plaintiff's argument, although he was not invited to have it so expressed, really was an argument to show that the policy here in effect was a time policy. I feel impressed by the words of the policy, which not only do not describe the risk to be taken as being a "time risk," but so describe it that it is obvious that the real risk was to continue from the time of leaving one of the optional ports, either in the United Kingdom or on the Continent, until the arrival back again of the ship at one of the optional ultimate ports. In the stress of having to satisfy those words, he attempted to say that this was neither a time policy nor a voyage policy; and that therefore there was absolutely no warranty of seaworthiness by the shipowner at all. I do not myself think that it very much matters what you call this policy—whether you call it a "time policy" or whether you call it a "voyage policy." One has to look at the policy, and what was contemplated by the shipowner, and the underwriters respectively, and see whether, having regard to what they both contemplated, the

A ship was seaworthy. I utterly reject the notion that under this policy you could say that there was no warranty of seaworthiness at all. In fact, counsel for the plaintiff himself shrink from saying that there was no warranty of seaworthiness at the commencement of the voyage.

B Once assume that there was an original warranty of seaworthiness, then it seems to me that the principle of the decision in *The Vortigern* (1) absolutely covers this case. If you look at the judgments in *The Vortigern* (1), it seems to me that, whether you regard the judgment of GORELL BARNES, J., in the first instance or the judgments in the Court of Appeal, you will find that the whole of the reasoning of the learned judges applies to the present case. I am for the purposes of my judgment assuming that under the circumstances of this case there was a plainly implied warranty of seaworthiness at the commencement of the voyage. If that is so, I repeat that it seems to me that the present case is entirely covered by the judgments of GORELL BARNES, J., and of the Court of Appeal. The passage in the judgment of GORELL BARNES, J., ([1899] P. at p. 147) seems to me entirely to accord with the statements of A. L. SMITH, L.J., (ibid at p. 153) where the learned judge said :

D “To obviate this difficulty—and a very great difficulty it is in cases of long voyages of cargo-carrying steamships, for it is manifest that no cargo-carrying steamship can ever be seaworthy when she starts on such a voyage as the present by reason of the impossibility of her having on board such an equipment of coal as will be sufficient to take her to the port of destination—it has become the practice, by reason of the necessity of the case, for cargo-carrying steamship owners to divide these long voyages into stages for the purpose of replenishing their ships with coal, and thus, as far as practicable, complying with the warranty of seaworthiness which attached when the ship commenced her voyage.”

E If you look at that passage and at the further passage in the same judgment (ibid. at p. 155), you can see that in each case the warranty of seaworthiness in the case of these long voyages is not broken because the steamer does not start in a seaworthy condition, but that the shipowner is entitled to satisfy the implied warranty by taking on board coal at the commencement of each stage. It is plain that to hold that there is no breach is a concession made by the law in favour of the shipowner, rather than in favour of the underwriters. It is also plain that the way in which the court regards these stages is to look at the voyage which is contemplated at each point where the ship takes advantage of this liberty and stops to coal. The shipowner must coal before the contemplated voyage. That does not mean in a case like the present a voyage which is defined in terms upon the face of the policy, but it means that the shipowner, taking advantage of this method of satisfying the implied warranty, must make up his mind where he intends to proceed; and he will only satisfy the warranty if he takes on board a sufficiency of coal for that contemplated voyage.

H I do not know that it is necessary to say anything more about this particular case. I cannot help saying, however, that I have never been quite able to understand the ways of underwriters and shipowners—they are too hard for me. Here is a case which, having regard to the enormous extent of sea carriage in the present day, must be arising every day. This particular voyage which was contemplated by the shipowner and the underwriters here, including, as it does, undefined coasting voyages upon the west coast of South America, obviously must be apt to give rise to occasions when the master of the ship is put in great difficulty, not only in respect of the quantity and quality of the coal which he may be able to obtain, but also as to the time when he really will be able to reach another coaling station. In such cases a very great stress must be thrown upon the master—even the most prudent master. One would have thought that it must have occurred to the shipowners that, unless they wished to go to sea under such conditions,

it was by no means impossible that even with a fairly prudent master they might find themselves uninsured through the breach of warranty of seaworthiness—a warranty which ex hypothesi it is impossible to satisfy at the starting of the ship. One would have thought that as between the contracting parties the underwriters would have charged a sufficient premium in such a form that the shipowners' insurance should not be entirely dependent upon the judgment of the master in the decision of this difficult question as to the quantity and quality of the coals which he might require. But for some reason or other the parties to these contracts of insurance seem to consider that the interests of commerce are forwarded by leaving things in a more or less uncertain state, and in such a condition that the shipowner undertaking a voyage of this sort can never feel very confident that he is really covered by his insurance. The appeal will be dismissed with costs.

ROMER, L.J.—I have come to the same conclusion. I think that this case is covered in principle by *The Vortigern* (1), by which this court is bound. The form of the policy on which the case before us turns is one which to my mind shows that the policy is what is commonly termed “a voyage policy”—a voyage policy properly so called. I may remark that the policy is so described by the parties to it on the face of it. It is a voyage from any port or ports in the United Kingdom and the Continent between Bordeaux and Hamburg to any port or ports on the west coast of South America and back again to corresponding ports from which the steaming takes place. Undoubtedly this voyage is a curious one, because it may cover voyages between ports on the west coast of South America. If the case had been one simply for a voyage, say, from any port at any part to be selected in a defined portion of Europe to a port to be selected in any defined portion of the west coast of South America and back again, nobody could for a moment have suggested that that was not a voyage policy in the strictest sense of the term to which the ordinary insurance law applicable to an implied warranty of seaworthiness would apply. The difference between that case and the present is really only one of degree. No doubt the voyage that is defined in this policy was a very onerous one for shipowners to undertake to insure against on one policy, but that was for them to consider. If the shipowners had wished to negative the implied warranty of seaworthiness on such a voyage to any extent, it was for them to do so by express bargain and by express stipulation in the policy.

As at present matters stand according to insurance law there are only two kinds of insurance policy known—a time policy and a voyage policy. I am referring, of course, to the kind of question we have to decide on for the purpose of this appeal. Speaking for myself, I think it would be most unfortunate for commercial law, and therefore for commercial people, if we had been obliged in this case to say that there was also a policy of a third kind known to the law—a kind of policy not hitherto supposed even by lawyers or by commercial men to exist. I do not mean to say, of course, but that one document might cover two policies. But in the present case the policy is not really two policies. The document does not cover two distinct insurances, and the policy is not in any true sense in part a time policy. It is, as I have pointed out, a voyage policy and nothing else; and I may add, as has been frequently stated before, that *The Vortigern* (1) was really decided in favour of the shipowners. It was to free them in long voyages from what would otherwise have been a most onerous obligation on their part in the case of steamers—namely, that they would have been obliged, however long a voyage, to have shipped coal sufficient to last the whole of the voyage.

In the present case but for the principle of *The Vortigern* (1)—which applies in favour of the shipowners here notwithstanding the curious nature of the voyage—it would have been obligatory on the part of shipowners to have taken care that when their vessel started from the port of departure it was reasonably coaled for the coming voyage. With reference to an argument that was used before us in which it was said that it was impossible for any shipowners to have coaled for such

A deviations of voyages on the west coast of South America as appears to have been contemplated by this policy. I need only remark that this is not necessarily so. What the shipowners would have to do would be to coal to the extent that was reasonable having regard to the probable nature and duration of the voyages likely to take place on the west coast. As I have said, if shipowners choose to undertake voyages with steam vessels—particularly such a voyage as this, so described, and so long—it is for them to protect themselves, if they do not wish to incur the ordinary obligations that are cast upon them as shipowners in respect of such a voyage. For the reasons I have given I think that this appeal fails.

STIRLING, L.J.—I am of the same opinion. I entirely agree with what was said by BIGHAM, J., in his judgment. He rested his decision to a large extent on C *The Vortigern* (1). That is a decision of the Court of Appeal. It was binding on BIGHAM, J., and it is no less binding upon us, and, unless it can be effectually distinguished, it seems to me that the result is that BIGHAM, J.'s decision must be affirmed. How is it sought to distinguish that case from the present? In the first place, it is said that case related to a contract of affreightment, whereas the present relates to a contract of insurance. In *The Vortigern* (1) I observe that the D learned counsel who argued for the appellants said in his reply that the doctrine of stages which was relied upon was a doctrine of insurance and ought not to be extended to a case of affreightment. Here the argument is the other way, that this is a doctrine which relates to cases of affreightment and ought not to be applied to cases of insurance. It seems to me that the Court of Appeal and GORELL BARNES, J., rejected that argument in the passage which is referred to by BIGHAM, J., in E his judgment and treated the case as being the same whether it arises between the steamship owner and his underwriter on a voyage policy or between the steamship owner and the cargo owner upon a contract of affreightment. I think, therefore, that the two cases can be distinguished on that ground.

But then it is said in the second place—and this is really the main contention—that the contract in *The Vortigern* (1) related to specified points, and that the F present contract relates to a voyage of a different character. In *The Vortigern* (1) the voyage was in substance from Manila to Liverpool, with liberty to coal at any ports in order, and it was held there that this doctrine of stages applied. Now we have before us undoubtedly a case in which the voyage is described in much wider terms. It is from a port or ports in the United Kingdom or within specified limits on the Continent to a port or ports, or place or places, on the west coast of South G America, and then back to a port in the United Kingdom, and between specified limits on the Continent, with power to go backwards and forwards, and forwards and backwards, on the west coast of South America. The risk is extended also until the expiry of thirty days after arrival or until the sailing of the next voyage, whichever first happens.

BIGHAM, J., held that that was what is termed in the language of insurance a H "voyage policy," and it seems to me that it was. If the voyage had simply been described as one from a port in the United Kingdom to a port on the west coast of South America and back from there to the United Kingdom, it would have been precisely within the decision in *The Vortigern* (1). And although it reduced the power to go backwards and forwards on the west coast of South America it really would not in my opinion affect the substance of the case. It seems to me that I there are reasons which may be urged against the law as laid down in *The Vortigern* (1). But if such there be, I express no opinion one way or another upon them. They must be considered, it seems to me, by a higher tribunal. I think that *The Vortigern* (1) cannot be distinguished for the purposes of the present case.

Appeal dismissed.

Solicitors: Coote & Ball, for Adamson & Adamson, North Shields; Field, Roscoe & Co., for Batesons, Warr & Wimshurst, Liverpool.

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]

COATES v. MOORE

[COURT OF APPEAL (Sir Richard Henn Collins, M.R., Stirling and Mathew, L.J.J.)
May 20, 1903]

Reported [1903] 2 K.B. 140; 72 L.J.K.B. 539; 89 L.T. 8; 51 W.R. 648;
10 Mans. 271]

Court of Appeal—Appeal from Liverpool Court of Passage—Interpleader issue—Right to appeal without leave—Liverpool Court of Passage Act, 1893, (56 & 57 Vict., c. 37), s. 10.

An application for judgment or a new trial of an interpleader issue tried in the Liverpool Court of Passage lies to the Court of Appeal without leave.

Bill of Sale—Copy—Omissions—Effect on validity of bill—Signature of grantor and particulars of witness.

The copy of a bill of sale under s. 10 (2), of the Bills of Sale Act, 1878, omitted the signature of the grantor and contained in the attestation clause a blank where the name, address and description of the attesting witness should have been. The original bill had been duly executed, and the affidavit which was filed with the copy of the bill contained a statement of the facts which had been omitted from the copy :

Held: the omissions from the copy did not invalidate the bill.

Thomas v. Roberts (1), [1898] 1 Q.B. 657, applied.

Bill of Sale—Security—Maintenance—Assignment of specified chattels—Covenant to replace worn out chattels.

A bill of sale contained an assignment of the chattels specifically described in the schedule, and also of any chattel and things which might at any time during the continuance of the security be substituted for them or any of them. The grantor covenanted that he would replace such of the chattels and things as should be worn out by other articles of value equal to the present value of the articles worn out so as at all times to keep up the total value of the chattels and things comprised in the security to the present value.

Held: these were terms for the maintenance of the security, and so did not invalidate the bill.

Seed v. Bradley (2), [1894] 1 Q.B. 319, followed.

Notes. The Liverpool Court of Passage Act, 1893, has been repealed. The statutory provisions regarding the Liverpool Court of Passage are now contained in the Liverpool Corporation Act, 1921 (5 HALSBURY'S STATUTES (2nd Edn.) 324), ss. 244-263.

As to interpleader in the Liverpool Court of Passage, see 9 HALSBURY'S LAWS (3rd Edn.) 502, 503; and for cases see 16 DIGEST (Repl.) 225, 226. As to the form of a bill of sale, see 3 HALSBURY'S LAWS (3rd Edn.) 287 et seq.; and for cases see 7 DIGEST (Repl.) 85 et seq.

Cases referred to :

- (1) *Thomas v. Roberts*, [1898] 1 Q.B. 657; 67 L.J.Q.B. 478; 78 L.T. 712; 14 T.L.R. 309; 42 Sol. Jo. 365; 5 Mans. 70, D.C.; 7 Digest (Repl.) 90, 520.
- (2) *Seed v. Bradley*, [1894] 1 Q.B. 319; 63 L.J.Q.B. 387; 70 L.T. 214; 42 W.R. 257; 10 T.L.R. 196; 1 Mans. 157; 9 R. 171, C.A.; 7 Digest (Repl.) 73, 420.
- (3) *Smith v. Darlow* (1884), 26 Ch.D. 605; 53 L.J.Ch. 696; 50 L.T. 571; 32 W.R. 665, C.A.; 29 Digest 494, 449.
- (4) *Anderson v. Dean*, [1894] 2 Q.B. 222; 63 L.J.Q.B. 668; 70 L.T. 830; 42 W.R. 472; 10 T.L.R. 452; 38 Sol. Jo. 436; 9 R. 418, C.A.; 16 Digest (Repl.) 225, 1156.

- (5) *Robinson v. Tucker* (1884), 14 Q.B.D. 371; 53 L.J.Q.B. 317; 50 L.T. 380; 32 W.R. 697, C.A.; 29 Digest 495, 464.
- (6) *Dawson v. Fox* (1885), 14 Q.B.D. 377; 33 W.R. 514; sub nom. *Fox v. Smith*, 54 L.J.Q.B. 299, C.A.; 29 Digest 451, 10.
- (7) *Thomas v. Kelly* (1888), 13 App. Cas. 506; 58 L.J.Q.B. 66; 60 L.T. 114; 37 W.R. 353; 4 T.L.R. 683, H.L.; 7 Digest (Repl.) 60, 318.

Application by the defendant for judgment or a new trial in an interpleader issue tried in the Liverpool Court of Passage before a judge and jury.

The plaintiff in the issue claimed, as grantee under a certain bill of sale, to be entitled to the goods thereby assigned, and the question in the issue was as to the validity of the bill. The bill of sale was made on Sept. 20, 1898, between Joseph Farrart, called the mortgagor, of the one part, and Frankland Douglas Coates, called the mortgagee, of the other part, and witnessed that in consideration of £50, the mortgagor thereby assigned

"unto the mortgagee all and singular the several chattels and things specifically described in the schedule hereto annexed and being on the premises situate and known as 8, Enid Street, Liverpool, aforesaid, and also all chattels and things which may at any time during the continuance of this security be substituted for them or any of them to hold the same by way of security for payment in manner hereinafter appearing of the sum of £50 . . . and the mortgagor doth also agree with the mortgagee that he will not during the continuance of this security without the written consent of the mortgagee assign or underlet the said chattels and things expressed to be hereby assigned or any of them, or remove the same or any of them except by necessary repairs, and will replace such of them as shall be worn out by other articles of value equal to the present value of the articles worn out so as at all times to keep up the total value of the chattels and things comprised in this security to the present value. . . ."

The bill of sale was duly executed by the grantor, and attested, and bore the address and description of the attesting witness, but in the copy filed in pursuance of s. 10 of the Bills of Sale Act, 1878, the places for the signature of the grantor and for the signature, address and description of the attesting witness were left blank. In the affidavit filed with the copy of the bill of sale, it was stated that the bill was duly executed and attested, and the name, address and description of the attesting witness were given. At the trial of the issue the plaintiff obtained a verdict and judgment.

By the Bills of Sale Act, 1878, s. 10,

"A bill of sale shall be attested and registered under this Act in the following manner: . . . (2) Such bill, with every schedule or inventory thereto annexed or therein referred to, and also a true copy of such bill and of every such schedule or inventory, and of every attestation of the execution of such bill of sale, together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same . . . and of every attesting witness to such bill of sale shall be presented to and the said copy and affidavit shall be filed with the registrar within seven clear days after the making or giving of such bill of sale in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filed."

J. H. Pugh, for the plaintiff, raised a preliminary objection that the appeal did not lie to the Court of Appeal. The Liverpool Court of Passage Procedure Act, 1853, contained three sections (ss. 66, 68, 69) dealing with interpleader issues, and s. 68 provided that "the judgment in any such action or issue as may be directed by the court, and the decision of the court in a summary manner, shall be final

and conclusive against the parties and all persons claiming by, from, or under them." This section was similar to s. 17 of the Common Law Procedure Act, 1860, under which there was no appeal from a judgment in an interpleader issue. He referred to *Smith v. Darlow* (3). He also referred to *Anderson v. Dean* (4), and admitted that, if there was an appeal in this case, it should be to the Court of Appeal and not to the Divisional Court. The defendant would no doubt rely on s. 10 of the Liverpool Court of Passage Act, 1893, which provided: "An appeal shall be allowed upon the trial of any issue in the Court of Passage in every case where an appeal would be allowed on a trial at nisi prius and subject to the same rules, regulations, and provisions." But the word "issue" in that section was used quite generally and could be read as referring to s. 45 of the Liverpool Court of Passage Procedure Act, 1853, which dealt generally with motions for a new trial "upon the trial of any issue." Section 10 of the Act of 1893 ought not to be construed as indirectly repealing s. 68 of the Act of 1853, which had never been directly repealed. Further, the defendant had not obtained leave to appeal and in an interpleader issue tried in the High Court, the judgment was final and conclusive "unless by special leave of the court or judge, as the case may be, or of the Court of Appeal" (R.S.C., Ord. 57, r. 11).

F. A. Greer, for the defendant cited *Robinson v. Tucker* (5) and *Darson v. Fox* (6).

The court said that they would hear the appeal.

F. A. Greer for the defendant.

Pugh, for the plaintiff, was not called upon to argue.

SIR RICHARD HENN COLLINS, M.R.—Both the objections made to the validity of this bill of sale must fail. The first objection is that, in the copy of the bill which was filed in accordance with the requirements of s. 10 of the Bills of Sale Act, 1878, there is no copy of the signature of the grantor, and there are blanks where the name, address and description of the attesting witness ought to be found. It is contended that the provisions of s. 10 have, therefore, not been complied with, and that the bill is consequently invalid as against the defendant in this issue. A similar point was taken, and was held bad, in *Thomas v. Roberts* (1), where it was held that a bill of sale was not void because the copy of the bill of sale required to be filed by s. 10 (2) of the Bills of Sale Act, 1878, left the date of the execution of the bill of sale in blank, if the date was truly stated in the original bill of sale and in the affidavit filed under the same section. In that case, the date was omitted from the copy which was filed, while in the present case the omission is of the signature of the grantor, and of the name, address and description of the attesting witness. The date of a bill of sale is just as essential a part of it as the signature of the grantor, and the name, address and description of the attesting witness; and here, as in *Thomas v. Roberts* (1), the omission can be supplied from the affidavit filed with the copy. The present case seems to me to be indistinguishable from *Thomas v. Roberts* (1), and I think, therefore, that the first objection is bad.

The second objection is that it embraces after-acquired property, and such goods as may be included in the security after the execution of the bill are not stated to be limited to goods which are brought on to the premises merely in maintenance of the security. In *Seed v. Bradley* (2), the Court of Appeal held that a covenant in a bill by which the grantor agreed to replace articles damaged or worn out with others of equal value to be included in the security was a covenant "for the maintenance of the security," which did not constitute a deviation from the statutory form of a bill of sale. *Kay, L.J.*, pointed out that *Thomas v. Kelly* (7) was not a decision upon a covenant for maintenance of the security. In *Thomas v. Kelly* (7), the assignment included chattels brought on to the premises "in substitution for a renewal of or in addition to" the scheduled chattels. *Kay, L.J.*, said ([1894] 1 Q.B. at p. 325):

A "These words 'in addition to' made it impossible to treat the assignment as though it were a covenant to maintain the security. No such suggestion appears in the argument as reported. But in the speech of LORD HALSBURY, he says that the second sub-section of s. 6 of the Act of 1882 'undoubtedly seems to indicate that goods not capable of specific description and to be afterwards supplied may, nevertheless, be so included in the security as yet not to make the bill of sale void. But, if one supposes the assignment to be of all such goods as are the subject of the proviso in question, and that in the schedule they were properly described, but added thereto were the words which give rise to the argument, namely, such goods as should be in substitution thereof, the form of the deed would be in accordance with the statute, though the schedule should contemplate substituted articles.' "

C These words seem to me to cover the present case. The words used in the bill show that what was in contemplation of the parties was the substitution of new goods for old, and that is the ground of the decision of the judge who tried the issue. Then, after the words of assignment of substituted goods comes the covenant by the mortgagor as to necessary repairs of the goods specifically described, and as to replacing such of them as shall be worn out by other articles of value equal to the present value of the articles worn out. The provision is obviously one for the substitution of chattels which shall take the place of those specifically described in the bill. For these reasons, I think that this appeal fails.

D
E STIRLING, L.J.—I agree. I think that the case is covered by the authorities that have been referred to by the Master of the Rolls.

MATHEW, L.J.—I am of the same opinion.

Appeal dismissed

Solicitors: *Ledgard, Street & Co.*, for Cecil B. Taylor, Liverpool; *Sharpe, Parker & Co.*, for Richardson & Marsh, Liverpool.

F [Reported by E. MANLEY SMITH, ESQ., Barrister-at-Law.]

UPPERTON *v.* RIDLEY

HOUSE OF LORDS (The Earl of Halsbury, L.C., Lord Macnaghten, Lord Davey, Lord Robertson and Lord Lindley), March 13, 16, and May 16, 1903]

[Reported [1903] A.C. 281; 72 L.J.K.B. 535; 88 L.T. 642; 67 J.P. 349; 19 T.L.R. 522; 1 L.G.R. 659; 20 Cox, C.C. 453]

Police—Pension—“Annual pay”—Exclusion of special allowance—Police Act, 1890 (53 & 54 Vict., c. 45), Sched. I, r. (11).

By the Police Act, 1890, a constable was entitled, after completing a certain number of years of service, to a pension, to be calculated “according to the amount of his annual pay at the date of his retirement.” The appellant, a constable in the metropolitan police, at the date of his retirement was receiving 39s. a week, being 32s., the ordinary pay of his rank and service, and 7s. in respect of special duty which he had been performing for some five years. He signed the weekly pay-sheets in which the 32s. only was entered under the column entitled “Amount of pay,” the 7s. being entered under the column for allowances.

Held: the 7s. did not form part of his “pay” for the purpose of calculating his pension under Sched. I, r. (11), to the Police Act, 1890.

Per LORD DAVEY: By signing the weekly pay-sheets in the form in which he did, the appellant contracted himself out of the Act.

Decision of the Court of Appeal, [1901] 1 K.B. 384, affirmed.

Notes. The Police Act, 1890, s. 1 and Sched. I, have been repealed. See now the Police Pensions Regulations, 1955 (S.I. 1955 No. 480), as amended.

Considered: *Goodwin v. Sheffield Corpn.*, [1902] 1 K.B. 629; *Kydd v. Liverpool Watch Committee*, [1908] A.C. 327. Referred to: *Bayley v. Bayley*, [1922] 2 K.B. 227.

As to police pensions, see 30 HALSBURY'S LAWS (2nd Edn.) 113 et seq.; and for cases see 37 DIGEST 192 et seq.

Case referred to in argument:

R. v. Postmaster-General (1878), 3 Q.B.D. 428; 47 L.J.Q.B. 435; 38 L.T. 89; 26 W.R. 322, C.A.; 42 Digest 894, 53.

Appeal in forma pauperis from a decision of the court of Appeal (A. L. SMITH, M.R., HENN COLLINS, and ROMER, L.JJ.), reported [1901] 1 K.B. 384, affirming a decision of the Divisional Court (CHANNELL and BUCKNILL, JJ.), reported [1900] 1 Q.B. 680, on a Special Case stated by quarter sessions.

The appellant was a constable in the metropolitan police, who had been selected for permanent special duty at the House of Lords. In consideration of this special duty he was paid a special allowance of 7s. a week in addition to his ordinary pay as a constable, and the question was whether this special allowance could be taken into account in calculating the amount of the pension to which he was entitled on retiring from the force. The Divisional Court (BUCKNILL, J., dissenting) held that the amount of the special allowance should be excluded in calculating the amount of the pension, and this judgment was affirmed by the Court of Appeal. The facts are set out in the opinion of LORD DAVEY.

Pickersgill and *Warren* for the appellant.

Macmorran, K.C., and *J. P. Grain* for the respondents.

Their Lordships took time for consideration.

May 26, 1903. The following opinions were read.

THE EARL OF HALSBURY, L.C.—Notwithstanding the very clear and able argument of counsel for the appellant, I cannot doubt that the respondents are entitled to our judgment. Treating the conditions of service as the contract, the words “the constable’s annual pay” have both from the language

A itself and by practice received an interpretation fatal to the appellant's contention. Indeed, if one analyses the arguments used, they are rather directed to show that the law might be different from what it is than arguments upon the language itself. They amount to this: that it is hard on a constable if he does not get a pension calculated on the whole amount of the remuneration for his services, but only on the amount of his "annual pay." Whether or not it would have been more

B satisfactory that the whole amount of the constable's remuneration should be included in the calculation when the amount of his pension was to be determined is a question with which I have nothing to do. I am of opinion that it has not been done, and I cannot construe the Police Act, 1890, so as to do what I may think more expedient. My duty is simply to give an interpretation to the language actually employed, and I cannot doubt that the "constable's annual pay" means

C what the court below has declared it to mean, viz., the ordinary pay of his rank, and that the term was not intended to bring within its scope the remuneration for other services, however meritorious they may be.

It appears to me, therefore, that, on that very short question, the only answer can be that the constable is only entitled to have his pension calculated on his annual pay, giving to those words the construction which ever since the Act passed

D they have received in practice, and that which has been accepted by those who have taken service in the police force. For these reasons, I move your Lordships that this appeal be dismissed.

LORD MACNAGHTEN.—I am sorry to say that I find myself compelled to come to the same conclusion as my noble and learned friend on the woolsack. I

E regret the result, because I am afraid that the persons most affected may think that they have been hardly dealt with. At first sight, it is not easy to see the difference between annual pay and an annual payment, or to understand why an annual allowance to a police constable engaged on permanent employment as a constable in the discharge of exceptional services should not be regarded as part and parcel of his annual pay, and as such be taken into account in calculating the amount of

F his pension on retirement. It must seem rather hard that such an annual payment should be excluded from the computation, when it is borne in mind that selection for these exceptional services is the reward of good conduct and may interfere with the constable's chance of promotion, and that, in the case of the eight senior superintendents, a similar allowance is taken into consideration in calculating their pensions. But, after considering the conditions of service signed by the

G appellant and the Police Act, 1890, the provisions of which in regard to pension the appellant elected to accept, I am of opinion that nothing is to be taken into account in calculating a retiring pension but the annual pay for which the constable contracted to serve—that is, the annual pay of the rank to which he may belong at the date of his retirement.

The matter, I think, is made tolerably plain if you look at the general rules in

H Part 3 of Sched. I, which, by s. 3 (7) of the Act, are declared to be applicable to all pensions granted under the Act. Rule (11) in Part 3 of the Schedule declares that the pension of a constable shall be calculated according to the amount of his annual pay at the date of his retirement, and then para. (c) explains that where a constable has, in the course of the three years before the date of his retirement

I been in more than one rank, his annual pay at the date of retirement shall be deemed to be the average annual amount of pay received by him for the said three years. This, I think, shows that the annual pay on which the calculation is to be made is the annual pay of the rank to which he belongs at the time of retirement, except in the particular case specified in para. (c).

LORD DAVEY.—The appellant joined the metropolitan police force on Dec. 30, 1872, and on Jan. 1, 1899, he was entitled as of right to retire with a pension for life of two thirds of his annual pay at the date of his retirement. The question

is: What was his annual pay for this purpose at this date? In March, 1894, the appellant was selected by the commissioner of police for permanent duty at this House, and continued to serve in that capacity until the date of his retirement; and during that period he was paid every week the sum of 39s., made up as follows: 32s., being the ordinary pay of a constable of his rank and service, and an additional sum of 7s. in respect of the special duty in which he was employed.

In Sched. I, Part 3, r. (11), to the Police Act, 1890, it is provided that, for the purposes of the Act, a pension or gratuity to a constable shall be calculated according to the amount of his annual pay at the date of his retirement. There is no definition of the word "pay" in the Act. By the Metropolitan Police Act, 1829, the receiver is directed to pay such "salaries, wages, and allowances" as the Secretary of State directs. And by the Metropolitan Police Act, 1839, s. 9, a return is directed to be made to Parliament in each year of the number of constables in each class "with the salaries and allowances enjoyed by each class"; by s. 15, it is provided that a constable resigning without leave shall forfeit all arrears of "pay"; by s. 22 a maximum of £2 10s. per cent. is to be deducted from the "pay" of constables to form a superannuation fund; and by s. 23, the amount of superannuation allowance is to be regulated by the amount of "pay" of the retiring constable in certain defined proportions. The word "pay" is used three times in the body of the Act of 1890, which is a general Police Act. By s. 15, a rateable deduction and stoppages during sickness and fines for misconduct are authorised to be made from the pay of every constable, and the amount of such deductions is directed to be carried to the pension fund; and by s. 20, regulations are authorised to be made with respect to such deductions and stoppages from "pay."

The conclusion to which I come from examination of the Acts is that the word "pay" is a word of general import, including all periodic payments regularly made to a constable for his services as such, whether ordinary or special, but not including casual receipts or allowances properly so called in lieu of emoluments in kind, such as lodgings, uniform or boots. The payment of 7s. per week to the appellant is called an allowance, but it seems to me to differ altogether from such emoluments as those to which I have referred, and to be in the nature of extra pay when employed on a particular service. The chief clerk to the commissioners says that they were under no obligation to pay the appellant the additional sum of 7s. even while he remained on special service. This may be so, but it appears to me immaterial. The Case finds that he was on permanent duty, and that the extra sum was paid to him regularly for five years, and, as I think, as pay for the performance of special duties. And it must be taken, I think, that the payment was made with the sanction of the Secretary of State. No doubt he was selected for these duties of a responsible character, involving the exercise of discretion and judgment, partly as a recognition of his past good conduct, and the additional payment is awarded partly because, being withdrawn from ordinary duty, he loses to some extent his chance of promotion; but these considerations do not appear to me to affect the nature of the payment.

If, therefore, the question were to be decided on the construction of the Act of Parliament alone, I should be of opinion that this payment of 7s. per week was extra pay, and was as truly part of the constable's pay at the time of his retirement within the meaning of the Act of 1890 as the ordinary pay of his class. But I think that it was competent for the appellant to contract himself out of the Act and to agree that extra pay for any special duties should not be reckoned as part of his pay for the purpose of fixing the amount of his pension on retirement. And this, I think, is what he has done by signing the weekly pay-sheets in which his ordinary pay only is entered under the column entitled "amount of pay," and this payment for special duties is entered as an allowance, together with the allowances properly so called for lodgings, etc. This shows the terms on which the appellant contracted to serve. It is true, as the learned counsel said, that the commissioners could not alter the Act by calling a thing by a wrong name, but I think that

A the appellant could completely renounce a prospective benefit to himself, although secured to him by statute. On this ground I think that the appeal fails.

LORD ROBERTSON.—I concur.

B LORD LINDLEY.—In order to determine the meaning of "annual pay" in Sched. I to the Police Act, 1890, it must be remembered that this Act is one of a series referred to in s. 38, some of which are enumerated in Sched. V. It must also be remembered that the Act of 1890 applies not only to the metropolitan police, but to the police force throughout England, except in the city of London. This appeal relates to the metropolitan police. The Act of 1890 does not fix the amount of pension payable to any particular person, but it entitles police constables to pensions on certain conditions; it fixes the maximum and minimum limit of such pensions; and it leaves the amount within these limits to be fixed by the police authority, which in this case, is the Secretary of State: (see ss. 1, 3, 32, 33, and Scheds. I and II). The same authority fixes the pay which police constables are to receive while in the police force (Metropolitan Police Act, 1829, s. 12), and also the stoppages which may be made from their pay during sickness (Police Act, D 1890, s. 20). The Secretary of State has issued a scale of pay, and also regulations or conditions of employment which constables are required to sign, and which the appellant did sign. He also signed weekly pay sheets.

E These regulations and pay sheets cannot properly be disregarded. Indeed, as pointed out by A. L. SMITH, M.R., apart from the regulations and scale of pay, the appellant could not establish his claim to any definite pay whatever. They entitled him to pay at the rate of 30s. a week, which sum was afterwards increased to 32s. a week. This was his pay when in the police force. He contends that, as he was paid 7s. a week more for some years for special services which he rendered, this additional sum ought to be added to his pay for the purpose of computing his pension. But this is to treat the 7s. a week now in a way different from that which it was treated before the appellant's retirement. His pay for all purposes F was what the police authority fixed as his pay, and I can find nothing in the Act of 1890 which justifies your Lordships in holding it to be more. The word "pay" is used in ss. 15, 16 and 20 of the Act, and has always been understood to mean the pay fixed by the police authority to the exclusion of extra allowances, gratuities and emoluments, which are not regarded as the "pay" of those who receive them. There is nothing in the Act of 1890 to show that "pay" in that G Act and its Schedules means anything more. Nor can I discover anything in the Act which shows that the word "pay" in the expression "annual pay" means more after a man's retirement than it meant before. The introduction of the word "emoluments" in s. 32 (5) seems to show that "pay" does not include all remuneration. Moreover, the rules in Part 3 of Sched. I throw some light on the meaning of "annual pay." Rule 11 (c) indicates that what is meant is the ordinary H pay of the rank to which the retiring constable belonged. This appears to me to be its clear meaning in the regulations, and to be the true meaning in Sched. I to the Act itself. In my opinion, therefore, the appeal should be dismissed.

Appeal dismissed.

I Solicitors: Mann & Crimp; Wontner & Sons.

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

HOVENDEN & SONS v. MILLHOFF

[COURT OF APPEAL (A. L. Smith, Vaughan Williams and Romer, L.JJ), July 12, 1900]

[Reported 83 L.T. 41; 16 T.L.R. 506]

Agent—Commission—Secret commission—Bribe—Payment to agent—Recovery by principal from person giving bribe—Amount recoverable.

For many years, the plaintiffs purchased cigars and cigarettes from the defendant, for which purpose they employed buyers on whose judgment they relied and to whom they paid bonuses in proportion to profits. The plaintiffs discovered that for twelve years, unknown to them, the defendant had been paying to their buyers 2½ per cent. on the invoice price of the goods sold to the plaintiffs. In an action by the plaintiffs claiming the recovery of the amount of the commissions thus secretly paid by the defendant to the buyers, for the return of moneys overcharged in respect of goods delivered by the defendant to the plaintiffs, for an account, and for damages for conspiracy, the jury negatived conspiracy, but found that the defendant had given bribes to the buyers and assessed the damages at one farthing. On appeal,

Held: the plaintiffs were entitled to recover as damages the ascertained amount of the bribes given by the defendant to their buyers.

Per ROMER, L.J.: If a gift be made to a confidential agent with the view of inducing the agent to act in favour of the donor in relation to transactions between the donor and the agent's principal and that gift is secret as between the donor and the agent—that is to say, without the knowledge and consent of the principal—then the gift is a bribe in the view of the law.

Notes. Considered: *Industries and General Mortgage Co. v. Lewis*, [1949] 2 All E.R. 573. Referred to: *Moody v. Cox and Hatt* (1917), 116 L.T. 740.

As to corruption of agent, see 1 HALSBURY'S LAWS (2nd Edn.) 226-228; and for cases see 1 DIGEST (Repl.) 545 et seq.

Cases referred to:

- (1) *Salford Corpn. v. Lever*, [1891] 1 Q.B. 168; 60 L.J.Q.B. 39; 63 L.T. 658; 55 J.P. 244; 39 W.R. 85; 7 T.L.R. 18, C.A.; 1 Digest (Repl.) 549, 1718.
- (2) *Grant v. Gold Exploration and Development Syndicate, Ltd.*, [1900] 1 Q.B. 233; 69 L.J.Q.B. 150; 82 L.T. 5; 48 W.R. 280; 16 T.L.R. 86; 44 Sol. Jo. 100, C.A.; 1 Digest (Repl.) 553, 1740.

Also referred to in argument:

- Shickle v. Lawrence* (1886), 2 T.L.R. 776, C.A.; 1 Digest (Repl.) 683, 2429.
Shipway v. Broadwood, [1899] 1 Q.B. 369; 68 L.J.Q.B. 360; 80 L.T. 11; 15 T.L.R. 145, C.A.; 1 Digest (Repl.) 552, 1733.
Lands Allotment Co. v. Broad (1895), 2 Mans. 470; 13 R. 699; 1 Digest (Repl.) 553, 1742.

Application for judgment or a new trial in an action which had been tried before GRANTHAM, J., with a jury.

The plaintiffs carried on business as wholesale perfumers and hairdressers' sundrymen. The defendant was, prior to 1886, and thenceforward, until May 31, 1898, a member of the firm of Drapkin and Millhoff, who carried on business as wholesale tobacconists. On May 31, 1898, that firm was dissolved, and from that date the defendant carried on business alone under the name of Drapkin and Millhoff. For the purpose of purchasing cigars and cigarettes, the plaintiffs employed certain persons as buyers, on whose judgment they relied and to whom they paid salaries and bonuses in proportion to profits. It was the duty of these buyers to order and get for the plaintiffs the necessary supply of cigars and cigarettes for use in their

A business on the best trade terms. The defendant, from January, 1886, till Aug. 14, 1899, the date of the writ of this action, had supplied the plaintiff with large quantities of cigars and cigarettes for which the plaintiffs had paid upwards of £28,000. In July, 1899, the plaintiffs discovered that, regularly at Christmas and Midsummer during the whole period of their connection with the defendant, he or the firm of which he was a member had made gifts of money in the nature of bribes to the plaintiffs' buyers which were calculated as amounting in all to some £710, or about $2\frac{1}{2}$ per cent. on the invoice price of the goods sold and delivered to the plaintiffs. The plaintiffs alleged a conspiracy between the defendant and the buyers to charge the plaintiffs with prices pretended to be due and owing by the plaintiffs to the defendant's firm, and further alleged that the defendant had given money bribes to the plaintiffs' buyers for the purpose of furthering the frauds and concealing the perpetration thereof whereby the plaintiffs had been induced to pay the sums of money. They claimed (i) an account of all moneys paid by the defendant or his firm to the plaintiffs' buyers and payment to the plaintiffs of the amount thereof; (ii) An account of all dealings and transactions between the plaintiffs and the defendant or his firm, and repayment of the amount of all fraudulent overcharges; (iii) £1,000 damages.

D At the trial, GRANTHAM, J., left several questions to the jury in answer to which they found (i) that the defendant did not fraudulently conspire with the plaintiffs' buyers or any of them to charge the plaintiff excessive prices for the goods bought from the defendant or his firm; (ii) that the prices at which the defendant or his firm had sold to the plaintiffs were not in fact excessive; (iii) that the payments made to the plaintiffs' buyers by the defendant or his firm, admittedly unknown to the plaintiffs, had an effect on the minds of the buyers in favour of the defendant in inducing the buyers to give orders for the goods, and to pay the prices stipulated for them. GRANTHAM, J., then left the amount of damages to the jury, who found (iv) that the damages amounted to one farthing. On these findings, the learned judge, considering that the case presented by the plaintiffs was substantially one of conspiracy, and that, on that charge, they had failed, and that they had secured only a technical victory on the minor part of the case, gave judgment for the defendant. The plaintiffs moved for judgment or a new trial. The amount of the bribes was agreed at £400.

Jelf, Q.C., and H. Courthope Munroe for the plaintiffs.

E. Marshall Hall, Q.C., and R. E. Moore for the defendant.

G **A. L. SMITH, L.J.**—The plaintiffs had for many years purchased from the defendant cigars and cigarettes amounting in value to some £28,000. In 1899, they found out that, during a period of twelve years, the defendant had been in the habit of paying to their agents $2\frac{1}{2}$ per cent. of the invoice price of the goods sold to them. These bribes had in fact been paid by the defendant to the plaintiffs' agents without the knowledge of the plaintiffs, who had no idea that they were including in the price of the goods this $2\frac{1}{2}$ per cent. As soon as they discovered the facts, the plaintiffs issued a writ indorsed with a claim for the recovery of the amount of secret commissions wrongfully paid by the defendant to the plaintiffs' servants or agents, and for the return of moneys overcharged in respect of goods sold and delivered by the defendant to the plaintiffs, and for an account and for damages for conspiracy. A statement of claim was delivered alleging a conspiracy to defraud, and alternatively claiming the amount of the bribes as money had and received. The conspiracy was negatived by the jury, and the question is, whether the amount of the bribes paid by the defendant to the plaintiffs' agents without the knowledge of the plaintiffs can or cannot be recovered by the plaintiffs from the defendant.

It seems to me clear from the judgments in *Salford Corpn. v. Lever* (1) and in *Grant v. Gold Exploration and Development Syndicate, Ltd.* (2) that, inasmuch as the amount of the bribes has been quantified, it can be recovered as money had and received. At the trial, the jury found that bribes were given by the defendant to

the plaintiffs' agents, and that the damages, notwithstanding this, amount to one farthing. That is an absurd verdict. If a vendor bribes a purchaser's agent, of course the purchase money is loaded by the amount of the bribe. It cannot be denied. In this case the purchase money was £28,000, in which was included the £700 given to the purchasers' agents. Of course the vendor would have sold the goods for £28,000 less £700; therefore, he has in his pocket £700, money of the purchasers. That £700 he must disgorge. That is the cause of action here. When a purchaser finds out this state of things, he may call on his agent or the vendor to disgorge. In *Salford Corpn. v. Lever* (1), LORD ESHER, M.R., said ([1891] 1 Q.B. at p. 177):

"The third person was bound to pay back the extra price which he had received, and he could not absolve himself or diminish the damages by reason of the principal having recovered from the agent the bribe which he had received."

When it was proved at the trial that the bribes had been paid, the direction to the jury ought to have been that the amount which could be recovered as money had and received was the amount of the bribes. But, instead of so directing the jury, the learned judge left to them the amount to be recovered. They found one farthing. That verdict cannot stand. The learned judge, instead of entering judgment for the defendant, ought to have directed the jury that the plaintiffs were entitled to judgment for £700. Judgment must be entered for the plaintiffs for £400, the amount they have agreed to take.

VAUGHAN WILLIAMS, L.J.—I agree. It is just possible that the jury did not mean to deal with the 2½ per cent., and that they meant to say that the charges made by the defendant for the cigars were no more than the ordinary prices in the market. This is an action against a briber in which the plaintiffs seek to recover from him the amount of the bribe. In *Grant v. Gold Exploration and Development Syndicate, Ltd.* (2) HENX COLLINS, L.J., said ([1900] 1 Q.B. at p. 249):

"Where the buyer elects not to rescind the sale, but can nevertheless point to a specific sum over and above what must be taken as between the parties to be the real price, which has found its way into the vendor's pocket as a result of a sale so effected [i.e., through a commission paid to the purchaser's agent], he is entitled to recover it back. When the sum is thus liquidated, and in the hands of the vendor, I think it would be clearly *contra æquum et bonum* that he should retain it. I think that if he takes the hazardous course of paying a sum to the buyer's agent in order to secure his help, and does not himself communicate it, he must at least accept the risk of the agent's not doing so. He has taken a course which can be validated only by actual disclosure to the opposite principal, and as a result of it he is in possession of a sum which, whether the bargain stands or is rescinded, never ought to have been paid by the buyer, or found its way into the pocket of the seller. He is responsible as for money had and received to the use of the buyer."

If that be so, there can be no question that, in this case, whatever the amount of the bribes is proved to be, that amount can be recovered from the agent. I used to think that the action against the briber was an action of fraud sounding in damages; but the judges in *Salford Corpn. v. Lever* (1) did not hold out much encouragement to me in that view. In *Grant v. Gold Exploration and Development Syndicate, Ltd.* (2) HENX COLLINS, L.J., took the other view. But it makes little difference which view is the right one, for, even assuming the action against the briber were an action sounding in damages, if the evidence were conclusive that payments of commission had been made to the plaintiffs' agent, and made to a certain fixed amount so that it was not necessary that there should be any inquiry as to the amount, it is clear that that was the amount which the vendors were willing to allow the agents of the purchasers, and it follows that the vendor was willing to

A part with his goods for a price less by that amount than the price at which he actually did part with them. Where that amount is quantified, that is the measure of damages. So that the same amount is recoverable whether the action is on an indebitatus count or in damages.

B ROMER, L.J.—The courts of law of this country have always strongly con-
demned and, when they could, punished the bribing of agents, and have taken a
strong view as to what constitutes a bribe. I believe that the mercantile community
as a whole appreciate and approve of the court's views on the subject. But some
persons undoubtedly hold laxer views. Not that these persons like the ugly word
"bribe", or would excuse the giving of a bribe if that word be used, but they differ
C from the courts in their view as to what constitutes a bribe. It may, therefore, be
well to point out what is a bribe in the eyes of the law. Without attempting an
exhaustive definition, I may say that the following is one statement of what con-
stitutes a bribe. If a gift be made to a confidential agent with the view of inducing
the agent to act in favour of the donor in relation to transactions between the donor
and the agent's principal and that gift is secret as between the donor and the agent—
that is to say, without the knowledge and consent of the principal—then the gift is
D a bribe in the view of the law.

If a bribe be once established to the court's satisfaction, then certain rules apply.
Among them the following are now established, and, in my opinion, rightly
established, in the interests of morality with the view of discouraging the practice
of bribery. First, the court will not inquire into the donor's motive in giving the
bribe, nor allow evidence to be gone into as to the motive. Secondly, the court will
E presume in favour of the principal and as against the briber and the agent bribed,
that the agent was influenced by the bribe; and this presumption is irrebuttable.
Thirdly, if the agent be a confidential buyer of goods for his principal from the
briber, the court will assume as against the briber that the true price of the goods
as between him and the purchaser must be taken to be less than the price paid to,
or charged by, the vendor by, at any rate, the amount or value of the bribe. If the
F purchaser alleges loss or damage beyond this, he must prove it. As to the above
assumption, we need not determine now whether it could in any case be rebutted.
As at present advised, I think that, in the interests of morality, the assumption
should be held an irrebuttable one; but we need not finally decide this, because in
the present case there is nothing to rebut the presumption.

Judgment for plaintiffs.

G Solicitors : *Gardner & Hovenden ; Rutter, Veitch & Bond.*

[*Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.*]

BURROWS v. BARNES

[QUEEN'S BENCH DIVISION (Ridley and Bigham, JJ.), May 21, 1900]

[Reported 82 L.T. 721]

Pawn—Sale of goods by auction—Pledge fraudulently pawned—Purchase by pawnbroker—Right of pawnbroker as against true owner—Pawnbrokers Act, 1872 (35 & 36 Vict., c. 93), s. 19.

A pawnbroker who purchases at a public sale under s. 19 of the Pawnbrokers Act, 1872, a pledge pawned with him does not thereby acquire a valid title against the true owner of the pledge when it has been fraudulently pawned.

Notes. The Pawnbrokers Act, 1872, s. 19, has been amended by the Pawnbrokers Act, 1960, s. 3 (40 HALSBURY'S STATUTES (2nd Edn.) 582), by substituting "forty shillings" for "ten shillings."

As to sale of pledges, see 29 HALSBURY'S LAWS (3rd Edn.) 230, 231; and for cases see 37 DIGEST 24. For the Pawnbrokers Act, 1872, s. 19, see 17 HALSBURY'S STATUTES (2nd Edn.) 769.

Case referred to in argument :

Singer Manufacturing Co. v. Clark (1879), 5 Ex. D. 37; 49 L.J.Q.B. 224; 41 L.T. 591; 44 J.P. 59; 28 W.R. 170; 37 Digest 8, 37.

Appeal by the defendant from a decision of his Honour JUDGE LUSHINGTON sitting at the Wandsworth County Court.

The defendant was the owner of a bicycle which he let out on hire. The hirer fraudulently pawned it, and, the pledge not being redeemed within the proper time, it was put up for auction and bought by the pawnbroker. He sold it to the plaintiff, who took it to the defendant for repair. The defendant, recognising it as his property, refused to give it up. The plaintiff brought this action to recover the bicycle, and the judge gave judgment for the plaintiff. The defendant appealed.

Colam for the defendant.

Gordon for the plaintiff.

RIDLEY, J.—It is quite clear that the learned judge made a mistake in thinking that the sections [ss. 16-19 of the Pawnbrokers Act, 1872,] gave an absolute title to the pawnbroker as against all the world. These sections deal with the rights as between the pledgor and pledgee. None of the other sections of the Act have any bearing. This bicycle belonged to the defendant, and the appeal must be allowed.

BIGHAM, J.—I agree.

Appeal allowed.

Solicitors : *G. Aplin Nichols; Hanne & Son.*

[Reported by W. DE B. HERBERT, ESQ., Barrister-at-Law.]

Re ST. THOMAS' RURAL DISTRICT COUNCIL AND HEAVITREE
URBAN DISTRICT COUNCIL

[KING'S BENCH DIVISION (Wright, J.), January 30, 1902]

[Reported 86 L.T. 153; 66 J.P. 597]

Local Authority—Alteration of area—Adjustment for loss caused by severance—New authority formed by severing part of existing authority area—Local Government Act, 1888 (51 & 52 Vict., c. 41), s. 57—Local Government Act, 1894 (56 & 57 Vict., c. 73), ss. 54, 68.

By an order made by a county council under s. 57 of the Local Government Act, 1888, a part of a rural district was severed from the district and constituted a new urban district. All necessary adjustments were to be made in accordance with the provisions of s. 68 of the Local Government Act, 1894. An adjustment of accounts was made and an agreement entered into between the councils providing for the payment of certain sums in respect of matters therein specified, and those sums were paid. Subsequently, the rural council, finding that the severance was a pecuniary loss to them, requested the urban council to come to an agreement as to the amount to be paid for such loss, but the councils were unable to agree and an arbitrator was appointed to determine the adjustment of the financial loss sustained by the rural district by the severance of the urban district in so far as such loss was not determined by the prior agreement. No claim for such loss was included in the prior agreement:

Held: although the severed portion had been formed into an urban district of itself and had not been transferred to an existing district, nevertheless the adjustment claimed by the rural council was an adjustment within the meaning of s. 68 of the Local Government Act, 1894, and the claim to have the adjustment was not barred by the prior agreement between the councils.

Notes. Section 57 of the Local Government Act, 1888, and ss. 54 and 68 of the Local Government Act, 1894, have been repealed. The present provisions relating to alteration of areas are now contained in ss. 129-155 of the Local Government Act, 1933, as amended by the Local Government Act, 1958.

As to the consequences of alterations, see 24 HALSBURY'S LAWS (3rd Edn.) 430 et seq.; and for cases see 33 DIGEST 24 et seq. For the Local Government Act, 1933, see 14 HALSBURY'S STATUTES (2nd Edn.) 353. For the Local Government Act, 1958, see 38 HALSBURY'S STATUTES (2nd Edn.) 614.

Case referred to:

(1) *Re Rochdale Union and Haslingden Union*, [1899] 1 Q.B. 540; 68 L.J.Q.B. 531; 80 L.T. 146; 17 W.R. 322; 15 T.L.R. 223; 43 Sol. Jo. 277, C.A.; 33 Digest 27, 127.

Special Case stated by an arbitrator concerning a dispute between the St. Thomas' rural district council and the Heavitree urban district council, Devon.

An order was made by the county council of Devon which set out s. 57 of the Local Government Act, 1888, and s. 54 of the Local Government Act, 1894, and stated that the parish of Heavitree formed part of the St. Thomas' rural district, and that, the county council being satisfied that a *prima facie* case was made out for the conversion of the parish of Heavitree into an urban district, had caused an inquiry to be made in the locality and had given the requisite notice, and that the conversion was desirable. It was further provided that the parish of Heavitree should be an urban district and should be called the Heavitree Urban District. This order was submitted by the county council to the Local Government Board for confirmation under s. 57 (3) of the Local Government Act, 1888, and it

was duly confirmed subject to certain modifications by the County of Devon (Heavitree) Confirmation Order, 1896. It was provided by this order that as from June 24, 1896, the parish of Heavitree should be severed from the St. Thomas' rural district and become an urban district. Clause 7 of this order provided that:

"all adjustments necessary in consequence of this order shall be made in the manner provided by and in accordance with the provisions contained in s. 68 of the Local Government Act, 1894, and any sum required to be paid for the purpose of an adjustment or of any award by any authority affected by this order, may be paid out of such funds as shall be determined by the agreement or by an arbitrator."

By an agreement dated Nov. 5, 1897, made between St. Thomas' rural district council and the Heavitree urban district council an adjustment of the accounts between the two councils was made and there was found to be due from the St. Thomas' council to the Heavitree council the sum of £908 11s. in respect of the highways, and £44 8s. in respect of the sanitary account. There was found to be due from the Heavitree council to the St. Thomas' council the sum of £3 10s., being one-sixth part of the amount paid on precept by the St. Thomas' council to the Exeter Port Sanitary Authority. The agreement went on to acknowledge that each council had paid to the other the amount due and provided that the St. Thomas' council was liable to pay £3 8s. 10d. to the clerk and surveyor of the late Ottery St. Mary Highway Board and that 12s. 5d. had been paid by the Heavitree council to the St. Thomas' council in respect of that council's apportion of that sum. It was then witnessed:

"(i) That the urban council thereby released the rural council from all claims in respect of the highways and sanitary accounts respectively, and thereby covenanted and agreed to pay annually to the rural council on Sept. 30 in every year so long as the same was payable the said sum of 10s. 8d.

(ii) The urban council thereby covenanted and agreed with the rural council to pay to them yearly and every year a sum equal to one-sixth of the whole amount paid in that year by the rural council to the Exeter Port Sanitary Authority.

(iii) The rural council thereby covenanted and undertook upon receipt of the said annual payment of 10s. 8d. to discharge from time to time the above sum of £3 8s. 10d., and did thereby release the urban council from all claims in respect of the sum so paid by the rural council to the Exeter Port Sanitary Authority as aforesaid."

On Feb. 15, 1901, the council of St. Thomas by their clerk wrote to the clerk of the council of Heavitree as follows:

"I am instructed by this council to write to you as clerk to the Heavitree Urban Council with reference to the loss this rural district has sustained in consequence of the withdrawal of Heavitree from its contributory rateable area by virtue of the order of the county council of March, 1896. Experience proves that the loss is considerable, and I beg, therefore, to invite your council to go into the matter with my council, so that an agreement may be come to under s. 68 of the Local Government Act, 1894, settling the amount which will be paid by Heavitree as compensation for the loss mentioned."

On Feb. 21, 1901, the council of Heavitree wrote that they had considered the matter with regard to the compensation, and that they did not acknowledge any liability, and that they must therefore decline to accept the invitation of the St. Thomas' council.

The two councils were unable to come to an agreement on the matters mentioned in the letters or as to the appointment of an arbitrator, and on Nov. 5, 1901, an

A order was made by a master in chambers under s. 68 of the Local Government Act, 1894, appointing an arbitrator to determine the question of adjustment of accounts between the two councils. By an agreement dated Dec. 6, 1901, made between the two councils it was settled and agreed in order to facilitate and shorten the arbitration proceedings that: (i) the annual loss of the St. Thomas' council should be admitted and agreed at the net sum of £100, such loss being attributable to

B highways; (ii) the St. Thomas' council should waive so much of its claim as arose under the Public Health Acts; (iii) this agreement was without prejudice to the contention of the Heavitree council that the claim was barred by the agreement of Nov. 5, 1897. At the arbitration on Dec. 17, 1901, the St. Thomas' council claimed from the Heavitree council £3,000 being thirty years' purchase of the agreed sum of £100. The Heavitree council contended that: (i) as their district had been formed into and constituted an urban district and had not been trans-

C ferred from one existing district council to another there was no case for adjustment within s. 68 of the Local Government Act, 1894; (ii) the agreement of Nov. 5, 1897, was a bar to the claim made in the arbitration; (iii) in any event no sum should be paid to the St. Thomas' council in respect of the claim in the arbitration. The arbitrator found the following facts: (i) that at the date of the

D agreement of Nov. 5, 1897, both councils were aware that the severance of the parish of Heavitree would be a considerable loss of income to the St. Thomas' council; (ii) that no claim other than appeared in the agreement was made or put forward for such loss of income occasioned by the severance; (iii) that neither council was aware that the St. Thomas' council had any right or power to make any such claim as was made in the arbitration; (iv) that the matters in the

E arbitration were not referred to nor included in the agreement of Nov. 5, 1897.

The questions for the opinion of the court were: (i) Whether the adjustment claimed in the arbitration was an adjustment within the meaning of s. 68 of the Local Government Act, 1894, having regard to the fact that the Heavitree urban district had been formed into and constituted an urban district and had not been transferred from one existing district council to another; and (ii) whether the

F agreement of Nov. 5, 1897, was a bar to the claim of the St. Thomas' council. If the St. Thomas' council were correct, the arbitrator found that the Heavitree council should pay them £2,375 and interest thereon at 3½ per cent. per annum from Feb. 15, 1901, until payment of the total sum and that the parties should each bear their own costs of the reference and each pay one-half the costs of the award. If the Heavitree council were correct then the arbitrator found that the St.

G Thomas' council were not entitled to any sum from them and the latter should pay the former's costs of the reference and the award.

By s. 57 of the Local Government Act, 1888 :

H "(1). Whenever a county council is satisfied that a *prima facie* case is made out as respects any county district not a borough, or as respects any parish, for a proposal for all or any of the following things; that is to say . . . (a) the conversion of any such district or part thereof, if it is a rural district, into an urban district, and if it is an urban district, into a rural district, or the transfer of the whole or any part of any such district from one district to another, and the formation of new urban or rural districts; the county council may cause such inquiry to be made in the locality, and such notice to be

I given, both in the locality, and to the Local Government Board, Education Department, or other government department, as may be prescribed, and such other inquiry and notices (if any) as they think fit, and if satisfied that such proposal is desirable, may make an order for the same accordingly. (3) In any other case the order shall be submitted to the Local Government Board, etc. (5) The Local Government Board, on confirming an order, may make such modifications therein as they consider necessary for carrying into effect the objects of the order."

By s. 54 of the Local Government Act, 1894 :

"(1). Where a new borough is created, or any other new urban district is constituted, or the area of an urban district is extended, then—(a) as respects any rural parish or part of a rural parish which will be comprised in the borough or urban district, provision shall be made, either by the constitution of a new parish or by the annexation of the parish or parts thereof to another parish or parishes, or otherwise, for the appointment of overseers and for placing the parish or part in the same position as other parishes in the borough or district, and (c) provision shall also, where necessary, be made for the adjustment of any property, debts, and liabilities, affected by the said creation, constitution, or extension. (2) The provision aforesaid shall be made—(c) Where any other new urban district is constituted by an order of the county council under s. 57 of the Local Government Act, 1888."

By s. 68 of the Local Government Act, 1894 :

"(1). Where any adjustment is required for the purpose of this Act, or of any order, or thing made or done under this Act, then, if the adjustment is not otherwise made, the authorities interested may make agreements for the purpose, and may thereby adjust any property, income, debts, liabilities, and expenses, so far as affected by this Act, or such scheme, order, or thing, of the parties to the agreement. (2) In default of an agreement, and as far as any such agreement does not extend, such adjustment shall be referred to arbitration in accordance with the Arbitration Act, 1889, and the arbitrator shall have power to disallow as costs in the arbitration the costs of any witness whom he considers to have been called unnecessarily, and any other costs which he considers to have been incurred unnecessarily, and his award may provide for any matter for which an agreement might have provided."

Macmorran, K.C. (*R. Cunningham Glen and Jenkin with him*), for council of St. Thomas.

C. A. Russell, K.C. (*Roskill with him*) for the Heavitree council.

WRIGHT, J. I think there is nothing in the last point raised whether the agreement of Nov. 5, 1897, is a bar to the claim made in this case. The agreement of Nov. 5, 1897, appears to me to be plainly confined to a settlement of the existing accounts when there were liabilities which the undivided district was already under an obligation to pay; and I do not think that the existence of that agreement precludes the claimants here from putting forward this claim. I think it is material to notice what counsel for the claimants pointed out, that the order for the division of the district, and the constitution of the urban district out of part of the rural district, was made under the Local Government Act, 1888, s. 57, and s. 62 of that Act, therefore, applies to this extent, that it authorises the parties from time to time to make agreements. I think that is a guide to what the legislature meant, and the fact of the Local Government Board having applied s. 68 of the Local Government Act, 1894, does not of itself show that the parties are precluded from making a further claim by arbitration because they had before that time already settled their differences by agreement. It seems to me plain that in these cases there may constantly be a necessity for a supplemental agreement; and I think it would be very unfortunate if there were any language in these Acts which absolutely bound the parties by the result of an agreement, or arbitration, undertaken very likely to deal with urgent matters, and undertaken and concluded before the parties had had time to ascertain what their relative positions were. Nor can I see any sufficient defence against this claim for adjustment in the suggestion that this is not the case of a transfer of a district from one existing body to another existing body, but is the constitution of a portion of the district into a separate Local Government Board unit. Both of these cases are in one sense transfers, and the order of the Local Government Board applies s. 68 of the Act of 1894, so that I cannot see that there is anything in that point.

A Then comes the main and real question. Certainly I find great difficulty in believing that any such contention as is here put forward for the claimants, the rural district council, was ever intended by Parliament. The words used are no doubt wide enough, and no doubt properly and intentionally wide enough, to include any possible adjustment, because any sort of adjustment may arise in a particular case, and if so, it must be provided for and covered. For instance, where there is
 B any kind of a joint rate, or where a burden has been undertaken by one of the joint districts which would not fall within it, but would be undertaken by it for the benefit of the other, the words must be wide enough to deal with a case of that kind. Therefore, I do not see how the Act could have been drawn not wide enough to cover a case where there is no joint rating and no burden undertaken for a consideration given as in this case. One of the main reasons for consulting an urban district out of part of a rural district very often is that it is
 C unfair to make one part pay for the expensive works and arrangements necessary for the other part. The populous part of a district wants better sewerage and lighting, which the rural part does not want, and they divide for the very purpose of leaving the populous part to bear its own cost, which is for its own benefit; but here the rural council turn round to the urban council and say: "We used to levy rates on you; now pay us something because we have gone away from you." In view of the decision of the Court of Appeal in *Re Rochdale Union and Haslingden Union* (1), I cannot say that it is impossible that such a claim can be maintained. LORD RUSSELL, C.J., says ([1899] 1 Q.B. at p. 544):

E "The substantial cause of complaint of the Rochdale Union is that there has been taken away from it a portion of the rateable area formerly comprised in it. The taxation of that area was a gain to the union, because the character of the district taken away was such that the union got more out of the district in rates than was required to be expended on that portion of the union for its poor. It is said that Haslingden Union has got the benefit of this, and that an adjustment ought to take place; and, in my view, that contention is right."

F Then A. L. SMITH, L.J., says (*ibid.* at p. 545):

"It is a case of a detriment to one union and an advantage to the other; and, in my opinion, it is a case which comes within s. 68, as it certainly does within s. 36."

G In view of these expressions of opinion I have only one course open to me, and that is to say that it is not impossible that such a claim as this can be maintained. That is all I can deal with. Unfortunately the two authorities here have come to an agreement as to an amount to be paid which I should have thought it impossible that any arbitrator could ever have arrived at. I should have thought that if the section meant that any contribution should be made, it ought only to be a nominal one, unless there were some consideration for it; but, of course, I
 H cannot deal with that. There may have been reasons why the parties thought that there was good ground for awarding a substantial sum; but as they have agreed on that point I cannot deal with it in any way. It may possibly be that in future cases of this kind the Local Government Board may think it right to deal with the matter themselves, as they have power to do under s. 59 (4) of the Local Government Act, 1888. I see no reason why they should not deal with this case. They
 I can deal with part of the arrangements as well as with the whole, and I should be very much surprised if they lay down any such general rule as that which is involved in this claim. As the matter stands, I must give judgment on the case for the claimants.

Judgment for the claimants.

Solicitor: Coode, Kingdon & Cotton, for Arthur E. Ward, Exeter; Geare & Pease, for J. W. W. Mathew, Exeter.

[Reported by W. W. ORR, Esq., Barrister-at-Law.]

Re KERLY, SON, AND VERDEN

[COURT OF APPEAL (Rigby and Stirling, L.JJ.), January 14, 15, 1901]

[Reported [1901] 1 Ch. 467; 70 L.J.Ch. 189; 83 L.T. 699; 49 W.R. 211;
17 T.L.R. 189; 45 Sol. Jo. 206]

*Solicitor's Undertaking—Enforcement—Undertaking to enter appearance to writ—
Delay of over twelve months in prosecution of action—Attachment—R.S.C.,
Ord. 8, r. 1.*

The writ in an action was issued on Feb. 24, 1899, and was immediately sent to the defendants' solicitors who, with the authority of the defendants, endorsed it: "We accept service for the defendants and will enter appearance in due course." Negotiations for a settlement took place and finally time was by agreement extended to April 30, 1899, but nothing was done in the action till Oct. 24, 1900, when, having decided to proceed with the action, the plaintiff required the defendants' solicitors to fulfil their undertaking to enter an appearance. The defendants' solicitors refused to do so on the ground that as, under R.S.C., Ord. 8, r. 1, the writ was no longer in force, the undertaking had ceased to be of effect at the end of twelve months from the time it was given. The plaintiff sought to attach the defendants' solicitors for non-compliance with their undertaking by issue of a writ of attachment.

Held: the acceptance of the writ in the action by the solicitors with the authority of the defendants was equivalent to service upon the defendants so that thereupon the undertaking to enter an appearance became unconditional, and, the solicitors being subject to the jurisdiction of the court, an order would be made that they forthwith enter an appearance to the writ.

Notes. As to enforcement of undertaking given by a solicitor, see 36 HALSBURY'S Laws (3rd Edn.) 195 et seq., and for cases see 42 DIGEST 334 et seq. For R.S.C., Ord. 8, r. 1; Ord. 9, r. 1; Ord. 12, r. 18, see ANNUAL PRACTICE (1962) 91, 101, 194, respectively.

Appeal by the defendants' solicitors from a decision of FARWELL, J., on a motion by the plaintiff under R.S.C., Ord. 12, r. 18, for the issue of a writ of attachment against the defendants' solicitors for failing to enter an appearance according to their undertaking.

An action was commenced on Feb. 24, 1899, by the plaintiff, Mrs. Grace Anderson, the executrix of W. Anderson, deceased, against the defendants, Tarbutt and Quentin asking (i) that an account might be taken of the net profits made by the defendants on a re-sale by them of a certain property purchased or agreed to be purchased by them and re-sold to the Nigel Deep Gold Mining Co. Ltd.; (ii) a declaration that the defendants were liable to pay to the plaintiff as such executrix £20 per cent. on such net profits; (iii) an order on the defendants to pay to the plaintiff a sum equal to £20 per cent. on such profits. On the margin of the writ an endorsement was made by the defendants' solicitors that they accepted service for the defendants, and would "enter appearance in due course." Various negotiations for a settlement took place, and finally, in March, 1899, consent was given to extend the time till April 30, 1899. From that time down to October, 1900, nothing was done. It appeared that some of the persons interested were in Johannesburg, and, owing to the war in South Africa, no communication could be had with them. In consequence there had been this delay of eighteen months. If the writ lapsed, in all probability a new writ would be had with the plea of the Statute of Limitations, which could not be raised under the present writ. The plaintiff, therefore, required the defendants' solicitors to enter appearance in accordance with their undertaking; but this they refused to do, on the ground that

A there was no writ in existence, and that their undertaking had run out at the end of twelve months from the time when it was given.

B On the plaintiff's motion for attachment, FARWELL, J., decided that the original writ was still in force, except for the purpose of service, notwithstanding that twelve months had elapsed (R.S.C. Ord. 8, r. 1), and that service was dispensed with where there was an undertaking such as this (R.S.C. Ord. 9, r. 1); that the undertaking was binding for six years, and that the defendants' solicitors must therefore enter an appearance in accordance therewith. The defendants' solicitors appealed.

Jenkins, Q.C., and Kerly for the appellants.

Upjohn, Q.C., and Gore-Browne for the plaintiff.

C **RIGBY, L.J.** In this case the question is whether the court has jurisdiction to proceed against solicitors on an undertaking given by them. All sides are agreed that there has been no unfair conduct on the part of the solicitors, and they are not in any position of difficulty, even if the position has been brought about by their own delay, because very fairly and very properly their clients say: "If you are held now liable under your undertaking, we will see that you do not suffer for it." On Feb. 24, 1899, the writ in this action was brought to the solicitors, and they endorsed that writ with an endorsement to the effect that they accepted service of the writ and undertook to enter an appearance. That was done with the authority of the clients. We are not in any way concerned with what would have been the case if it were an authority usurped by the solicitors, and not sanctioned by the clients. But it was done with the authority of the clients; and in my opinion all obligation from that moment as to service on the part of the plaintiff was waived—or, at any rate, the acceptance by the solicitors with the authority of the clients was equivalent to service upon the clients. That being so, the undertaking to enter an appearance at once became an unconditional undertaking. I should not have been ready to conclude that without a service on the solicitors the undertaking would have taken effect. That was not the case. They accepted the service. They then offered to compromise, and that offer was to last for two months. I do not think that it was necessary on their part to intimate at the end of the two months that the offer was no longer a continuing offer. But I agree with the position taken by counsel for the plaintiff, that at the expiration of the two months they ought in pursuance of their undertaking to have entered an appearance. He acquits them, as everyone who has heard the case would do, from any impropriety in not entering an appearance. But, at any rate, it was their place to enter an appearance, and not the plaintiff's place to do anything in the way of service.

Under these circumstances, I think that R.S.C. Ord. 8, r. 1, has no application at all, and that these solicitors cannot complain and their clients cannot complain of delay, because the delay really has been caused by the defendants' solicitors not entering the appearance in accordance with their undertaking. I am of opinion, therefore, that they are now subject to the jurisdiction of the court, and that they ought really to enter an appearance. There is no wrong dealing at all. Their clients, I repeat, have very fairly said: "If they ought to do it, then we will permit them to do it and authorise them to do it." It seems to me that the order that ought to be made is that the solicitors do forthwith enter an appearance to the writ. I do not apprehend that there will be any difficulty; but if there is a difficulty the application, in form an application to commit them, should again be brought before the court.

I say nothing about the contract whether that is right or wrong. It seems to me not to be involved in this action, which is an application in the matter of the solicitors. I think that that order should be made. The costs both here and below should be paid by the solicitors, who will get such indemnity from their clients as the clients think they are bound to give.

STIRLING, L.J. I agree in the result which has been pronounced by the Lord Justice. I desire to say, speaking for myself, that I do not wish to decide anything in this case beyond what arises from the particular facts which are brought before us. Those are very short and simple.

[His Lordship stated the facts, and continued.] The position which is taken up by the defendants' solicitors is a perfectly natural and intelligible one. No one makes any complaint as to it. It was stated by one of them in the affidavit which has been filed on behalf of the defendants :

"After the receipt of the letter of Oct. 24, 1900, I applied to the defendants for their instructions as to entering appearances for them, and they informed me that, in view of the long delay on the part of the plaintiff, they regarded the action as at an end, and they directed me not to enter such appearances. Since the service of the notice of the present application I have again applied to the defendants for their instructions, and at my request they have instructed me to do what the court thinks fit under the circumstances to direct."

That is the position. The application before FARWELL, J., was under the rule to attach the solicitors for not having performed their undertaking. FARWELL J., on the application of the plaintiff, made an order expressing his opinion to be—and ordering in point of fact—that the solicitors should in pursuance of their undertaking enter an appearance in the action. The question is whether or not that order ought to be upheld. The main objection which has been pressed upon us is that, having regard to R.S.C. Ord. 8, r. 1, the writ for purposes of service is spent, so to speak, and no doubt Ord. 8, r. 1, is to be taken into consideration on this question. It provides :

"No original writ of summons shall be in force for more than twelve months from the day of the date thereof . . ."

It is conceded on all hands that that does not mean that it is not to be in force for any purpose, but that it is limited to being in force for the purpose of service. Therefore, if it is not served within the period of twelve months it is at an end, for it is no longer in force. But there is this provision :

". . . If any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to the court or a judge for leave to renew the writ; . . ."

so that there is an application provided for by a plaintiff who has not served in accordance with the rules of court to be made to the court or a judge for the renewal of the writ—

"and the court or judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original or concurrent writ of summons be renewed for six months from the date of such renewal inclusive, and so from time to time during the currency of the renewed writ. . . . A writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited and for all other purposes from the date of the issuing of the original writ of summons."

R.S.C. Ord. 9, r. 1 provides :

"No service of writ shall be required when the defendant by his solicitor undertakes in writing to accept service and enters an appearance."

What has taken place here is not exactly in accordance with either rule. The defendants' solicitors, as I pointed out, with their authority, up the receipt of the writ indorsed it that they accepted service and would "enter an appearance in due course." That, it seems to me, means this : The defendants say, "You may treat

A used served for the purpose of this action, and a proper appearance shall be entered in due course." It is in point of fact, as it seems to me, on the part of the defendants a dispensation from any further formal service. That being done, any further question of service might indeed arise, because the service has not taken place in accordance with the provisions of R.S.C. Ord. 9, r. 1, precisely. But, nevertheless, when you are dealing with the force of the writ under R.S.C. Ord. 8, r. 1, it seems to me that it would be taken into consideration—and very serious consideration—by any judge or court which had to consider the question of the renewal of a writ or its efficiency. In my opinion, after a formal acceptance of service of a writ in that manner it would require a very strong case to show that at all events the writ might not to be renewed. Here we are invited to say what, under all the circumstances of the case, is the proper thing to be done in this present action. That is one circumstance which seems to me of very great weight. Another is that the offer was only to remain open for two months, and that at the end of that period of two months the next step was to be taken in accordance with the undertaking of the defendants to enter an appearance. That was not done. There has been a great delay—a delay of eighteen months—and that is a circumstance which the court has to take into consideration. But, looking at all the circumstances of the case, the delay has not been so great as to deprive the plaintiff of the right to say that, as regards service, the writ ought to be held by the court to be still an effective writ, and one to which an appearance ought to be entered. That is the view which was taken by FARWELL, J., and with that I agree. The result, therefore, will be that the appeal will be dismissed.

E RIGBY, L.J.—The dismissal of the appeal will be sufficient under the circumstances. The appeal will be dismissed with costs.

Appeal dismissed.

Solicitors : *Kerly, Son & Verden ; Loughborough, Gedge, Nisbet & Drew.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

Re EDGCOME. Ex parte EDGCOME

[COURT OF APPEAL (Vaughan Williams, Romer and Stirling, L.J.J.), July 9, 11, 1902]

[Reported 1902 2 K.B. 403; 71 L.J.K.B. 722; 87 L.T. 108; 50 W.R. 678; 18 T.L.R. 734; 46 Sol. Jo. 649; 9 Mans. 227]

Bankruptcy—Stay of action against bankrupt—Committal for non-payment of rates—Bankruptcy Act, 1883 (46 & 47 Vict., c. 52), s. 10 (2).

Committal for non-payment of rates under s. 2 of the Distress for Rates Act, 1849 [see now s. 7 (1) of the Distress for Rates Act, 1960] **held** to be punitive in character, and not merely "legal process" to compel payment of the debt, and, therefore, the fact that a receiving order had been made against the debtor did not give the court jurisdiction under s. 10 (2) of the Bankruptcy Act, 1883 [now s. 9 (1) of the Bankruptcy Act, 1914] to stay the committal proceedings.

Middleton v. Chichester (1) (1871), 6 Ch. App. 152 and *Re Smith, Hands v. Andrews* (2), [1893] 2 Ch. 1, applied.

Dieta of Mellish, L.J., in *Cobham v. Dalton* (3) (1875), 10 Ch. App. at p. 657, not followed.

Notes. Section 10 (2) of the Bankruptcy Act, 1883, is re-enacted in s. 9 (1) of the Bankruptcy Act, 1914. The Distress for Rates Act, 1849, has been repealed by the Distress for Rates Act, 1960. Section 7 of the Act of 1960 contains provisions as to imprisonment in default of distress formerly in s. 2 of the Act of 1849.

Referred to: *Church's Trustee v. Hibbard* (1902), 87 L.T. 412; *Re McGreavy, Ex parte McGreavy v. Benfleet U.D.C.*, [1950] 1 All E.R. 30.

As to stay of legal process, see 2 HALSBURY'S LAWS (3rd Edn.) 321. As to imprisonment for debt see *ibid.*, 638, and for cases see 5 DIGEST (Repl.) 1093 et seq. For cases on the effect of a receiving order, see 4 DIGEST (Repl.) 185 et seq. For the Bankruptcy Act, 1914, s. 9, see 2 HALSBURY'S STATUTES (2nd Edn.) 337, and for the Distress for Rates Act, 1960, s. 7, see 40 HALSBURY'S STATUTES (2nd Edn.) 639.

Cases referred to:

- (1) *Middleton v. Chichester* (1871), 6 Ch. App. 152; 40 L.J.Ch. 237; 24 L.T. 173; 19 W.R. 369, L.C. & L.J.J.; 5 Digest (Repl.) 1094, 8317.
- (2) *Re Smith, Hands v. Andrews*, [1893] 2 Ch. 1; 62 L.J.Ch. 336; 68 L.T. 337; 57 J.P. 516; 41 W.R. 289; 9 T.L.R. 238; 37 Sol. Jo. 247; 2 R. 360, C.A.; 5 Digest (Repl.) 1094, 8319.
- (3) *Cobham v. Dalton* (1875), 10 Ch. App. 655; 44 L.J.Ch. 702; 23 W.R. 865, L.J.J.; 4 Digest (Repl.) 197, 1777.
- (4) *Re M^r Williams* (1803), 1 Sch. & Lef. 169; 4 Digest (Repl.) 188, *628.
- (5) *Lees v. Newton* (1866), L.R. 1 C.P. 658; 1 H. & R. 734; 35 L.J.C.P. 285; 14 W.R. 938.
- (6) *Marris v. Ingram* (1879), 13 Ch.D. 338; 49 L.J.Ch. 123; 41 L.T. 613; 28 W.R. 434; 5 Digest (Repl.) 1094, 8318.

Also referred to in argument:

- Re Wray* (1887), 36 Ch.D. 138; 56 L.J.Ch. 1106; 57 L.T. 605; 36 W.R. 67; 3 T.L.R. 708, C.A.; 5 Digest (Repl.) 1103, 8901.
- Re Berry, Duffield v. Williams*, [1896] 1 Ch. 939; 65 L.J.Ch. 245; 74 L.T. 306; 44 W.R. 346; 40 Sol. Jo. 275; 3 Mans. 11; 5 Digest (Repl.) 1085, 8748.
- R. v. Pratt* (1870), L.R. 5 Q.B. 176; 39 L.J.M.C. 73; 18 W.R. 626; sub nom. *Ex parte Cole*, 21 L.T. 750; 34 J.P. 150; 5 Digest (Repl.) 1095, 8827.
- Stonor v. Fowle* (1887), 13 App. Cas. 20; 57 L.J.Q.B. 387; 58 L.T. 1; 52 J.P. 228; 36 W.R. 742; 4 T.L.R. 109, H.L.; 5 Digest (Repl.) 1109, 8961.

- A *Jones v. Williams and Roberts* (1877), 46 L.J.M.C. 270; 36 L.T. 559; 41 J.P. 614, D.C.; 25 Digest 353, 45.
Re Nathal. Pora v. Nathal (1891), 64 L.T. 241 55 J.P. 565; 7 T.L.R. 373; 8 Morr. 106, C.A.; 5 Digest (Repl.) 1111, 8968.

Appeal from a decision of Mr. Registrar Hore, sitting in Bankruptcy on an application by the appellant, James Edgcome, for an order under s. 10 (2) of the Bankruptcy Act, 1883, to stay legal process against him.

The appellant was the rated occupier of 12, St. James' Square, in the city of Westminster, and as such became liable to pay the sum of £174 odd under a general rate made in April, 1901. Having defaulted in payment, a distress warrant was issued by a police magistrate on Sept. 19, 1901, to levy the amount on his goods. A return of nulla bona was made, and on Mar. 10, 1902, a warrant of commitment in default of distress was issued under the Distress for Rates Act, 1849, by the magistrate, directing that the appellant should be imprisoned for one month unless the debt and costs should be sooner paid. The warrant was directed to be held over for a month, and was eventually executed on July 1, 1902, when the appellant was arrested and lodged in prison. On the following day the appellant presented a bankruptcy petition and a receiving order was at once made against him on that petition. On July 4, 1902, the appellant applied to Mr. Registrar Hore for an order that he should be released from prison under s. 10 (2), of the Bankruptcy Act, 1883, which gave the Court of Bankruptcy power to stay legal process against the property or person of the debtor. The application was made on the ground that the commitment was a legal process against the appellant's property or person. On July 5, 1902, the registrar dismissed the application. From that decision the appellant now appealed.

Haldinstein for the appellant.

Muir Mackenzie for the respondents.

July 11, 1902. The following judgments were read.

VAUGHAN WILLIAMS, L.J.—In this case we think that the appeal from Mr. Registrar Hore must fail. I confess that I have arrived at that conclusion with some reluctance, and my reluctance is based upon this: In the application of the Debtors Act, 1869, and the effect of the making of a receiving order, it does not seem to me that the decisions of the courts and the rules that have been made with reference thereto all follow the same principle.

But that is not what we have to consider. We have to consider here whether this case is really covered by authorities, and whether or not those authorities are right and consistent with the view that has been taken in other cases on the Debtors Act, 1869. It is our duty, if this case is covered by any authority, to act upon that authority. His Lordship stated the facts, and continued: The section upon which the appellant relies is s. 10 (2), of the Bankruptcy Act, 1883, which says:

"The court may at any time after the presentation of a bankruptcy petition stay any action, execution, or other legal process against the property or person of the debtor, and any court in which proceedings are pending against a debtor may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings or allow them to continue on such terms as it may think just."

It is contended that the process which has resulted in this order for imprisonment for one month is legal process against the property or person of the debtor for the purpose of enforcing payment of the rates, and that, therefore, the Court in Bankruptcy has jurisdiction either to allow or to prohibit the continuance of the process. Whether that is so or not depends really upon this: Whether the imprisonment which has been ordered is imprisonment intended as a means of enforcing payment

or whether it is intended as a punishment. If it is intended as a punishment, there would be no jurisdiction under s. 10 to order the discharge of the bankrupt from his imprisonment.

There can be no doubt that if the law, as it was expressed by MELLISH, L.J., in *Cobham v. Dalton* (3) (Ch. App. at p. 657), is still to be regarded as good law, we should have to treat this order for imprisonment merely as process instituted for the purpose of enforcing payment of a debt, because MELLISH, L.J., says, speaking generally of the arrest for debt, that it "is intended as a means of enforcing payment, not as a punishment." And he gives as a proof of that this fact, "for if the party pays the debt he is entitled to be discharged." When one looks at the Act of Parliament, the Distress for Rates Act, 1849, s. 2, which gives the power of committal to prison for nonpayment of rates, one finds first, from a recital at the beginning of the Act, that by the Poor Relief Act, 1601, a power of imprisonment was given not for a limited time but a power to commit the party "there to remain without bail or mainprize until payment." After that recital this Act goes on (s. 2) to authorise a person in default of payment

"to be imprisoned in the common gaol or house of correction for any time not exceeding three calendar months unless the sum or sums therein mentioned shall be sooner paid."

If one could apply the observations of MELLISH, L.J., and the reasons which he gives for treating the arrest as a mere means of enforcing payment, it would follow that in this case we should have to treat the order as a mere means of enforcing payment, for undoubtedly on the terms of the section and on the face of the warrant the debtor is entitled to his discharge on payment of the debt. But if one looks at the authorities, it seems that one must not regard that observation of MELLISH, L.J., as still being law. The first case I will refer to with regard to this matter is the judgment of LORD HATHERLEY in *Middleton v. Chichester* (1).

Before, however, calling attention to that decision, I wish to say a word as to the Debtors Act, 1869, itself and the general effect of that Act. Section 4 says:

"With the exceptions hereinafter mentioned, no person shall after the commencement of this Act be arrested or imprisoned for making default in payment of a sum of money."

There is a general abolition of imprisonment for debt, subject only to the exceptions which follow, which are (i) default in payment of a penalty; (ii) "Default in payment of any sum recoverable summarily before a justice or justices of the peace." That is this case. (iii) Default by a trustee or person acting in a fiduciary capacity. I do not know that I need read them all, but here is a list of the exceptions as to which the liability to imprisonment is continued notwithstanding the general abolition of imprisonment for debt. It is, however, right to observe in passing that there is another saving on this general abolition of imprisonment, and that is under s. 5 which provides that

"Subject to the provisions hereinafter mentioned and to the prescribed rules, any court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent court."

And, when one looks at the condition under which that order may be made, one finds in sub-s. (2),

"that such jurisdiction shall only be exercised where it is proved to the satisfaction of the court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which

A "he has made default and has refused or neglected or refuses or neglects to pay the same."

LORD HATHERLEY in *Middleton v. Chichester* (1) considers the exceptions in s. 4, the exceptions under which the liability to imprisonment still continues. He says this (6 Ch. App. at p. 156):

B "Now the first exception is the case of a penalty, and that makes the distinction I have pointed out extremely clear, because if it is merely a penalty in respect of a contract, that is not to deprive the person who has incurred it of the benefit of the section; but if it is any other sort of penalty, by which is meant a penalty for non-observance of a positive law, then he is to be exempted from the benefit of the section. The second exception is default in payment of any sum recoverable summarily before a justice or justices of the peace. That, again, would be something in the nature of a penalty, and not in the nature of a simple debt."

C He goes on to deal with the other exceptions—I need not read what he says at length, but he mentions the case of default by a trustee and misconduct by a solicitor—and he says (*ibid.*, at p. 157):

"Therefore, in every case there is something of the character of delinquency pointed out, and one cannot see that it makes a shadow of difference, with reference to the question of delinquency, whether a person has the money in his possession at the time the order is made or had parted with it some short time before the making of the order."

E The view of LORD HATHERLEY undoubtedly was that, taking all the exceptions in s. 4, each one of those exceptions retains imprisonment, because the legislature treats each one of the cases as one in which there was a delinquency, and the imprisonment is therefore a punishment and therefore differs from a mere process for the recovery of a debt. Later on in 1893 this question had to be considered again in the Court of Appeal in *Re Smith, Hands v. Andrews* (2) where LINDLEY, L.J., says ([1893] 2 Ch. at p. 17):

"Although *Cobham v. Dalton* (3) was decided in 1875, and *Middleton v. Chichester* (1) was decided in 1871, and the lords justices who decided *Cobham v. Dalton* (3) were members of the court which decided *Middleton v. Chichester* (1), the view there taken and expressed with reference to the punitive character of s. 4 of the Debtors Act, 1869, seems to have been overlooked by them."

It will be observed that he is not there speaking of any particular sub-section, but generally of s. 4. He continues:

H "JAMES, L.J., does not allude to it; MELLISH, L.J., said: 'Now arrest for debt is intended as a means of enforcing payment, not as a punishment, for if the party pays the debt he is entitled to be discharged.' This observation was true of ordinary debts (*Re M'Williams* (4); *Lees v. Newton* (5)), but not of obligations to pay under orders made under s. 4 (3), of the Debtors Act, 1869. The punitive character of s. 4 of the Debtors Act, 1869, which was pointed out in *Middleton v. Chichester* (1) has been since so often recognised that it cannot now be questioned."

I He cites some cases and goes on to say (*ibid.*, at pp. 17, 18):

"In these cases, however, the fact that a commitment under that section is not to be regarded simply as a form of civil process, but as punitive, is distinctly recognised. Having regard to the Debtors Act, 1878, and to the decisions to which we have referred, it would be clearly wrong now to apply MELLISH, L.J.'s, observation in *Cobham v. Dalton* (3), above quoted, to obligations to pay money in obedience to orders made under the Debtors Act, 1869, s. 4 (3)."

It is quite true that, when he goes on to say what they should do with the case than before the court, he speaks only of s. 4 (3), that being the one which deals with trustees who have had trust funds in their possession. But I have read the whole passage in order that it may be seen clearly that, although the words only apply to sub-s. (3), the principle in terms applies to the whole of the exceptions in s. 4, and not only to sub-s. (3). In other words, he does what LORD HATHERLEY had so carefully and plainly done in *Middleton v. Chichester* (1). He goes through, one by one, every one of the exceptions to s. 4 and points out that they are all punitive, and not to be treated as process for enforcing payment of the debt. Under these circumstances I think that we have no choice now but to treat this order which was made by the magistrate at Great Marlborough Street as a punitive order, and one from the stringency of which James Edgcome cannot obtain relief under s. 10 of the Bankruptcy Act, 1883.

I said, when beginning my judgment, that I thought that this was not satisfactory, because it is plain that the practice as to non-application of relief under the Bankruptcy Act, 1883, to these cases, as to which imprisonment has been continued by the Debtors Act, has not been consistently followed. If you go on to s. 5, it is obvious that that is just as much an exception from the general abolition of imprisonment for debt as is s. 4. It is put in a different section for this reason, that it is a section which deals with the power of the court to commit a debtor to prison for nonpayment of a judgment debt; and when one looks at the conditions—the only conditions under which such an order is allowed to be made—it is perfectly plain that the orders can only be made when you have got a contumacious debtor who has the means or has had the means to pay the debt, and his conduct is in the nature of contempt. His imprisonment is for a fixed time not exceeding six weeks and is a punishment for the contempt, and the suffering of that imprisonment in no way discharges the debt. One would have thought that, if the principles I have been dealing with had been applied consistently, the result would be that no relief could have been given under ss. 9 and 10 of the Bankruptcy Act, 1883, after a receiving order had been made. That is not the case. So far from that being the case, under the County Court Rules, 1889—which have been made applicable to all courts with jurisdiction in respect of judgment debtors' summonses by Ord 25, r. 29:

"Where a judgment debtor shall upon the return day of a judgment summons satisfy the judge that a receiving order has been made for the protection of his estate or that he has been adjudicated bankrupt, and that the debt was provable in the bankruptcy . . . no order of commitment shall be made except in accordance with the provisions of the last-mentioned section [i.e., s. 122 of the Bankruptcy Act, 1883]."

Under these circumstances it seems to me a little unfortunate that the same principle has not been acted on with regard to exceptions under s. 5 that has been acted on with regard to exceptions under s. 4, although one would have said that if any of these exceptions were in respect of the conduct of the debtor being such as merited punishment, they would have been those under s. 5. However, we have not to deal with that here. The result of it is that in respect of this particular debt, a debt for rates, the getting of a receiving order will not entitle the debtor to come and ask for relief under these sections of the Bankruptcy Act, 1883, notwithstanding the fact that at any time during the imprisonment he could get rid of the imprisonment by payment of the debt. Notwithstanding that, it seems to me that, unless we disregard *Middleton v. Chichester* (1) and *Re Smith, Hands v. Andrews* (2), we are bound to say, with regard to the exceptions in each one of the sub-sections of s. 4, that the orders are punitive orders. The appeal must, therefore, be dismissed.

ROMER, L.J.—I also think that this appeal fails. It is true that a committal under an order of a magistrate if and when made under the Distress of Rates Act, 1849, terminates on payment by the debtor, but the committal nevertheless is of a punitive character, and not merely a legal process to compel payment. That is made

A clear by the express provision of the Act; for by the Act a discretion is given to the magistrate as to whether he will or will not commit, and, if he does commit, a discretion as to the period for which he will commit not exceeding three months. To my mind, in making an order under the Act the magistrate is bound to exercise his discretion, and in so doing he must have regard to the existing circumstances, and must consider what under those circumstances, if the money is not paid, the duration of the imprisonment ought to be. That shows that it is something in the nature of a punishment apart from legal process to procure payment. If the order is punitive, the Court of Bankruptcy has no power to interfere. The same view is arrived at by a consideration of s. 4 of the Debtors Act, 1869. The exceptions there mentioned from the general rule that there shall be no imprisonment for debt form a class of cases standing on the same footing; and they were excepted because imprisonment under them all was meant to be a punishment. That was the view expressed by LORD HATHERLEY in *Middleton v. Chichester* (1) and by LINDLEY, L.J., in *Re Smith, Hands v. Andrews* (2), and it was also expressed by SIR GEORGE JESSEL, M.R., in *Morris v. Ingram* (6).

D **STIRLING, L.J.**—I am of the same opinion, and for the same reasons; but I should like to add this: This case is one of rates, and depends on particular statutes. If it were an isolated case, one might have supposed that it had escaped the notice of the persons who framed the Debtors Act, 1869, but in truth there must be a large class of orders of the same kind made by magistrates; for instance, orders for imprisonment for non-payment of costs under s. 18 of the Summary Jurisdiction Act, 1848, under the Ecclesiastical Courts Jurisdiction Act, 1860, for rioting in church, and under the Elementary Education (Defective and Epileptic Children) Act, 1899, for enforcing attendance at school. I think that this is not an isolated case, and that the appeal must fail.

Appeal dismissed.

Solicitors: *Reginald G. Davis; Caprons, Hitchins, Brabant & Hitchins.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

BRADSHAW v. WIDDRINGTON AND ANOTHER

COURT OF APPEAL (Sir Richard Henn Collins, M.R., Stirling and Cozens-Hardy, L.JJ.), May 12, 13, 14, 15, 1902]

[Reported [1902] 2 Ch. 430; 71 L.J.Ch. 627; 86 L.T. 726; 50 W.R. 561; 46 Sol. Jo. 530]

Limitation of Action—Mortgage—Acknowledgment—Payment of interest "by person by whom the same shall be payable or his agent"—Real Property Limitation Act, 1874 (37 & 38 Vict., c. 57), s. 8.

In 1879 the mortgagor mortgaged his estate to secure a loan for his son. He handed over the amount of the loan to the son who then contracted with the mortgagor to repay the principal amount and the interest on the loan. Pursuant to this contract the son, from 1879 until 1892, which latter date was within 12 years of the date of this action, paid the interest to the mortgagees through his solicitor. The mortgagor himself never paid any interest. In 1892 the solicitor misappropriated money paid to him by the son in repayment of the mortgage debt, but continued to pay the interest to the mortgagees. Meanwhile, in 1884, the mortgagor had sold the estate to the plaintiff "free from incumbrances," and in 1887 the mortgagor died appointing the son and the solicitor his executors. When the solicitor's misappropriation was discovered the mortgagees requested the plaintiff to pay off the mortgage debt. The plaintiff thereupon claimed a declaration against the mortgagees that the debt was barred by s. 8 of the Real Property Limitation Act, 1874, as there had been no payment of interest "by the person by whom [the interest] was payable" so as to prevent time running against the mortgagees under the section.

Held: where there was a contract between the mortgagor and a third person that the latter should pay the interest for the mortgagor such payment, though not made by the mortgagor himself and though there was no contract between the third person and the mortgagees, was a payment by the mortgagor's agent for the purpose of s. 8 of the Real Property Limitation Act, 1874, and it operated as an acknowledgment by the mortgagor of the subsistence of the mortgage; as the payments made by the son after the mortgagor's death were on the same footing as those made during his life, there had been a payment of interest for the purposes of s. 8 which prevented the statute of limitation running against the mortgagees who were thus entitled to enforce the mortgage against the plaintiff.

Notes. Section 8 of the Real Property Limitation Act, 1874, has been repealed and replaced by s. 18 and s. 23 of the Limitation Act, 1939 (13 HALSBURY'S STATUTES (2nd Edn.) 1159); sub-s. (4) of s. 23 of the Act of 1939 provides, in respect of actions to recover debts, that there is a fresh accrual of the action on "the person liable or accountable" for the debt making any payment in respect thereof.

Considered: *Re Lacey, Howard v. Lightfoot*, [1907] 1 Ch. 330; *Re Edwards' Will Trusts, Brewer v. Gething*, [1937] 3 All E.R. 58.

As to the fresh accrual of actions to recover debts, see 24 HALSBURY'S LAWS (3rd Edn.) 298, para. 590; as to what payments are sufficient to preserve a mortgagee's right of action, see *ibid.* 307, para. 607. For cases see 32 DIGEST 411 et seq.

Case referred to:

(1) *Lewin v. Wilson* (1886), 11 App. Cas. 639; 55 L.J.P.C. 75; 55 L.T. 410, P.C.; 32 Digest 414, *h*.

Appeal from a decision of BUCKLEY, J., dated July 6, 1901, in an action brought by the plaintiff, John Charles Bradshaw, against the defendants, Shalcross Fitzherbert Widdrington and Sir Reginald John Cust, for a declaration that the right

A of the defendants as mortgagors under a mortgage of the Fair Oak estate, dated Aug. 1, 1879, was extinguished and that the charge created by the mortgage was to be deemed satisfied; the delivery to the plaintiff of the title deeds of the Fair Oak estate, and for an injunction restraining the defendants, their solicitors and agents from selling the Fair Oak estate or any part thereof and from conveying away or otherwise dealing with the legal estate therein on the ground that the mortgage was a subsisting security, and from parting with the title deeds of the estate. The defendants counter-claimed against William Bradshaw (who for the purpose of the counterclaim was joined with John Charles Bradshaw as a defendant) for payment by him as surviving executor of the mortgagor, James Edward Bradshaw, of the mortgage debt of £517 14s. 6d. together with interest thereon, and if necessary for administration of James Edward Bradshaw's estate; and as against John Charles Bradshaw the defendants counter-claimed for foreclosure of the mortgage and for the appointment of a receiver. The facts appear in the judgment of

C SIR RICHARD HENN COLLINS, M.R.

Henry Terrell, K.C., and *George Henderson* for the plaintiff and William Bradshaw. *Astbury, K.C.* (with him *Bryan Farrer*) for the defendants.

D **SIR RICHARD HENN COLLINS, M.R.**—The question of law that arises upon the facts of this case is whether a payment which was made within twelve years before action was made under such circumstances as to be a payment by the mortgagor within the meaning of s. 8 of the Real Property Limitation Act, 1874, coupled as a claim for foreclosure with the Real Property Limitation Act, 1837.

E That question involves an examination of the circumstances under which this mortgage came into existence. A difficulty arises by reason of the fact that all the parties had a common solicitor, Mr. Harrison, of the firm of Ingram and Harrison, who is now dead. A very great discussion was opened before us by counsel for the plaintiff and William Bradshaw, whether or not certain accounts kept by Mr. Harrison in his capacity as solicitor between the parties were or were not admissible in

F evidence. Those accounts were between him and the father Mr. James Edward Bradshaw, and between him and the son Mr. William Bradshaw, and then there were also the accounts kept with the Cust trustees. But there are certain facts that are capable of proof either by admissions, or which stand proved quite apart from those documents kept by the solicitor, and I think that they may be shortly stated thus: There is no doubt that Mr. William Bradshaw was heavily indebted at the time. There is no doubt that he was desirous of raising a loan of £5,000 odd, and that the machinery by which that loan was obtained was by his father raising the sum by mortgaging his estate of Fair Oak to the Cust trustees, and by handing the money so received to his son. There is also no doubt that the mortgage was effected, and that interest continued to be paid upon it right down to 1892. I need not carry it beyond that. It was paid by Mr. Harrison who, it is admitted,

G was the agent or the solicitor acting for the mortgagor Mr. James Edward Bradshaw, down to his death, and who continued to act as solicitor for his executors—of whom he was one—after the death of the mortgagor. Those facts are admitted.

H But it is said that, admitting those facts, there is no evidence of a payment by the mortgagor which would keep alive the obligation of the mortgagor under the statutes of limitations. The section primarily in question is s. 8 of the Real Property

I Limitation Act, 1874, to which I have just referred. It is in these terms:

"No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same unless in the meantime some part of the principal money or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or

his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given."

The section of the Real Property Limitation Act, 1837—the whole Act consists of one section—is as follows: After reciting that doubts had been entertained as to the effect of the Real Property Limitation Act, 1833, so far as the same related to mortgages, and that it was expedient that such doubts should be removed, it enacts that:

"It shall and may be lawful for any person entitled to or claiming under any mortgage of land, being land within the definition contained in the first section of the said Act, to make an entry or bring an action at law or suit in equity to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued, anything in the said Act notwithstanding."

Dealing first with what I have called the uncontested facts, how does the matter stand? You have a mortgage created; you have interest paid upon it right up to a period within the statutes of limitations by a person who is admitted to have been the solicitor for the mortgagor himself and afterwards for his executors; and you have the payment admittedly received as and for a payment under this mortgage by the mortgagees. Why are the mortgagees, starting at that *prima facie* case, not entitled to succeed? It seems to me that the evidence alone is sufficient to justify the mortgagees here in saying: "There has been a payment made within the statutory period of this mortgage. We accept it that, as against a person who has been in possession, as the plaintiff has here, for something more than twenty years, the onus is upon us to show as against him that that mortgage is alive. But accepting it, we prove by admissions or aliunde"—and the facts which I have mentioned are uncontested—"a continuous payment of interest by a person who *prima facie* is the proper person to pay it to persons who have received it under the mortgage." It seems to me that that has thrown the onus of proof on the persons who say that the mortgage has ceased to exist. That is on the plaintiff here. The question then would be whether he has discharged that onus which has been thrown back upon him, and displaced these statements by showing that the payments were made under such circumstances as not to be payments by the mortgagor within the meaning of the section which I have read.

If the case rested there, and if counsel for the plaintiff and William Bradshaw succeeded in the very vehement argument which he has addressed to us with a view to excluding the accounts kept by the solicitor, it seems to me that counsel would have no answer to this case at all, because he elected not to call the person now living who knows most about this matter, namely, Mr. William Bradshaw. He deliberately elected not to do that, and having elected not to do that he comes before us and objects strenuously to the admission of the accounts kept by Mr. Harrison which purport to show the whole history of the financial dealings between these parties, the father Mr. James Edward Bradshaw, and the son Mr. William Bradshaw, and himself. It seems to me that counsel cannot really advance a step in this case without going into those accounts. Therefore, I think that though this decision might be rested, and firmly rested, upon facts quite apart from anything in those accounts which were specially dealt with by the learned judge in the court below, yet as counsel, while trying to keep them out, has himself relied upon some of the facts which appear in them, I think that it will be better on the whole to deal with them. Dealing with them involves a consideration—but I think that a cursory consideration will be enough—of the question how far those accounts really are admissible.

A With respect to that question, it seems to me that counsel for the plaintiff and William Bradshaw is really not in a position to contest before us, as a matter of strict law, whether those accounts are admissible or not, because at the trial counsel for the defendants was there with the evidence which would have told us the precise conditions under which those accounts came into existence. Owing to what passed at the time between him and counsel for the plaintiff and William Bradshaw

B in the presence of the judge in the court below, that evidence was not called. Having regard also to the nature of the admissions interchanged and counsel's very pronounced admissions to us as to what was in his own mind at the time, and to the attitude of the judge, and having regard further to the complete absence of any reference to this point or concerning any objection either in the note handed to us or in his Lordship's judgment, which is a very careful judgment, it is obvious to me that the explanation of what took place before the learned judge was this:

C Counsel for the plaintiff and William Bradshaw had not in his mind at the time the technical difficulties which arose as to the admissibility of entries in accounts made by a deceased person, but he was of opinion that those entries were really *res inter alios acta*, and did not bear directly upon his position, and were not admissible in evidence as between the parties. He had that in his mind. I do not think that there

D were present to his mind the technical grounds upon which admissions made by a deceased person are or are not capable of being received at all in evidence. I think that his view was that if those accounts were allowed they really were not evidence against his clients and that they were irrelevant. He certainly did bring it to the learned judge's mind—indeed I understood him to admit that very fact himself—that he thought that there were technical objections as to the reading of those

E accounts at all. If those objections had been pressed, counsel for the defendants had witnesses who were prepared to deal with them. And I do not think that we should be justified now in excluding that evidence on the ground that those technical objections had not been made good if it were possible that they could have been made good by counsel for the defendants calling witnesses.

F One objection pressed upon us by counsel for the plaintiff and William Bradshaw was that as to the class of entries, of which it was asserted that as they were entries made in the course of the discharge of duty they must not only be made in course of duty but they must be made at the time. Counsel for the defendants' witnesses could have described how they came into existence and when they were made. He certainly could not deal with an objection based on this ground where

G the witness after discussion was not put into the box because he was not wanted. But there is a further observation to be made upon that. If this case had been seriously argued on the ground which counsel for the plaintiff and William Bradshaw argued it upon before us, and if the learned judge in the court below had been disposed to take counsel's view of it, it was competent for counsel for the defendants there and then to call from the hostile camp the gentleman who knows most about it—but who I have no doubt for very good reasons thought it desirable not to go into

H the box—and that is Mr. William Bradshaw. We cannot put counsel for the defendants' clients back into the position in which they were at the time, and counsel for the plaintiff and William Bradshaw cannot rely on the technical objections that might be urged as to those accounts, though I must say, after hearing the arguments, that I am not disposed to attach very great weight to them. Still, I do not think that the question is now open to us any more than it was to the learned judge

I before whom it was never made, and whose opinion upon it we have not got.

Having said that much, I propose now to refer to one document at all events which is outside any of the principles urged by counsel for the plaintiff and William Bradshaw, that is the extract from the bill book kept by Mr. Harrison, which bears an entry, "*Received on account costs of loan, Nov. 24, 1879, £150.*" That is a clear entry against interest as to which I do not think it can be contended that it did not make this bill admissible in evidence. But when you get this bill in evidence it really tells the whole transaction out of which this mortgage arose. It shows

what the object of raising the money was. Mr. James Edward Bradshaw, the father, became the nominal debtor. The mortgage was actually between him and the Cust trustees. But between him and his son, as he was raising the money for his son, the son undertook the obligation and the right of paying the interest upon the mortgage. I need not go through the entries in detail; but that is to me the fair and inevitable inference to be drawn from them. The money was borrowed for the purpose of the son, and was borrowed by the machinery of the father giving a mortgage upon his own property. We know—in fact it is admitted—that the payment of interest was made by Mr. Harrison throughout and by the executors of Mr. James Edward Bradshaw, Mr. Harrison, and Mr. William Bradshaw, after the death of their testator. If that money was paid by the person—Mr. William Bradshaw—who had come under the obligation which is evidenced by that bill, how can that be said to be a payment not by the mortgagor? It is a payment which was made under an obligation imposed by the bargain between the parties that Mr. William Bradshaw should pay. Mr. James Edward Bradshaw was responsible directly and personally to the Cust trustees; but as between himself and his son William, William was the real debtor and the father was a surety.

If you look to the origin of this, the inference drawn from a payment and its effect in keeping the security alive, it is necessary that it must be a payment by the mortgagor—that is to say, it must be such a payment as raises the inference that the mortgagor acknowledges the security as a still subsisting security. That is the meaning of saying that the statute only runs from the time of payment. It does not say in terms in the Act that it is to be a payment by the mortgagor. But the Act obviously implies that it must be a payment—and the cases have established it—as will operate as an acknowledgment by the party to the contract, the mortgagor, of the subsistence of the security. After such a payment he cannot say that at the time of the payment the mortgage did not exist. You get that acknowledgment just as much where you have an arrangement between the mortgagor and somebody else—either by a contract or by a mere mandate—that that other person shall pay the interest for him. Whether that person who pays has the obligation imposed upon him by law as a legal agent without his assent, but still having all the rights as though he had the assent of the mortgagor, or whether you have him appointed under some arrangement with the mortgagor himself, so long as he pays with the assent, expressed or implied or imposed, of the mortgagor, that seems to me to be a payment that keeps alive the liability of the mortgagor, being in point of law an admission by him of the still subsistence of the security.

It seems to me that you have that element exactly in this case if it is inferred as a fact, as I have no hesitation in inferring, and as BUCKLEY, J., did infer, that the arrangement at the inception of this mortgage was that the money was borrowed for the purpose of the son, and that as between the father and the son, the son was the real principal debtor and the father the surety. To follow out this transaction, and looking at these entries as admitted in evidence, we do find that the interest was continued to be paid by the son, and was in the books apparently paid to the father's account down to 1886. From that time onwards it was paid direct to the trustees, so far as appears from the entries in Mr. Harrison's books. The father died in September, 1887. From that date onwards, as I have said, the two executors, Mr. Harrison and Mr. William Bradshaw, continued up to 1892, at all events, to pay interest in the same way as it had been paid before.

The payment relied upon as taking this case out of the statutes of limitations must be a payment made before 1892. I think that 1889 would be the last date. That is to say, it must be a payment made after the death of the father. It was very strenuously contended by counsel for the plaintiff and William Bradshaw, for more than one reason, that that is not a payment which would be a payment by the mortgagor within the meaning of the section. The first point that he takes is that, examining the accounts which I am now treating as admitted in evidence—I think that they are in for the benefit of counsel for the plaintiff and William Brad-

A show, who contested them, rather than for the benefit of counsel for the defendant. You find in 1884 and 1885 a transaction which would seem to show that the mortgage of £5,000 odd was, in point of fact, paid off. Though interest was continued to be paid in the same way by Mr. William Bradshaw right on, and though counsel for the plaintiff and William Bradshaw admits that the mortgage was not in point of fact paid off, still this entry, he says, taking it at the highest against him, indicates some transaction between the father and Mr. Harrison whereby the father understood that either the mortgage had been paid off, or that arrangements were being made to pay it off, which justified him in thinking that he might, as he did, convey the estate or a part of it, which was subject to this mortgage, free from incumbrances to the plaintiff. Unquestionably he did convey part of it in 1884, and then the executors afterwards conveyed the residue to the plaintiff free from incumbrances. Though there is some difficulty as to those entries, it seems to me that it is only a *prima facie* difficulty, and that though those entries are admissible they are, like every other evidence, to be simply taken for what they are worth, and they do not become absolutely unimpeachable because they are admitted in evidence. Knowing as we know now, that Mr. Harrison terminated his career abruptly by suicide, and had for some period before his death obviously been falsifying his books, we look with suspicion at those entries. Where they accord with the facts they would be aliunde confirmed; but where they are inconsistent with facts that cannot be disputed we must accept the inference that they are not to be relied upon.

Counsel for the plaintiff and William Bradshaw contends that if we accept those accounts at all we are bound to accept them absolutely and for all purposes, and without qualification. I do not agree to that at all. They are only evidence and they are to be weighed as every other evidence is weighed, according to the probabilities and according to the admitted facts. Where they do not agree with those, or where some particular entry does not agree with them, they or it must be rejected. If you take this particular entry it does not accord with the facts because on the very date at which it is asserted that this mortgage was paid off we find that Mr. William Bradshaw gave a bond for a sum which embraces this very sum—that is to say, for the sum of £15,171, being the £5,171 plus the £10,000 fresh loan. That is absolutely inconsistent with the notion that Mr. James Edward Bradshaw supposed that that mortgage had been paid off. The interest was continued to be paid in the same way, as I have said, right down to 1892. Therefore, it seems to me, that that piece of evidence is displaced. It is quite probable that there was some suggestion made that something of the kind should be done, and it may even be possible that Mr. James Edward Bradshaw thought that it was going to be done, at all events to such an extent as to justify him in making a conveyance to the plaintiff on the footing that these incumbrances would be paid off. But when he conveyed this estate free from encumbrances he did not deny the encumbrances. He simply as between himself and his purchaser left the obligation upon him to keep the interest down. Though he may have supposed it was going to be paid off so as to justify him in making the conveyance, that does not in the least carry the paper entry beyond this fact—that it is a paper entry which does not accord with the fact.

Then counsel for the plaintiff and William Bradshaw says, in relying on the payment by Mr. William Bradshaw as taking this case out of the statute, that you can only use it for that purpose upon the inference that what was done was done with the assent of the mortgagor. He says that if the mortgagor is under the impression that the mortgage is paid off, that at any rate gets rid of any implied assent on his part or admission on his part that the security is still subsisting. He says that Mr. James Edward Bradshaw regarded the mortgage as at an end, and that you cannot draw from the fact that Mr. William Bradshaw paid interest an inference that his father assented to the security being thereby kept alive. But it seems to me that that point cannot be maintained if once you assent to the view which I take, and which BUCKLEY, J., took of the original arrangement for the mortgage loan. You get to this—that Mr. William Bradshaw came under a liability to his father to

pay the interest and the principal upon that mortgage as long as it subsisted. That obligation continued upon him and that right continued upon him as long as the mortgage subsisted, whether the father thought it subsisted or not. And the payment by him under those circumstances pursuant to the contract with his father would, it seems to me, by virtue of that contract be a payment which would enure as a payment in relief of the mortgage, and a payment which would be taken to be made with the father's assent and by his authority under the contract. That contract would survive although the mortgagor were dead. Therefore it would be possible—and it was indeed obligatory still upon Mr. William Bradshaw as between himself and the estate after the death of the mortgagor—to keep alive the mortgage and to pay the interest, as he did pay it. Although his father might for some time

I do not know that the impression continued, if it ever existed; I do not think that it could have continued for some years afterwards—have been under the impression at one time that the mortgage had been paid off, yet that obligation to pay remained. Therefore, it seems to me that you get a payment which has all the essentials to make it an admission by the mortgagor that the mortgage still subsisted.

Then counsel for the plaintiff and William Bradshaw takes another point. He says: "Whether these points that I have so far taken are right or wrong, here you have a payment by a person after the death of his father. It is a payment by a person who, although he was executor, still continued to be what he was before"—the person who, as we think, was the person for whom the money really was borrowed, retained his position such as it was before the death after the death, notwithstanding that he has become an executor—"and no payment made by him can have any more force or effect than if he had not been executor at all." That requires some little analysis. No doubt after the father's death the position was changed to this extent, that the father was not there to be personally and ostensibly bound by and taken to make the admission involved in a payment made by his son of the interest from time to time. But there were his representatives, the executors, of whom the one was the son and Mr. Harrison the other, who would be just as much bound as the father would be if he had been alive. They were persons who could make the admission, and who could make the payment. A fortiori if they were bound by the contract made by their testator as his representatives they were bound by that to assent to whatever was done in carrying out that contract by the other party to it. The other difficulty arises from the fact that the other party to the contract, Mr. William Bradshaw, was himself executor. But it was perfectly competent, it seems to me, for Mr. William Bradshaw and Mr. Harrison, as executors, to stand in the shoes of the testator and to approve of that which had been done by one of them—by Mr. William Bradshaw, the debtor—in implementing the bargain of the original loan. Therefore, it seems to me that the payment by Mr. William Bradshaw when he was executor afterwards is exactly on the same footing as the payment by him before his father died, and has exactly the same consequences, and that therefore that was a good payment to take the case out of the statutes.

I do not think that it is necessary to travel into any of the numerous cases that have been discussed, because I think that on the broad principle that I have stated this bargain clearly brings the payment within the limits that have been put by the cases upon the right to say that a payment made by another person is a payment made by the mortgagor. There is the case in the Privy Council of *Lewin v. Wilson* (1), which clearly covers the position which I find as a fact was the position of these two parties, the father and the son, in relation to this mortgage. For these reasons I think that BUCKLEY, J., who has delivered a most admirable judgment, in which he has discussed all the authorities, is absolutely right. And really, if it had not been for the vigorous and interesting argument which was addressed to us here by counsel for the plaintiff and William Bradshaw I should have thought it sufficient to say that I entirely agreed with BUCKLEY, J., both in his reasons and in his conclusions. I think, therefore, that this appeal must be dismissed. With regard to the costs, there will be an order against the plaintiff and William Bradshaw for costs,

A with liberty to me to add such costs as the defendants may not get in their security. That was the order that was made in the court below.

STIRLING, L.J.—I am of the same opinion, and I do not wish to add anything to what the Master of the Rolls has said.

B COZENS-HARDY, L.J.—I am of the same opinion. I only desire to say a few words. The real point seems to me to be, What was the arrangement actually come to? BECKLEY, J., has arrived at the conclusion that the father borrowed money for William the son, and, as between the father and William the son, William was the person liable to pay the interest. Apart from anything else it seems to me that the bill of costs to which the Master of the Rolls has alluded contains abundant evidence to satisfy that. I find there that it is a bill paid by the son. I find "Instructions for bond from you to your father to secure the amount." I find again on a later date, "Attended you on your calling when you executed bond to your father for the amount raised by him on mortgage." Putting together the fact that the mortgage was for an odd sum, a peculiar sum, that the bond of the same date was for a larger sum, and that the rate of interest was the same, and that there are these entries in the bill of costs, quite apart from other disputed documents, I think that it is abundantly clear that as between the father and the son the son was bound to indemnify the father against this mortgage obligation.

That being so, although there was no contract between the mortgagees and the son, it is quite sufficient in my view, that there was a contract between the mortgagor and the son which as between these parties bound and entitled the son to make the payments of interest to the mortgagees. That being so, there has been a payment of interest, which suffices to prevent the statute from running. Any other conclusion than that which has been arrived at by BECKLEY, J., would, I think, have placed mortgagees in a position of extreme danger. Mortgagees advance money on a mortgage; they take security; interest is paid for a very long period regularly to them and received as and for interest, and it is received by them from a solicitor who is admitted to have been solicitor for the mortgagor and for his executors after his death. It does seem to me that mortgagees under those circumstances are not bound to inquire into the precise relations between the solicitors and their clients, but that they are entitled to assume that the solicitors are doing that which is in the ordinary course of business as solicitors under those circumstances—namely, to pay for their clients the interest due on the mortgage for which those clients are liable. G For all these reasons I think that the appeal fails and ought to be dismissed with costs.

Appeal dismissed.

Solicitors : *Hunter & Haynes; Nicholl, Manisty & Co.*

[*Reported by E. A. SCRATCHLEY, ESQ., Barrister-at-Law.*]

WILLIS AND OTHERS *v.* BARRON

HOUSE OF LORDS (The Earl of Halsbury, L.C., Lord Macnaghten, Lord Shand, Lord Davey, Lord Brampton and Lord Robertson), May 12, 13, 1902]

[Reported [1902] A.C. 271; 71 L.J.Ch. 609; 86 L.T. 805; 18 T.L.R. 602]

Undue Influence—Husband and wife—Duty of solicitor—Execution of deed by wife relinquishing rights under marriage settlement—Wife advised by husband's solicitor who drew up original settlement and who was a trustee and the father of one of the ultimate beneficiaries—Duty of solicitor to advise wife to take independent advice.

By a post-nuptial settlement made in 1890 certain funds, the property of the husband, were settled subject to the life interest of the husband's mother, upon trust for the husband for life, after his death for the wife for life, and, after the death of the survivor, in trust for their issue, or, in default of issue, as the husband and wife jointly should appoint, or, in default of joint appointment, as the survivor should appoint, and, in default of appointment, for the appellants, W. and S., absolutely. The solicitor who prepared the deed was the husband's family solicitor and was one of the trustees of the deed; he was also the father of S. In 1891, the husband and his mother, wishing to prevent the possibility of the wife, if she survived, exercising her power of appointment in favour of a second husband, had a deed prepared by the same solicitor by which the wife's interest, should she survive, was limited to her widowhood, and her power of appointment was excluded and the husband given a sole power of appointment. The solicitor stated that he explained the effect of this deed to the wife, telling her that it was intended to correct a "mistake" in the deed of 1890, and the wife executed it in that belief, without any independent advice.

Held: the deed of 1891 was not binding on the wife and would be set aside because its true purpose and effect had not been explained to her, and, having regard to the solicitor's relation to the husband and to the fact that he was a trustee of the settlement and the father of S., who would benefit from the deed, it was the solicitor's duty to tell the wife to take independent advice before she executed the deed.

Notes. Referred to: *Wright v. Carter*, [1903], 1 Ch. 27; *Bank of Africa v. Cohen*, [1909] 2 Ch. 129; *Howes v. Bishop*, [1909] 2 K.B. 390; *Bank of Montreal v. Stuart*, [1911] A.C. 120; *Moody v. Cor and Hatt* (1917), 116 L.T. 740; *Weston v. Fairbridge*, [1923] 1 K.B. 667; *Re Lloyds Bank, Ltd., Bomze and Liederman v. Bomze*, [1931] 1 Ch. 289.

As to transactions between solicitor and client, see 36 HALSBURY'S LAWS (3rd Edn.) 85 et seq., and for cases see 42 DIGEST 76 et seq. As to undue influence by the husband in gifts between husband and wife, see 19 HALSBURY'S LAWS (3rd Edn.) 836, para. 1363, and for cases see 27 DIGEST (Repl.) 156. For cases on the release of a power of appointment by a married woman, see 27 DIGEST (Repl.) 125.

Appeal from a decision of the Court of Appeal (SIR NATHANIEL LINDLEY, M.R., RIGBY and HENN COLLINS, L.JJ.), reported [1899] 2 Ch. 578, reversing a decision of COZENS-HARDY, J., reported 81 L.T. 321, in favour of the appellants, the defendants in an action brought by the respondent for a declaration that a deed made in 1891 was not binding on her. The facts are as stated by LORD MACNAGHTEN.

Warmington, K.C., and *P. S. Stokes* for the appellants.

Hughes, K.C., and *Ashton Cross*, for the respondents, were not called upon to address their Lordships.

A THE EARL OF HALSBURY, L.C. I have not the least doubt that this judgment ought to be affirmed, and I confess that I am a little surprised that the learned judge who heard the case originally entertained a different view, and I think that I should have treated the matter very summarily but for the learned judge having entertained that view. It seems to me that there are one or two grounds upon which the deed which it is sought to set aside by this proceeding might be impeached.

B I am by no means certain that, if the whole question had arisen in a court of law upon this state of the evidence, I should not as a jurymen have found upon an issue of non est factum that it was not her deed at all. It seems to me that she was in a position in which it was impossible to suppose that any lady under the circumstances of this case could form a judgment of her own as to what was the effect of all these settlements. And when she was told that it was for the purpose of rectifying a mistake which had been made in the deed of 1890, it seems to me

C that it was an untrue statement—whether consciously or unconsciously made, I will not say; but, at all events, it was not true. There was no mistake made in the deed. The deed was executed with unusual and extraordinary care. The discussions about it extended over months; corrections were made from time to time in the draft deed by the parties to it; and not until the parties began to think what different events might occur, so that the property would be held in a way which according to their then view would be unjust, did anybody dream that any mistake, in the popular and natural meaning of the word, had occurred at all.

Let us see what the state of facts was. This young woman is told that there was a mistake in the deed. I will come presently to the mode and the circumstances in which she is told; but I assume for the present purpose, and I think it established,

E that she was told that there was a mistake in the deed. What must have been the condition of mind of a person who was told that? Whatever rights were given by the original deed, as I took occasion to say in the course of the argument, any self-respecting person, much more a person bound by endearing ties such as ought to exist between husband and wife, when she was told that a mistake had been made, would say at once: "If there was a mistake made I will give in at once, and

F I will put it right, and I will agree to anything you like to suggest." That seems to me to be the most natural and ordinary course, giving the person no extraordinary credit for virtue or self-denial. But suppose, instead of telling her that there was a mistake, they had said: "When we made this deed we gave you certain rights, and it may happen hereafter that you will have such and such control and power over this property, which we did not think of at the time we executed the deed, but

G do not think that you ought to have now"; would not the attitude of mind of the person to whom such an observation as that was made be entirely different from the one which I suggested just now? It does not require argument, I think, to make that out.

This lady applies to a person, and the natural person to whom a wife would apply under these circumstances would be the person who had been the family solicitor, and was her husband's solicitor, apart from the question, which I cannot leave out of sight here, that he was her trustee. Then, the issue being, What was it that was said to her when she was induced to execute this deed? I find in her cross-examination—of much of which I disapprove, for from time to time words were put into her mouth as if she had said them, though she had not—what seems to me

I to be overwhelmingly conclusive about this matter; not a statement alone by her, but an assumption by the learned counsel who is cross-examining her:

"Q.: Do you mean to tell his Lordship that you did not know perfectly well that the deed was altered in connection with what your husband had been saying? A.: No, I did not.—Q.: What do you think it was altered for? A.: To rectify mistakes that had been made.—Q.: What mistakes? A.: I do not know.—Q.: Did not you ask? A.: No, I expected it was all right.—Q.: You knew it was to alter the settlement? A.: Yes, of course it was altering it.—Q.: And you knew that after the settlement had been made your husband had

complained and talked in this violent way to you about your family and about his money going to them—you knew that? A.: Only from what Mr. Skinner had said to him.—Q.: You knew it? A.: Yes.—Q.: Then you knew that according to your husband's view there was a mistake in this settlement, whatever the mistake was? A.: Yes.—Q.: And you knew that it was to rectify a mistake that he had found in the settlement. A.: Yes."

It is manifest that what the lady is assenting to is what is actually put to her by the learned counsel who appears against her. He assumes as the result of the evidence before him—and I suppose upon his instructions that it was the state of facts—that that was what was told her. If so, it is impossible to doubt that it was a misrepresentation. It is all very well to say that the word "mistake" may be used in a popular and ambiguous sense. I am not quite certain that I understand what is meant by that. If it is meant that there was a mistake made at the time of the execution of the deed of 1890, it is not true. If it is meant that after full consideration and after the lapse of six months the parties had begun to think again what would be the effect of the deed which they had already executed with perfect knowledge and with great deliberation, and thought that the effect of it might be different from what they had at first supposed, then that is not a "mistake" in any sense, but it is something which shows that when they had considered the matter more maturely, or in view of some facts which afterwards happened, they thought, not indeed that it was a mistake at all, but that in view of events following the deed, peradventure the arrangement they had made in the deed might have a different effect from what they had anticipated that it would have. But what then? It was not a mistake at all. No mistake was made at the time of the execution of the deed in 1890; but they thought better of it. Suppose they had said to this lady, "We have changed our minds; we do not want to give you such rights as those we gave"—I have already commented upon what would be the result of that.

With the utmost respect for the learned judge who found the other way, and for the Court of Appeal, whose judgment I think ought to be affirmed, I think that none of the courts have recognised what appears to me to be the accumulated force of all this. Here was a young woman without advice. She had begun, unfortunately, by reason of her husband's habits of drink, to contemplate a separation. She goes to this gentleman and asks him for advice. He says that he did not know that she came to him as a solicitor. He says that there was no entry in his book making her his client. It seems to me that that is really blinding one's eyes to the course of human events. She went to him as a friend. In one sense she did not go to him as a solicitor at all, I agree; but she went to him as the natural person to whom to apply for protection. He says that he stated the facts and did not advise her. I will not juggle with words. I know what she went for, from the statement of both of them—she went there to consult a friend. He was a solicitor too, and he was her trustee.

Was he under no duty to his *cestui qui trust* to tell her what her rights were, and what the rights were which she was giving up? It seems to me, I confess, hardly susceptible of argument. He was under a duty as a friend, as a solicitor, and as her trustee to take care that she thoroughly understood what was the supposed error which had been made in the first instance, and to make her understand what was the effect of what she was doing. She says in the most natural way that she did not know what it was; she was told that there was a mistake, and of course he was to alter the settlement. I venture to say that she did not know what the mistake was. There is not a single word from beginning to end throughout the course of the evidence given by this gentleman himself to the effect that he ever did explain to her what the "mistake," as he called it, was, and what the effect upon her rights would be. He says that he thoroughly explained the deed. We have seen the deed, and can form our own judgment of what sort of definite idea there would be in the mind of this young woman when this deed was read over to her and explained. I have thought it right to say so much out of respect for the

A learned judge who took a different view, although it appears to me to be abundantly clear what the judgment of the House must be. I move that this appeal be dismissed with costs.

LORD MACNAGHTEN.—I am of the same opinion. Speaking for myself, I think this a very plain case. I do not at all concur with an observation that I find in one of the judgments of the Court of Appeal—that the case is very near the line. I think it is perfectly plain; and, although the cross-examination is somewhat protracted and diffuse and rather perplexing (I should think that it was as perplexing to the lady who was being cross-examined as it has been to some of us who have heard it read), I think that the case lies within a very narrow compass. In my opinion it depends on some facts which have not been and cannot be controverted. In September, 1891, Mr. Joseph Willis, who is now dead, and his wife, who was the plaintiff (she is dead, I believe, also, afterwards Mrs. Barron, were living together. The relations between them were much strained, not on account of any fault of hers, but on account of the intemperate habits of her husband. He seems to have been drinking himself to death as fast as he could, and in his sober intervals he behaved to his wife very brutally and very coarsely. At that time, under a deed made in 1890, property to the amount of about £15,000 had been settled. The first life interest was given to Mrs. Ann Willis. Subject to that, there was a life interest to the husband with certain provisions intended to protect him from the consequences of his own misconduct, and then the wife had a life interest, and in the event of there being no issue, and in default of the exercise of the joint power of appointment, the survivor had an absolute power of disposition over the property. There was an ultimate trust for a cousin of Mr. Willis, and for Mr. Frederick Herbert Skinner. The settled property belonged entirely to Mrs. Ann Willis and Mr. Joseph Willis. The younger Mrs. Willis did not contribute anything to it, and so far as she was concerned it was a voluntary settlement; but the interest which she took under that settlement was as much hers as if she had provided or contributed to the fund.

The settlement was prepared by Mr. William Moore Skinner, who seems to have been a solicitor in large practice. He was a very intimate friend of the Willis family, he was the family solicitor, and he was the father of Mr. Frederick Herbert Skinner. I do not attribute anything like dishonourable conduct to Mr. Skinner. I have read the whole of the evidence and all the letters, and I do not think that there is any ground for attributing anything dishonourable to him; but I do think that he neglected his duty on more than one occasion. I think that it was a very unfortunate thing that he permitted himself to take this gift in favour of his son without taking the ordinary precautions which the law requires in such a case. I cannot help thinking that a great deal of the difficulty in this case arises from his having neglected his duty on that occasion. As regards the plaintiff, I think that he neglected his duty over and over again—that is to say, he seems to have been under the impression that he had a duty to her, but he only fulfilled it in a sort of half-hearted manner; he did not fulfil it thoroughly.

In September, 1891, there seems to have been a good deal of discussion between Mrs. Ann Willis and the husband and the solicitor about these unfortunate differences, as they are called, between the husband and the wife. In the course of those interviews the settlement came up for discussion, and then, apparently for the very first time, Mrs. Ann Willis and Mr. Joseph Willis expressed their dissatisfaction with the contents of the settlement, and they gave instructions to Mr. William Moore Skinner to have it altered. He laid instructions before counsel without saying anything to young Mrs. Willis, though only a few days before she had had an interview with him. She says that she was not consulting him; but I should say that she consulted him on a very delicate matter—that is to say, as regards her relations with her husband, and what her property was. But before he sent the instructions to counsel he did not take any instructions from her, or consult her, or even

intimate to the husband and to the husband's mother that she ought to be consulted. He laid the instructions before counsel, and at the conclusion of the instructions he says: "If any difficulty should arise as regards the assent of Mrs. Willis, junior" (it is quite clear, therefore, that he had not got her assent at that time, and thought it quite possible that there might be some difficulty about it), "it is assumed the Court of the Chancery Palatine of Durham will be competent to rectify the settlement in the way desired, and that no court of law would hesitate to grant the relief asked from it." The counsel was of a very different opinion. He settled the deed as requested, and at the end of it he put this note:

"As regards the action of the court, it does not appear to me that any alteration could be obtained, for, although the provisions are somewhat unusual, it seems to me clear that the settlement was made on full consideration, and the court would only interfere on the ground that the trusts were contrary to the intentions of the parties at the time of execution of the settlement. I cannot see how this could be proved to the satisfaction of the court."

That is the opinion of the gentleman who was concerned in the preparation of the earlier deed, and had gone through it very carefully with Mr. Skinner. The deed was settled on Sept. 22, 1891. What does Mr. Skinner do then? He does not send it to the wife and explain it to her, or do anything of the kind, but he sends a fair copy of it to the husband with this letter:

"Dear Sir,—We beg to enclose you a fair copy of the proposed deed to rectify your marriage settlement. Please read it over to your wife, and see if it meets her approval as well as your own. If it does, return same to us, when we will have it engrossed ready for the signature of all parties without delay."

So that he seems to have considered even then that he had a duty to the wife; but he employs the husband—a very extraordinary medium considering what had passed quite lately at the interview between him and the wife—to explain to her the propriety of her losing the whole of her interest in the event of her marrying after his death. Then nothing takes place until Sept. 30, and on that date Mr. Skinner seems to have chosen an extraordinarily inopportune time for explaining matters to the wife. He is called in to make a will for her mother, who was either on the point of death or, at any rate, in a most critical condition, and then he says that he explained it to her. She says that she does not remember anything of the kind. I think it extremely likely, considering the position in which she was at that time, that she paid very little attention to what was going on, and the whole thing may have vanished from her mind; but let us take Mr. Skinner's own account of it:

"I saw the plaintiff in the dining-room of her mother's house, and I explained to her that Mrs. Willis and her son had called upon me in the way I have already stated, and that they desired to have the deed altered for the purpose of depriving her of the life interest which she took under the original settlement, to cut down that interest to an interest during her widowhood, and depriving her of the power of disposing of the property provided she survived her husband without their having jointly executed it."

Then come these words: "I explained it as clearly as it was possible for me to do, and as it was my duty to do." So that he plainly recognises that there was a duty cast upon him with regard to this lady. He had the duty, as he says, of explaining it; she did not go to him for explanation; he came to her. He felt that he had this duty; but what on earth was the use of explaining what was going to happen to her unless he had also explained to her clearly what her position was, and what course she ought to take under the circumstances. It appears to me certain that Mr. Skinner does not for a moment say that he had no duty to her, but what he says is that he had a duty, which he performed in a most perfunctory manner which misled her entirely. I am disposed quite to believe what she says, that she went

A through the execution of this deed under the impression that her husband certainly
told her—and I think Mr. Skinner admits, or at any rate half admits, that he told
her so—that it was merely to correct a mistake which had been made in the original
settlement. Putting out of consideration the fact that by that alteration Mr.
Skinner's son got a very great advantage, I think that, even if the person who was
B the ultimate remainderman had been no connection of Mr. Skinner, there would
have been ample ground for setting aside this deed, considering that Mr. Skinner
was her family solicitor, the person to whom she would naturally go for advice, and
that he was her trustee. I must say that I think it makes it rather stronger when
you come to consider that the effect of this alteration was to make certain, or almost
certain, a gift which was contingent and doubtful until that deed was executed.
C I have no hesitation in concurring in the motion which has been proposed. I think
that this appeal ought to be dismissed with costs.

LORD SHAND.—I am entirely of the same opinion. I concur in all the observa-
tions that have been made by the Lord Chancellor and LORD MACNAGHTEN, and I
shall add only a few words to what they have said. It appears to me to be quite
D plain that it was the duty of Mr. Skinner on the occasion of the execution of the
deed of 1891 to have required that the lady should put her interests into other hands,
and that he should not have been the person to advise her upon those interests. I
think, looking at the relations between the parties, looking to the fact that Mr.
Skinner was a friend and was trustee in the administration of the funds upon which
she was dependent for her subsistence through her husband, and that he was her
E agent, as I take it he was, in the circumstances which have been disclosed, that it
was clearly his duty to require that she should get independent advice. It is said
that he explained the matter to her. I agree with LORD MACNAGHTEN in thinking
that that explanation was not sufficient or satisfactory, even as stated by Mr. Skinner
himself, as given to her in the evening at her mother's house, which is, however,
disputed or denied by her; but, whatever explanation may have been given, I do
F not think that the explanation by him was enough. I think, looking at the circum-
stance that there was a great disadvantage to Mrs. Willis in the execution of this
deed in which she was renouncing valuable interests—at the circumstance that at
the same time a benefit was being given to Mr. Skinner's own son by that act of
renunciation, and at the circumstance of Mr. Skinner's position as law agent, as I
think she was entitled to take him as being at the time—looking at these circum-
stances, I am clearly of opinion that nothing short of putting the interests of this
G lady into other hands would have satisfied the case, or have avoided the legal
result which now follows. An independent agent would, it may be assumed, have
explained to her that the deed was not for the purpose of merely correcting a
mistake, but was intended materially to alter her position, and to cut down, and on
H her part to renounce, important pecuniary rights; and even leaving out of view the
advantage to be gained by Mr. Skinner, jun., as LORD MACNAGHTEN has observed,
the very observation of counsel in the note of Sept. 22, 1891, would in all probability
have been forcibly laid before her. To this independent advice I think she was
entitled. I am of opinion, therefore, that the judgment appealed from ought to
be affirmed.

I **LORD DAYEY.**—I am of the same opinion, and I do not think it necessary to
make any detailed examination of the facts of the case which are brought out in the
examination and cross-examination of the witnesses, as I agree with what has been
said on that point by the Lord Chancellor and LORD MACNAGHTEN. The first question
is to inquire what the deed of 1891, which it was sought to set aside by this action,
did; and I find that it did two things, and two things only. In the first place, it cut
down the life interest to which the plaintiff was entitled during her life, in case she
survived her husband, to an estate *durante viduitate* only, so long as she should
remain his widow, and not marry again; secondly, it made a material alteration as

to her interest in the capital fund, and indeed it deprived her of any prospect of sharing in the capital fund; for whereas under the original deed she would have had a joint power of appointment with her husband during their joint lives, and if she survived him a separate power of appointment, she gave up both her joint power during their joint lives and also the chance of having a separate power of disposition in case she survived her husband.

It will be observed that those alterations in the deed were concessions which came entirely from her side, and that no alteration was made in her favour, and no consideration of any sort or kind, no *quid pro quo*, was provided for her by the deed. The next question I ask is, what was the position of Mr. William Moore Skinner? Mr. Skinner was her husband's solicitor, and indeed he was the solicitor for the whole family--and not only for the whole family, but it appears that he also attended Mrs. Brown, the plaintiff's mother, when she was on her death-bed, and I think made Mrs. Brown's will for her. But he was more than that. He was also a very intimate friend of the Willis family, including the plaintiff and her husband, and he was also a trustee under the original settlement. I think it a sound observation that a wife usually has no solicitor of her own apart from her husband, and I think that she is *prima facie* entitled to look to her husband's solicitor, the solicitor of her husband's family, for advice and assistance until that solicitor repudiates the obligation to give such advice, and requires her to consult another gentleman.

The result of the evidence upon my mind, without going into details, is that this lady did in fact rely upon Mr. William Moore Skinner to advise and assist her as her solicitor. I do not find that Mr. Skinner ever repudiated the obligation to advise the plaintiff. I am aware that he says that he was somewhat sore at the suggestion that he had made a mistake with regard to the earlier deed, and that he required not Mrs. Willis, not the plaintiff, but her husband and her, to go and consult another solicitor across the street. But that is a very different thing from advising the plaintiff to consult a solicitor separate from her husband. The suggestion which he says he made was that they should both go and consult another solicitor. What he ought to have done was to advise her to consult a solicitor separate from and independent of her husband. It is to be observed that the deed was in fact prepared by him on behalf of all parties, and I cannot find throughout this mass of evidence that any suggestion was ever made by anybody that it had been perused or settled by any person on her behalf. Therefore, I take it to be clear that he was the only solicitor acting for her in the matter, and that he was the solicitor who prepared and perused and settled the deed on behalf of all parties. Indeed, Mr. Skinner seems to have accepted that situation, and to have taken some pains to explain the contents of the deed to the plaintiff. But, as RIGBY, L.J., says, that was not enough. She required not only explanation of the meaning of the deed, but what she wanted was, or what she had a right to look for was, advice as to her rights.

The next question I ask is, What was the knowledge of the plaintiff and the information given to her as to the circumstances and the purpose for which the deed was to be executed? On those points, again, I will not trouble to read long passages from the evidence, because I agree with the Lord Chancellor that the information given to her, and her belief founded upon that information, was that a mistake had been made in drawing up the previous deed, and that all that was asked of her was to put right or rectify a mistake which had been made--inadvertently made--by the parties. It is of course a commonplace to point out the widely different position of a woman who is asked to put right a mistake made in a deed under which she derived very considerable advantages and that of a woman who is asked, the parties to a deed which conferred an advantage upon her having changed their minds, whether she will assist them to carry out, not their original mind and intention, but their new mind and intention. It is admitted by the learned counsel for the appellants (and the admission could not have been avoided) that there is no evidence that any mistake in fact had really been made in drawing up

A the previous deed. What we must understand is that the parties, having realised the effect of what they had done, had changed their minds and intention. If she had consulted a separate solicitor, who would of course have advised her as to her real position, he would have told her that it was not a case of a mistake which any person of right feeling who was taking a gift from others might have considered himself under an obligation to put right. In such circumstances I should think
B must fair-minded persons would say: "I will not accept a gift which has been made to me under a mistake." If she had consulted a separate solicitor, he would have told her what her real position was, and what were the rights to which she was entitled under that deed; at the lowest, he would probably have succeeded in making a bargain and securing for her countervailing advantages in place of those which she was asked to give up.

C I, therefore, think that the judgment of the Court of Appeal in this case must be affirmed, on the ground that the plaintiff did not understand the purpose and intention or the true effect of the deed of 1891, and that such failure to grasp the true effect of the deed arose from Mr. Skinner, who had assumed the position and the obligation of advising her, having failed to give her proper advice. The alterations made in the deed made an important difference in the position of young Mr. Skinner,
D who was entitled to a moiety of the capital in default of the exercise of any of the powers of appointment which were given by the settlement. In the first place his prospect of succeeding to a share of the capital depended on the single contingency only of Joseph Willis dying without having exercised the power of appointment, instead of the double contingency of the joint power not being exercised and the wife being the survivor (which event actually happened) and her not exercising the power. He also gained a considerable advantage by his prospect of succeeding to the capital being accelerated by the plaintiff's life interest being cut down to an interest during widowhood only. I, therefore, think that the decision of the Court of
E Appeal may also be supported upon the ground upon which the learned judges of the Court of Appeal based it—namely, that Mr. William Moore Skinner's son could not take a benefit from the plaintiff without showing the righteousness of the transaction, or, in other words, that she had independent advice and assistance as to her rights and real position. I, therefore, concur in the judgment which has been proposed.

LORD BRAMPTON.—The deed of 1890 was all that the parties intended it to be, and no more. After the deed was executed the settlors changed their minds and desired to limit the benefits which it conferred on the plaintiff. This could only be
G done by getting the plaintiff to sign the deed in question to effect this alteration. The deed of 1891 was accordingly prepared and in order to obtain the plaintiff's execution of it she was told that it was to rectify a mistake in the original deed. There was no mistake—the parties meant all that was in the deed of 1890. It was in fact untrue to say that there had been any mistake at all. I agree in all that has been said by the Lord Chancellor and my other noble and learned friends who
H have expressed their views, and in the judgment proposed.

LORD ROBERTSON.—I entirely agree.

Appeal dismissed.

Solicitors: *Balfour, Allan & Co., for Skinner, Church & Michael, Sunderland;*

I *Wynne-Baxter & Keeble, for Beldon & Ackroyd, Bradford.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

EDELSTEIN v. SCHULER & CO.

[KING'S BENCH DIVISION (Bigham, J.), April 8, 10, May 9, 1902]

[Reported [1902] 2 K.B. 144; 71 L.J.K.B. 572; 87 L.T. 204; 50 W.R. 493;
18 T.L.R. 597; 46 Sol. Jo. 500; 7 Com. Cas. 172]*Negotiable Instrument—Bearer bond—Debenture—Transferable by delivery—
English or foreign corporation—Theft of bonds—Liability of holders for value.*

A bond or debenture declared on the face of it to be payable to bearer, and shown to be dealt with among merchants as transferable by delivery, is by the law merchant a negotiable instrument whether it is the bond or debenture of an English or a foreign corporation.

Bechuanaland Exploration Co. v. London Trading Bank (1), [1898] 2 Q.B. 658, followed.

Negotiable bonds owned by the plaintiff were stolen from his safe by a clerk who sent them to M., a local stockbroker, to be sold. M., in the ordinary way of business instructed the defendants, who were London stockbrokers, to sell the bonds to jobbers for cash or account. When the bonds had been sold M. sent them to the defendants for delivery to the jobbers in exchange for the purchase price, and the defendants remitted the price to M. who in turn remitted it to the clerk. The defendants sold the bonds in good faith and without notice of the theft. The plaintiff claimed damages from the defendants for conversion of the bonds.

Held: the defendants, having negotiated the sale of the bonds to the jobbers on behalf of M. in the ordinary course of business and thus become personally liable to deliver the bonds to the jobbers, became entitled to the bonds for valuable consideration, and, on the bonds being delivered into their possession by M. in exchange for the price, they became holders for value of the bonds and as such were not liable to the plaintiff for conversion.

Notes. Referred to: *Webb, Hale & Co. v. Alexandria Water Co.* (1905), 21 T.L.R. 572; *Clayton v. Le Roy*, [1911] 2 K.B. 1031.

As to what instruments are negotiable, see 3 HALSBURY'S LAWS (3rd Edn.) 239 et seq.; and for cases see 6 DIGEST (Repl.) 418 et seq.

Cases referred to:

- (1) *Bechuanaland Exploration Co. v. London Trading Bank*, [1898] 2 Q.B. 658; 67 L.J.Q.B. 986; 79 L.T. 270; 14 T.L.R. 587; 3 Com. Cas. 285; 6 Digest (Repl.) 422, 2973.
- (2) *Goodwin v. Roberts* (1875), L.R. 10 Ex. 337; 44 L.J.Ex. 157; 33 L.T. 272; affirmed (1876), 1 App. Cas. 476; 45 L.J.Q.B. 748; 35 L.T. 179; 24 W.R. 987, H.L.; 6 Digest (Repl.) 423, 2978.

Also referred to in argument:

- Southwell v. Bowditch* (1876), 1 C.P.D. 100; 45 L.J.Q.B. 374; 34 L.T. 133; reversed 1 C.P.D. 374; 45 L.J.Q.B. 630; 35 L.T. 196; 24 W.R. 838, C.A.; 1 Digest (Repl.) 731, 2755.
- Thompson v. Doming* (1845), 14 M. & W. 403; 14 L.J.Ex. 320; 5 L.T.O.S. 268; 153 E.R. 532; 8 Digest (Repl.) 568, 203.
- Gurney v. Behrend* (1854), 3 E. & B. 622; 23 L.J.Q.B. 265; 23 L.T.O.S. 89; 18 Jur. 856; 2 W.R. 425; 118 E.R. 1275; 41 Digest 385, 2297.
- Crouch v. Credit Foncier of England* (1873), L.R. 8 Q.B. 374; 42 L.J.Q.B. 183; 29 L.T. 259; 21 W.R. 946; 6 Digest (Repl.) 421, 2972.
- London and County Banking Co. v. London and River Plate Bank* (1887), 20 Q.B.D. 232; 4 T.L.R. 179; subsequent proceedings (1888), 21 Q.B.D. 535; 4 T.L.R. 774, C.A.; 6 Digest (Repl.) 424, 2984.

- A** *Rumball v. Metropolitan Bank* (1877), 2 Q.B.D. 194; 46 L.J.Q.B. 346; 36 L.T. 240; 25 W.R. 366, D.C.; 6 Digest (Repl.) 423, 2979.
- Dixon v. Borill* (1856), 3 Macq. 1; 28 L.T.O.S. 130; 2 Jur.N.S. 933; 4 W.R. 813, H.L.; 6 Digest (Repl.) 427, 3001.
- Colonial Bank v. Cady and Williams, London Chartered Bank of Australia v. Cady and Williams* (1890), 15 App. Cas. 267; 60 L.J.Ch. 131; 63 L.T. 27; 39 W.R. 17; 6 T.L.R. 329, H.L.; 6 Digest (Repl.) 425, 2985.
- B** *Lickbarrow v. Mason* (1787), 2 Term Rep. 63; 6 East, 20, n.; 100 E.R. 35; reversed sub nom. *Mason v. Lickbarrow* (1790), 1 Hy. Bl. 357, Ex. Ch.; reversed sub nom. *Lickbarrow v. Mason* (1793), 4 Bro. Parl. Cas. 57, H.L.; subsequent proceedings (1794), 5 Term Rep. 683; 6 Term Rep. 131; 6 Digest (Repl.) 428, 3007.
- C** *Sewell v. Burdick* (1884), 10 App. Cas. 74; 54 L.J.Q.B. 156; 52 L.T. 445; 33 W.R. 461; 1 T.L.R. 128; 5 Asp.M.L.C. 376, H.L.; 41 Digest 372, 2186.
- Georgier v. Mieville* (1824), 3 B. & C. 45; 4 Dow. & Ry. K.B. 641; 2 L.J.O.S.K.B. 206; 107 E.R. 651; 6 Digest (Repl.) 419, 2959.
- Brown, Shipley & Co. v. Inland Revenue Comrs.*, [1895] 2 Q.B. 598; 64 L.J.M.C. 241; 73 L.T. 377; 11 T.L.R. 585; 39 Sol. Jo. 720; 14 R. 661, C.A.; 6 Digest (Repl.) 467, 3273.
- D** *Stern v. R.*, [1896] 1 Q.B. 211; 65 L.J.Q.B. 240; 73 L.T. 752; 44 W.R. 302; 10 Digest (Repl.) 1296, 9145.
- Duncan v. Hill, Duncan v. Beeson* (1873), L.R. 8 Exch. 242; 42 L.J.Ex. 179; 29 L.T. 268; 21 W.R. 797, Ex. Ch.; 1 Digest (Repl.) 628, 2103.
- E** *Lacey (Lacy) v. Hill, Crowley's Claim* (1874), L.R. 18 Eq. 182; 43 L.J.Ch. 551; 30 L.T. 484; 22 W.R. 586; 1 Digest (Repl.) 617, 2024.
- Cochrane v. Rymill* (1879), 40 L.T. 744; 43 J.P. 572; 27 W.R. 776, C.A.; 37 Digest 19, 153.
- Hollins v. Fowler* (1875), L.R. 7 H.L. 757; 44 L.J.Q.B. 169; 33 L.T. 73; 40 J.P. 53, H.L.; 1 Digest (Repl.) 787, 3155.
- F** *Cranch v. White* (1835), 1 Bing. N.C. 414; 1 Hodg. 61; 1 Scott, 314; 4 L.J.C.P. 113; 131 E.R. 1176; 1 Digest (Repl.) 787, 3150.
- Goggerley v. Cuthbert* (1806), 2 Bos. & P.N.R. 170; 127 E.R. 589; 6 Digest (Repl.) 87, 690.
- Fine Art Society v. Union Bank of London* (1886), 17 Q.B.D. 705; 56 L.J.Q.B. 70; 55 L.T. 536; 51 J.P. 69; 35 W.R. 114; 2 T.L.R. 883, C.A.; 6 Digest (Repl.) 418, 2956.
- G** *Glyn v. Baker* (1811), 13 East, 509; 104 E.R. 468; 6 Digest (Repl.) 419, 2957.
- Arnold v. Cheque Bank, Arnold v. City Bank* (1876), 1 C.P.D. 578; 45 L.J.Q.B. 562; 34 L.T. 729; 40 J.P. 711; 24 W.R. 759; 6 Digest (Repl.) 451, 3154.
- Barker v. Furlong*, [1891] 2 Ch. 172; 60 L.J.Ch. 368; 64 L.T. 411; 39 W.R. 621; 7 T.L.R. 406; 43 Digest 497, 363.
- H** *Nash v. De Freville*, [1900] 2 Q.B. 72; 69 L.J.Q.B. 484; 82 L.T. 642; 48 W.R. 434; 16 T.L.R. 268, C.A.; 6 Digest (Repl.) 341, 2467.

Action, tried in the Commercial Court without a jury, brought by the plaintiff, one Edelstein, of Bradford, against the defendants, Schuler & Co., of Angel Court, E.C., for damages for the conversion of certain securities the property of the plaintiff.

- I** The plaintiff owned certain debenture and other bonds of foreign corporations and also certain debenture bonds of an English company registered under the Companies Acts, 1862 to 1900, the Bechuanaland Rail. Co. He kept the bonds in a safe in his office from which they were stolen by one of his clerks. This clerk sent them to a local stockbroker called Megson to have them sold. Megson in the ordinary way of business sold them through the defendants, who were London stockbrokers. The bonds were sold to jobbers either for cash or for account, and when sold they were sent to the defendants to be delivered to the jobbers in exchange for their price. The price when received by the defendants was remitted by them to Megson either

in which he in account current, and he in turn paid it to the clerk. No question was raised as to the defendants having notice of the clerk's theft, or otherwise as to their bona fides in the transaction. On the discovery of the theft this action was commenced.

The debenture bonds of the English company, the Bechuanaland Rail. Co. were in the following form :

"Debenture.—£10.—1. For valuable consideration already received the Bechuanaland Rail. Co., Ltd. (hereinafter called "the company") will, as and when the principal moneys hereby secured become payable in accordance with the conditions indorsed hereon, pay to the bearer or, when registered, to the registered holder, on presentation of this debenture, the sum of £10 with a bonus of £5 per cent. thereon.

2. The company will during the continuance of this security pay interest on the said sum of ten pounds at the rate of £5 per cent. per annum by equal half-yearly payments on every 1st day of May and 1st day of November in each year, in accordance with the coupons annexed hereto and any further coupons issued pursuant hereto. 3. This debenture is issued subject to and with the benefit of the conditions indorsed hereon, which are to be deemed part of it—. Given under the common seal of the company this 15th day of August, 1898."

The conditions indorsed on the debentures were as follows :

"(2) Annexed to this debenture are twenty coupons, each providing for the payment of a half-year's interest, and such will be payable or satisfiable only on presentation and delivery of the coupon referring thereto. A voucher for fresh coupons in like form is also annexed hereto, and will be exchangeable for a fresh sheet of coupons and a fresh voucher as and when the coupons for the time being issued in respect of this debenture are exhausted. (3) The principal moneys and interest hereby secured will be paid without regard to any equities between the company and the original or any intermediate holder thereof. (4) If and when the principal moneys hereby secured shall become payable, the person presenting this debenture for payment must surrender therewith the coupons (if any) representing subsequent interest and any voucher held by him for fresh coupons, the company nevertheless paying the interest for the fraction of the current half year. (5) The delivery to the company of this debenture and of each of the said coupons and vouchers aforesaid shall be a good discharge for the principal moneys and interest therein respectively specified, and the company shall not be bound to inquire into the title of the respective bearers of such instruments, or to take notice of any trusts affecting such moneys, or be affected by express notice of the right, title, or claim of any other person to such moneys or instruments. Nevertheless when registered the receipt of the registered holder, or his legal personal representative, shall alone be a good discharge to the company for such principal moneys. (6) Whenever this debenture is unregistered it is to be regarded as negotiable, and all persons are invited by the company and the owner for the time being to act accordingly, but the company will at any time upon the request of the bearer (whilst unregistered) register him or his nominee in the register below mentioned as the holder of this debenture, and indorse a note of such registration hereon, and the company will also at any time upon the request of the registered holder, or his legal personal representatives, cancel the registration and the note thereof indorsed hereon, and thereupon the debenture will again become transferable on delivery. A fee of ten shillings shall be paid to the company upon every such registration or cancellation. (7) A register of the debentures for the time being registered as aforesaid will be kept at the company's registered office wherein there will be entered the names, addresses, and descriptions of the registered holders and particulars of the debentures held by them respectively, and such register will at all reasonable times during business hours be open to the inspection of the regis-

A tered holder thereof and his legal personal representatives and any person
 authorised in writing by him or them. (8) Whoso registered the registered
 holder will be regarded as exclusively entitled to the benefit of this debenture,
 and all persons may act accordingly, and the company shall not be bound to
 B enter in the register notice of any trust or to recognise any right in any other
 person save as herein provided. (9) Every transfer of this debenture when
 registered must be in writing under the hand of the registered holder or his legal
 personal representatives. The transfer must be delivered at the registered
 C office of the company with a fee of 2s. 6d. and such evidence of identity or title
 as the company may reasonably require; and thereupon the transfer will be
 registered and a note of such registration will be indorsed thereon. The com-
 pany shall be entitled to retain the transfer. (11) The company may at any time
 give notice in writing to the holders of the debentures of this series of its inten-
 tion to redeem the same, and at the expiration of six calendar months from such
 notice the whole of the debentures of this series shall become payable with the
 bonus within mentioned. (12) The principal moneys hereby secured shall
 immediately become payable—(a) If the company makes default for a period
 of six calendar months in the payment of any interest hereby secured, and the
 D bearer hereof before such interest is paid, by notice in writing to the company,
 calls in such principal moneys; or (b) if an order is made or an effective resolu-
 tion is passed for the winding-up of the company; or (c) at the expiration
 of six calendar months from the time when this debenture is drawn for redemp-
 tion pursuant to cl. 25 of the indenture below mentioned and the notice in that
 clause mentioned is given. (13) The principal moneys and interest hereby
 E secured will be paid at Parr's Bank, Ltd., Bartholomew Lane, London, or at
 the registered office of the company."

The various stolen bonds of the foreign corporations were in the following forms:—

De Beers Consolidated Mines, Ltd.: Its debenture bonds contained similar terms
 F to the bonds of the English company except that there was no provision for register-
 ing the holder's name.

Union Pacific Railroad Co.: Its bonds provided that the company promised to
 pay the holder, or where the bonds were registered, the registered holder, the sum
 of one thousand dollars at the company's New York office, and to pay interest
 G thereon at a stated rate on the presentation and surrender of the coupons annexed
 to the bonds at the New York office. The bonds of this company further provided
 that

"the bonds shall pass by delivery or by transfer on the books of the railroad
 company in the City of New York; after registration of ownership certified
 thereon by the transfer agent of the railroad company no further transfer except
 upon the books of the said company shall be valid unless transferred to bearer on
 H said books, after which this bond shall pass by delivery as at first, but shall
 continue subject to registration and transfer to bearer successively at the option
 of each holder; such registration, however, shall not affect the negotiability of
 the coupons, but the same shall continue to be transferable by delivery, not-
 withstanding registration of the bond. This bond is also exchangeable at any
 I time for a registered bond without coupons, as provided in said mortgage or deed
 of trust. This bond is to be valid only when authenticated by the certificate
 thereon, signed by the trustee, to the effect that it is one of the bonds secured
 by the said mortgage or deed of trust."

The bonds of the remaining foreign corporations, Denver and Rio Grande Railroad
 Co., the Erie Railroad Co., and the Mexican National Railroad Co., were for the
 purposes of the trial practically identical with the bonds of the Union Pacific Rail-
 road Co., and no attempt was made to rest any contention on a distinction between
 them. At the hearing evidence was given by stockbrokers, bankers, and others

accustomed to deal with those bonds and debentures and other bonds of the same kind that such bonds while unregistered are treated on the London Stock Exchange and in the mercantile world generally as negotiable instruments passing on delivery.

Danckwerts, K.C., and *Montague Lush, K.C.*, (*W. J. Waugh* with them) for the plaintiff.

Rufus Isaacs, K.C., and *Duke, K.C.*, (*Ellis Hill* with them) for the defendants.

May, 9, 1902. **BIGHAM, J.**, stated the facts and read the following judgment.— In my view, the comparatively recent origin of this class of securities creates no difficulty in the way of holding that they are negotiable by virtue of the law merchant; they are dealt in as negotiable instruments in every minute of a working day, and to the extent of many thousands of pounds. It is also to be remembered that the law merchant is not fixed and stereotyped; it has not yet been arrested in its growth by being moulded into a code; it is, to use the words of *COCKBURN, C.J.*, in *Goodwin v. Roberts* (2) (L.R. 10 Ex. at p. 346), capable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce, the effect of which is that it approves and adopts from time to time those usages of merchants which are found necessary for the convenience of trade. Our common law, of which the law merchant is but a branch, has in the hands of the judges the same facility for adapting itself to the changing needs of the general public.

Principles do not alter, but old rules of applying them change, and new rules spring into existence. Thus it has been found convenient to treat securities like those in question in this action as negotiable, and the courts of law recognising the wisdom of the usage have incorporated it in what is called the law merchant, and have made it part of the common law of the country. In my opinion the time has passed when the negotiability of bearer bonds, whether government bonds or trading bonds, foreign or English, can be called in question in our courts. The existence of the usage has been so often proved and its convenience is so obvious that it must be taken now to be part of the law. The very expression "bearer bond" connotes the idea of negotiability, so that the moment such bonds are issued to the public they rank themselves among the class of negotiable securities. It would be a great misfortune if it were otherwise, for it is well known that such bonds are treated in all foreign markets as deliverable from hand to hand; the attribute not only enhances their value by making them easy of transfer, but it qualifies them to serve as a kind of international currency; and it would be very odd and a great injury to our trade if these advantages were not accorded to them in this country.

But I am not to be guided alone by evidence and by questions of expediency. The point is entirely covered by authority. The arguments in support of the contention that these bonds are not negotiable were all adduced before and carefully examined by *KENNEDY, J.*, in *Bechuanaland Exploration Co. v. London Trading Bank* (1), and were dismissed by him as unsound. I have read the judgment in that case, and I desire to say that I entirely agree with the conclusion and with the reasons which lead up to them. I go, perhaps, further than *KENNEDY, J.*, intended to go, for I think that it is no longer necessary to tender evidence in support of the fact that such bonds are negotiable, and that the courts of law ought to take judicial notice of it.

The negotiability of the bonds being established, it is clear that the jobbers who bought them, having given value and having acquired them without any notice of infirmity in the vendor's title, could not be sued in trover by the plaintiff. But can the defendants, the brokers who assisted in perfecting the good title acquired by the jobbers, be sued? It is said they can. A broker who merely negotiates the sale of chattels without the authority of the true owner commits no tort at all. The sale is a mere void act. It divests the true owner of no right, and it does not physically interfere with his control or possession of the goods. But if in addition

A to negotiating a sale the broker meddles with the goods themselves and hands them to the buyer with the object and intention of transferring to the buyer the property and possession in pursuance of the unauthorised sale, then he makes himself liable in trover to the true owner, for he is guilty of an act in relation to the goods themselves which is inconsistent with the rights of the true owner. It is argued that the defendants by what they did in handing the bonds to the jobbers have brought themselves within this rule of law. But, in my opinion, before the defendants had possession of the bonds at all or physically dealt with them in any way, they had become entitled to them for a valuable consideration just as effectually as the jobbers subsequently became entitled to them by paying the purchase price. When in the ordinary course of business the defendants negotiated the sale of the bonds to the jobbers, they came under a personal liability to the jobbers to deliver them. This liability they undertook at the request of Megson, who was acting for the thief, and in consideration of their undertaking the liability Megson or the thief promised that he would deliver to them the bonds; these circumstances, in my view, made the defendants holders for value, and, as the bonds were negotiable, gave them power to deal with the bonds. Or it may be put in another way. Megson in the ordinary course of business would look to the defendants (so long as they were solvent), and not to the jobbers, for the price of the bonds; it is the defendants whom he would treat as the buyers, and to whom he would look, and, in fact, did look, for his money; this is the way in which the transactions would be carried through, and although this course of business does not make the defendants the buyers of the bonds, it makes them, in my opinion, holders for value as soon as they get possession of them and hand over the money in exchange for them.

E I think for these reasons that the defendants became as much holders of the bonds for value as the jobbers, and that they are entitled to the same protection. But even if they were not holders for value, I doubt whether they could be sued in trover, or sued at all. There appears to me to be an essential difference between meddling with goods with the intention of transferring a title which will be bad as against the true owner and the case of assisting in perfecting a title which will be good as against the true owner. It would be very odd that an action should lie against the broker for assisting the jobber to get his title when no action lies against the jobber who gets the title; and to so hold would go far to destroy the advantages of the negotiability of the bonds. It is not, however, necessary for me to decide this point. It is sufficient for me to say that, in my opinion, these bonds were negotiable instruments, and that the defendants were holders of them for value.

G *Judgment for defendants.*

Solicitors: Warren, Murton & Miller, for Mossman, Atkinson & Blankley, Bradford; Gush, Phillips, Walters & Williams.

[Reported by J. ANDREW STRAHAN, ESQ., Barrister-at-Law.]

DUBLIN CORPORATION v. TRINITY COLLEGE

[HOUSE OF LORDS (The Earl of Halsbury, L.C., Lord Macnaghten and Lord Lindley).
March 19, 24, 26, 30, 1903]

[Reported 88 L.T. 305]

Statute—Construction—Effect of continuous user.

No amount of subsequent user will control the plain meaning of an Act of Parliament; but a continuous user, extending over many years, may be called in aid to show what the true meaning is.

Notes. As to the operation of an Act of Parliament, see 36 HALSBURY'S LAWS (3rd Edn.) 419 et seq.; and for cases see 42 DIGEST 666 et seq.

Appeal from a decision of the Court of Appeal in Ireland (FITZGERON, HOLMES and WALKER, L.J.J.), dated Feb. 25, 1902, affirming an order of the King's Bench Division (PALLES, C.B., ANDREWS and JOHNSTON, J.J.), directing judgment to be entered for the respondents. The case turned on the construction of various Irish statutes, and is reported only on the observations of the Lord Chancellor on the meaning of Acts of Parliament.

The MacDermot, K.C., C. A. O'Connor, K.C., and P. A. O'C. White (all of the Irish Bar) for the appellants.

Matheson, K.C., Samuels, K.C., and G. W. Walker (all of the Irish Bar) for the respondents.

The House took time for consideration.

Mar. 30, 1903. The following opinion was read.

THE EARL OF HALSBURY, L.C., stated that the judgments in the courts below had dealt with the whole subject in such an exhaustive and unanswerable manner that he did not wish to add anything to them, and continued: There is a single observation which I ought to make, rather in reply to what was urged by the learned counsel at the Bar than by way of adding anything to the judgment below. The learned counsel have insisted that, if the plain words of an Act of Parliament imposed a tax, no amount of omission to charge that tax or to insist on it by the proper executive officer could control, or cut down, or override the force of the Act of Parliament itself. With that observation in itself I entirely agree. I do not think that any amount of user would be enough to contradict the proper efficiency of an Act of Parliament; but the proposition must be that the language of the Act of Parliament is incapable of exposition otherwise than in the mode in which it must hit this or that subject of taxation. When, however, one sees what the application of that general proposition is to the particular facts with which we are dealing, it is manifest that, when you are dealing with the question of what is the meaning of an Act of Parliament, or of certain words used in it, the question how those words were understood at the time when the Act was passed, or what was the sense in which at that time people would generally have understood them, is a very different question. To my mind, when there has been a user for some centuries in which a particular meaning has been attached to particular words it may well be that the true understanding of those words is exhibited by the continuous practice of those centuries. I only wish to make this additional observation because something which was said at the Bar leads me to suppose that the language of PALLES, C.B., and of the Court of Appeal has been misunderstood, as if those learned judges had assumed that any amount of

user afterwards would control the plain meaning of the Act of Parliament. It will not control it, but, in order to interpret the meaning when it is not plain, the user at the time, or at a subsequent time, may well be brought in aid. I move that this appeal be dismissed with costs.

LORD MACNAGHTEN and LORD LINDLEY *concurred*.

Appeal dismissed.

Solicitors: *Leslie S. Badham*, for *Harry Bonass*, Dublin; *Hopgoods & Dowson*, for *Mounsell, Dudley & Orpen*, Dublin.

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

Re LONDON AND GLOBE FINANCE CORPORATION, LTD.

[CHANCERY DIVISION (Buckley, J.), March 4, 5, 10, 1903]

[*Reported* (1903) 1 Ch. 728; 72 L.J.Ch. 368; 88 L.T. 194; 51 W.R. 651; 19 T.L.R. 314; 10 Mans. 198]

Criminal Law—Company—Director—Winding-up—Circumstances in which prosecution of director should be ordered by court—Companies Act, 1862 (25 & 26 Vict., c. 89), s. 167.

In considering whether an order should be made, under s. 167 of the Companies Act, 1862 [repealed], to prosecute a director of a company which is being wound-up for alleged offences at the expense of the assets of the company, the court ought to direct a prosecution at the expense of the assets, if it would have been the duty of a good citizen, in a case where he alone was concerned, to prosecute at his own expense. The refusal of the Attorney-General to authorise the Director of Public Prosecutions to prosecute at the public expense is not conclusive, or necessarily relevant to the question whether such a prosecution ought to be directed by the court under s. 167, because it may have been arrived at on public grounds which have no application to a prosecution by the liquidator.

Notes. The Companies Act, 1862, has been repealed. The corresponding provision of the Companies Act, 1948, to s. 167 of the 1862 Act is s. 334 (1): "If it appears to the court in the course of a winding-up by . . . the court that any past or present officer, or any member, of the company has been guilty of any offence in relation to the company, for which he is criminally liable, the court may . . . direct the liquidator to refer the matter . . . to the Director of Public Prosecutions . . ." Section 334 (5) obliges the Director to institute a prosecution after such a reference "If . . . he considers that the case is one in which a prosecution ought to be instituted . . ."

Despite the difference between these provisions and those of s. 167 of the Act of 1862, the report is reprinted because the observations of the court may be relevant in construing s. 334 of the Act of 1948, and also for the observations on the meaning of "intent to defraud or deceive" in the Larceny Act, 1861, s. 84.

Considered: *R. v. Bassey* (1931), 47 T.L.R. 222; *R. v. Wines*, [1953] 2 All E.R. 1497; *Re Agricultural Industries, Ltd.*, [1952] 1 All E.R. 1188. Referred to: *R. v. Newlon and Bennett* (1913), 109 L.T. 747; *Kal v. Diment*, [1950] 2 All E.R. 657; *R. v. Potter*, [1958] 2 All E.R. 51.

As to publication of fraudulent statements by company officers, see 6 HALSBURY'S LAWS (3rd Edn.) 197, 198; as to prosecutions, see *ibid.* 710; and for cases see 16 DIGEST (Repl.) 1042. For the Companies Act, 1948, s. 334, see 3 HALSBURY'S STATUTES (2nd Edn.) 716, and for the Larceny Act, 1861, s. 83, s. 84, see 5 HALSBURY'S STATUTES (2nd Edn.) 741, 742.

Summons under s. 167 of the Companies Act, 1862, for an order to prosecute alleged offenders at the expense of the assets of a company in liquidation.

The London and Globe Finance Corporation, Ltd. was being wound-up compulsorily under order of the court, and the official receiver had been appointed official liquidator. The company was hopelessly insolvent, and the claims of creditors already admitted amounted to over one and a half millions, upon which a dividend of 1s. in the pound had been paid. Further claims were being put forward, and it was stated that the assets would not eventually realise more than sufficient to pay a further 1s. in the pound. It was alleged that certain criminal offences in connection with the company's balance-sheets and accounts had been committed by Mr. Whitaker Wright, the late managing director, and application had been made by some of the creditors to the Attorney-General to direct a public prosecution, which had been refused. Mr. Flower, a creditor to a large amount, took out a summons asking that the official liquidator might be ordered to institute a prosecution at the expense of the assets under s. 167 of the Companies Act, 1862. He was supported by a majority of the committee of creditors, and by other creditors representing together claims against the company to the extent of about £650,000. Other creditors to the amount of £100,000 were neutral, and the proposed prosecution was actively opposed by the Nickel Corporation, Ltd., who were creditors for about £175,000, and by a few others. The expense of the prosecution was estimated not to exceed £5,000, towards which a sum of £1,250 had been privately subscribed. The alleged offences were committed before the coming into operation of the Companies Act, 1900. The summons came in the first instance before the registrar, who gave leave to the Nickel Corporation to appear and ask the court to hear them in opposition. Counsel for the applicant asked that the application should be heard in chambers, but BUCKLEY, J., said that it must be heard in public.

Avory, K.C., for the applicant.

Isaacs, K.C., and *G. F. Hart* for the official receiver.

Astbury, K.C., and *Wilkinson* for the Nickel Corporation.

By s. 167 of the Companies Act, 1862:

"Where any order is made for winding up a company by the court or subject to the supervision of the court, if it appears in the course of such winding-up that any past or present director, manager, officer or member of such company has been guilty of any offence in relation to the company for which he is criminally responsible, the court may, on the application of any person interested in such winding-up, or of its own motion, direct the official liquidators, or the liquidators (as the case may be), to institute and conduct a prosecution or prosecutions for such offence, and may order the costs and expenses to be paid out of the assets of the company."

Cur. adv. vult.

Mar. 10, 1903. **BUCKLEY, J.**, read the following judgment.—The questions which arise on this application are of the largest general importance. Their importance lies not only, nor even principally, in the fact that the application is made in the winding-up of a corporation, whose affairs have become a matter of great public notoriety, and in which grave and grievous frauds are said to have been committed, but rather because, for the proper decision of the matter, it is necessary to investigate the general principles on which a criminal prosecution at the expense of the estate ought to be directed under s. 167 of the Companies Act, 1862.

A The statutes relating to limited liability have probably done more than any legislation in the last fifty years to further the commercial prosperity of the country. They have, to the advantage of the investor as well as the public, allowed and encouraged the aggregation of small, or comparatively small, sums into large capitals which have been employed in undertakings of great public utility, largely increasing the wealth of the country. But, at the same time, in this branch of the law the apathy of the public in setting the law in motion has, I will not say B discouraged, but at least failed to repress, grievous frauds which have been committed, and which have often gone unpunished. Relatively to the advantages which have accrued from the law of limited liability, the mischief of such frauds has been small, but when regarded, not relatively, but absolutely, the frauds which have been committed under cover of these Acts have no doubt been great. Recourse C has seldom been had to s. 167 of the Act of 1862. There are two other remedies which the law provides. The Companies (Winding-up) Act, 1890, by s. 7 and s. 8, gives machinery by which light must in every case of compulsory liquidation be let in on the dealings of the company, resulting, in cases where the official receiver finds fraud has been committed, in the public examination of promoters and directors. In the case before me that machinery has been employed, fraud D has been found, and a public examination has taken place. The question I have to determine is whether, in the result, the power given by s. 167 of the Act of 1862 ought to be exercised, and the direction given to the official receiver to institute a criminal prosecution at the expense of the estate. The applicant, Mr. John Flower, is a creditor of the London and Globe Finance Corporation, and a member of the committee of inspection. He asks for an order directing the official receiver to prosecute, at the expense of the estate, Whitaker Wright, who was E the managing director of the corporation. The prosecution which it is sought to institute will be under s. 83 and s. 84 of the Larceny Act, 1861, and s. 166 of the Companies Act, 1862, or one of these sections. The transactions impeached took place before the Companies Act, 1900, came into operation. Section 28 of that Act is, therefore, not applicable.

F The offence is that of making or publishing a false statement or account, or a false or fraudulent entry, with intent to deceive or defraud. To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit; it is by deceit to induce a man to act to his injury. More tersely it may be put that to deceive is by falsehood to induce a state of mind, G and to defraud is by deceit to induce a course of action. The first question I have to determine is whether there is here shown a case of doing some or one of the acts mentioned in the sections to which I have referred with intent to deceive or defraud. It is not, in my opinion, necessary that I should find that the facts are so plain that a conviction must ensue. Until the accused has been heard in his defence, no man can or ought to say that he must be, or ought to be, convicted. H I must look to see whether such facts are made out that, if they are not shown to be erroneous or displaced by other facts, a conviction ought to ensue. I must look to see if there is a *prima facie* case. For obvious reasons, I do not here analyse or examine the facts on which I arrive at the conclusion that such a case has been shown. On a full consideration of the facts before me, I am of opinion I that a case has been shown.

I have next to consider on what principles I ought to exercise the power given me by s. 167 of the Act of 1862 to direct the official receiver to institute and conduct a prosecution at the expense of the assets. It is obvious that no one legitimately can or ought to institute a criminal prosecution with a view to his personal profit, neither can a prosecution be instituted by motives of vengeance against the offender. The motive ought to be to inflict punishment on the criminal for the proper enforcement of the law, and to the advantage of the State, and with a view to deter others from doing what was charged against the criminal.

From the prosecution, no doubt, there may arise benefit to the prosecutor in the sense that, if he be a person interested in commerce, it may be to his advantage to enforce commercial morality, but, except in this sense, the personal advantage of the prosecutor is not to be regarded. The principle on which I am to apply s. 167, therefore, cannot be that I ought to regard the pecuniary benefit or advantage of a class at whose expense the prosecution would be conducted. Again, the whole scheme of the Acts with reference to the liquidation of companies no doubt is that the assets are to be realised to the best advantage for the benefit of those who are entitled to share in their distribution, but indications are not wanting that the assets may, under the Acts, be applied for some purpose other than this. Section 167 of the Act of 1862 is, having regard to the reasons I have just given, an example of this, and in the Companies (Winding-up) Act, 1890, the same intent may be found in s. 7 and s. 8. These are sections which require the preparation of a statement of the company's affairs at the expense of the assets, leading to a preliminary report which is to show whether further inquiry is desirable as to matters of promotion and the like, and, if necessary, to a public examination of the parties incriminated, with the object of enforcing commercial morality. It is, therefore, plain that the principle on which I am to apply, or refuse to apply, s. 167 is not measured or limited by or even concerned with pecuniary benefit to be obtained for the shareholders or creditors.

So far, I have addressed myself negatively to the considerations which in my judgment, can govern the question. Affirmatively, what are the considerations which ought to apply? I think the principle lies in the answer to the following questions: If the persons at whose expense the prosecution would be instituted were not a class but a single person, and that person were an honest and upright man, desirous as a good citizen of doing his duty by the State, are the circumstances such as that, in the discharge of that duty, he would feel that he ought, at his own expense and to his own loss, to institute a prosecution? Not in every case in which a criminal offence has been committed would such a one think it his duty to prosecute. The question to be answered is, Would he in this case think his duty to the State required him to prosecute? If that question be answered in the affirmative, then, on principle, I think the court ought to direct a prosecution. Further, I think the court can, and in a proper case ought, to direct a prosecution without the assent, or even notwithstanding the dissent, of the class or many classes at whose expense the prosecution would be instituted. It is noticeable that the court may act on its own motion. No principle suggests itself to me on which the court ought of its own motion to direct a prosecution other than that above alluded to. The first question, therefore, I ask myself is, Would a good citizen, in the discharge of his duty to the State, think that in this case he ought to prosecute and bear the expense? I answer the question in the affirmative. That is, in my judgment, the dominant and guiding principle, but there are several other considerations to which due weight ought to be given. One of them is the question of the proportion of the class affected who respectively approve and disapprove of the institution of a prosecution.

In the present case, the facts stand thus: There is a committee of inspection, under the Act of Parliament, of eight persons, who ought to have an intimate knowledge of the affairs of this company. At a meeting of the committee, on Feb. 13 last, four members, of whom the applicant is one, were present. They were unanimous in desiring a prosecution at the expense of the assets. A fifth member states that, had he been present, he would have voted for it. A sixth writes that it is difficult to say how he would have voted, but that, if counsel had advised a prosecution, he would have considered it his duty to vote for the resolution. A seventh is travelling in South America, and has not replied, and the eighth, Mr. Brigstock, says he would have voted against it. Mr. Brigstock is a member of the firm of Read and Brigstock, who were the private stockbrokers

A Whitaker Wright, the accused, who are stated to be at the present time acting as his brokers. As regards the creditors themselves, creditors to the amount of about £600,000 desire to prosecute, while others to the amount of about £100,000 have expressed themselves as neutral. The Nickel Corporation, creditors for about £175,000, opposed actively. The total amount of the admitted claims was about £1,665,000. The substantial majority of the creditors who expressed any view at all, therefore, are in favour of a prosecution, but those opposing are, no doubt, creditors to a large amount. I say nothing about any question personal to the latter in the matter of their opposition. I do not find anything in the facts I have stated which would induce me to abstain from making an order. The second subsidiary question deserving of consideration is whether the expense of a prosecution would bear hardly on the creditors. The expense is put roughly at £5,000, and the applicant is prepared to pay not less than £1,250 into court towards the amount required. The admitted claims of £1,665,000 have received a dividend of 1s. in the pound, which requires £83,250. There are further possible claims to a large amount, and, allowing for the fact that some of these may be admitted hereafter, the remaining assets of £100,000 may possibly pay another 1s. in the pound. If £3,750 were wanted for the prosecution, the dividend may be diminished by about 4d. in the pound. In this state of things it is impossible to say that, as against the considerations which I have already pointed out, an order ought to be refused because it would bear hardly on the creditors.

There remains the fact to which I undoubtedly ought to give, and desire to give, all due weight—namely, that the Attorney-General has in this case declined to set the Public Prosecutor in motion. The first observation I have to make on this is that the question which the Attorney-General had to consider is, to my mind, a different question to that which I have to consider. The conclusion he arrived at may, for aught I know, be no guide for the purpose of determining the question before me. In arriving at his decision, the Attorney-General may have gone on one of the following grounds: firstly, that the Prosecution of Offences Act, 1879, does not apply to every case in which a criminal prosecution will lie—the Attorney-General might have found that, having regard to s. 2 of that Act, this case does not fall within it; secondly, he might have thought that the Public Prosecutor ought not to be set in motion unless there were grounds for the probability, unless there was a reasonable certainty, that a conviction would ensue, and that he did not think that there was such certainty; and, thirdly, he might have thought that, inasmuch as s. 7 of that Act leaves it open to any person to prosecute, there was, under s. 167 of the Companies Act, 1862, a remedy available, and that there were funds, and that, under these circumstances, the matter ought to be left to the very remedy which I am now asked to apply. He may also have thought that a prosecution ought not to be instituted at the public expense. If his decision rested on any of these grounds, it was irrelevant to anything I have to decide except that, if it was on the third ground, it would not be adverse to, but in favour of, my making this order. If his decision rested on the ground that, in his judgment, a *prima facie* case for a prosecution was not shown, no doubt that is a matter which would weigh with me very much; but, even if this was the reason, I do not know whether the materials before him extended to all those which were before me. The result, therefore, is that, first, I do not know whether the conclusion at which the Attorney-General arrived was based on considerations relevant to anything which I have to determine, and, secondly, even if it was arrived at on a ground which renders it relevant, I do not know whether he was acting on the same materials. Under these circumstances, it seems to me that I ought not to allow my judgment to be influenced by the fact that even the highest authority at the Bar and the first law officer of the Crown has not thought proper to put the Public Prosecutor in motion. I must accept the responsibility for determining the question before me for myself.

The conclusion at which I have arrived is that, on the facts as they at present

appear, a grave case of criminal offence committed is shown, and that, on the principles which I have endeavoured to explain, I ought to use my power under s. 167 of the Act of 1862. I direct the official receiver to institute and conduct against Whitaker Wright a criminal prosecution for such offences under s. 83 and s. 84 of the Larceny Act, 1861, and s. 166 of the Companies Act, 1862, or any of these sections as he may be advised, and I order the costs and expenses of the prosecution to be paid out of the assets of the company so far as funds be required in aid of the £1,250 or other larger sum which the applicant will pay into court, the £1,250 to be paid into court before the order is drawn up, and its payment to be stated in the order. I direct the costs of the applicant and the official receiver to be paid out of the assets of the company, and I give no costs to those who are here to oppose.

Solicitors : *Simmons & Simmons; Michael Abrahams, Sons & Co.; Greenop & Co.*

[*Reported by A. L. MORRIS, Esq., Barrister-at-Law.*]

R. v. TIBBITS AND ANOTHER

COURT FOR CONSIDERATION OF CROWN CASES RESERVED (Lord Alverstone, C.J., Wills, Grantham, Kennedy, and Ridley, JJ.), October 26, November 9, 1901]

[Reported [1902] 1 K.B. 77; 71 L.J.K.B. 4; 85 L.T. 521; 66 J.P. 5; 50 W.R. 125; 18 T.L.R. 49; 46 Sol. Jo. 51; 20 Cox, C.C. 70]

Criminal Law—Obstructing course of justice—Prejudicing fair trial of legal proceedings—Publication of matter prejudicial to person charged with offence—Proof of intent to obstruct—Conspiracy.

It is a misdemeanour to publish with regard to a person who is charged with a criminal offence matter which is prejudicial to that person and is calculated to interfere with the course of justice by perverting or influencing the minds of examining magistrates before whom he is charged or of the court or jury at the assizes to which he is committed for trial. An intention to pervert the course of justice may properly be inferred from the character of the publication itself and the circumstances under which it was published. An agreement so to pervert the course of justice is a criminal conspiracy.

Notes. The Prevention of Cruelty to Children Act, 1894, was repealed by the Prevention of Cruelty to Children Act, 1904, also now repealed. For the present law see 10 HALSBURY'S LAWS (3rd Edn.) 759.

Explained and approved : *R. v. Nield* (1909), Times, Jan. 27. Referred to : *R. v. Parke*, ante p. 721.

As to conspiracy generally and perversion of the course of justice, see 10 HALSBURY'S LAWS (3rd Edn.) 310-314, 631, and for cases see 14 DIGEST (Repl.) 121 et seq.

Cases referred to :

- (1) *R. v. Jolliffe* (1791), 4 Term Rep. 285; 100 E.R. 1022; 14 Digest (Repl.) 289, 2654.
- (2) *R. v. Fisher* (1811), 2 Camp. 563; 15 Digest (Repl.) 841, 8040.
- (3) *R. v. Williams* (1823), 2 L.J.O.S.K.B. 30; 15 Digest (Repl.) 841, 8043.
- (4) *Skipworth's Case* (1873), L.R. 9 Q.B. 230; 28 L.T. 227; sub nom. *R. v. Skipworth*, *R. v. De Castro*, 12 Cox, C.C. 371; 37 J.P. Jo. 85, D.C.; 16 Digest (Repl.) 23, 171.

A

(5) *R. v. Gray*, ante p. 59; [1900] 2 Q.B. 36; 69 L.J.Q.B. 502; 82 L.T. 534; 64 J.P. 484; 48 W.R. 474; 16 T.L.R. 305; 44 Sol. Jo. 362, D.C.; 16 Digest (Repl.) 23, 176.

(6) *R. v. Grant* (1848), 7 State Tr.N.S. 507.

(7) *Mulcahy v. R.* (1868), L.R. 3 H.L. 306, H.L.; 14 Digest (Repl.) 123, 856.

B

(8) *R. v. Holbrook* (1878), 4 Q.B.D. 42; 48 L.J.Q.B. 113; 39 L.T. 536; 43 J.P. 38; 27 W.R. 313; 14 Cox, C.C. 185, D.C.; 14 Digest (Repl.) 43, 113.

Also referred to in argument :

R. v. Mawbey (1796), 6 Term Rep. 619; 101 E.R. 736; 15 Digest (Repl.) 844, 8087.

R. v. Sterenton (1802), 2 East, 362; 102 E.R. 407; 15 Digest (Repl.) 843, 8068.

R. v. Leach and Wainwright (1804), 5 Esp. 107, N.P.; 14 Digest (Repl.) 522, 5061.

C

Wade v. Broughton (1814), 3 Ves. & B. 172; 35 E.R. 444; L.C.; 14 Digest (Repl.) 120, 837.

R. v. Kroehl (1818), 2 Stark. 343; 14 Digest (Repl.) 316, 3030.

R. v. Hamp (1852), 6 Cox, C.C. 167, N.P.; 15 Digest (Repl.) 844, 8080.

R. v. Farrington (1811), Russ. & Ry. 207, C.C.R.; 14 Digest (Repl.) 501, 4831.

D

R. v. Hicklin (1868), L.R. 3 Q.B. 360; 37 L.J.M.C. 89; 16 W.R. 801; 11 Cox, C.C. 19; sub nom. *R. v. Wolverhampton Recorder, Re Scott v. Wolverhampton JJ.*, 18 L.T. 395; sub nom. *Scott v. Wolverhampton JJ.*, 32 J.P. 533; 14 Digest (Repl.) 55, 194.

Case Stated by KENNEDY, J.

E

The defendants, Charles John Tibbits and Charles Windust, were indicted at the Bristol Summer Assizes on an indictment containing sixteen counts, in which they were charged with: (i) an unlawful attempt to obstruct and pervert the due course of law and justice; (ii) the unlawful doing of an act calculated and tending to the same result; (iii) the composing, printing, and publishing of matters with the same intent; and (iv) a conspiracy to obstruct and pervert the due course of law and justice. The charges embodied in the indictment were based upon the

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publication in Bristol of portions of certain issues of a newspaper known as the "Weekly Dispatch," at various dates between Jan. 13, 1901, and Mar. 4, 1901, inclusive. These portions consisted of statements as to the case of one David Allport and one Louisa Eleanor Chappell, and appeared in the newspaper while charges of felony and misdemeanour against both those two persons were being heard before Charles Coates, the magistrate, who ultimately committed them for trial, and before and during the subsequent trial of those two persons at the assizes before Day, J. The charge preferred against Allport and Chappell before the

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magistrate was in the first instance the charge of an offence against s. 1 of the Prevention of Cruelty to Children Act, 1894, in respect of A. B. Allport and W. C. Allport. On Jan. 17 there was a further charge against them of the felony of attempting to murder a child named Arthur Bertie Allport. At a subsequent hearing there was a further charge of conspiracy to murder the same child.

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On Feb. 6 there was a further charge of conspiracy to commit the offence against s. 1 of the Prevention of Cruelty to Children Act, 1894, in respect of both the above-named children. On Feb. 8 Allport and Chappell were committed to take their trial at the next Bristol Assizes, which had been fixed to commence on Feb. 20.

I

Allport and Chappell were put upon their trial at the assizes before DAY, J., on the indictment for the attempt to murder Arthur Bertie Allport. The trial commenced on Mar. 1 and terminated on Mar. 5. They were found guilty, and sentenced, Allport to fifteen years penal servitude and Chappell to five years penal servitude.

The defendant Charles John Tibbits was the editor of the "Weekly Dispatch," and the defendant Charles Windust was employed upon the staff of the newspaper as a reporter, and was the special "Criminal Investigator" mentioned in the headings of the columns of the "Weekly Dispatch," relating to the case of Allport and Chappell in the issues of Jan. 13 and Jan. 20, as the author of the

matter therein published. Evidence was given at the trial that copies of the issue of the "Weekly Dispatch," containing the publications which formed the subject of the indictment, were circulated in Bristol, and that the sale of the newspaper had considerably increased in January, February, and March, 1901. Editions of the "Weekly Dispatch" in January, February, and March, 1901, contained, the prosecution alleged, statements regarding Allport and Chappell which were extremely prejudicial to those persons and were written by Windust and published with the knowledge of Tibbits.

The following abstract of the counts of the indictment on which Tibbits and Windust were charged is taken from the judgment of the court. Count 1 alleged that the accused unlawfully attempted, by the composition and publication of the statements contained in the issue of the "Weekly Dispatch" of Jan. 13, to influence and prejudice the mind of the magistrate before whom the charge against Allport and Chappell was pending, and so unlawfully attempted to obstruct and pervert the due course of law and justice. Count 2, in regard to the same publication, alleged the same offence by a similar attempt to influence, by the same publication, the mind of the jurors who might be returned and empanelled for the trial of Allport and Chappell at the assizes. Count 3 charged in regard to the same publication the doing knowingly and unlawfully of an act calculated and tending to obstruct and pervert the due course of law and justice when the case of Allport and Chappell was before the magistrate. Count 4 was identical with count 3 except that it related to the trial of Allport and Chappell at the assizes. Count 5 charged in regard to the same publication that the defendants, unlawfully desiring and intending to injure and prejudice Allport and Chappell, and to deprive them of a fair and impartial hearing before the magistrates, unlawfully, wilfully, and maliciously printed and published, and procured to be printed and published, a scandalous and malicious writing. Count 6 was identical with count 5 except that it related to the trial of Allport and Chappell at the assizes. Counts 7 to 12 in substance repeated in regard to the issue of the "Weekly Dispatch" of Feb. 3 the same charges as were contained in counts 1 to 6 in regard to issue of Jan. 13. There was an additional precatory averment of the preferring on Feb. 17 of a further charge against Allport and Chappell of attempting to murder Arthur Bertie Allport, and in counts 11 and 12 was added a charge as to the publication in the incriminated article of a scandalous representation of Allport in clerical garb. Count 13 alleged an unlawful conspiracy between Tibbits and Windust on Jan. 9, 1901, and on divers other days between that day and Jan. 14, 1901, to obstruct and pervert the due course of law and justice in reference to the hearing before the magistrates. Count 14 alleged the same unlawful conspiracy in reference to the trial of Allport and Chappell at the assizes. Count 15, after prefatory averments relating to the further charges against Allport and Chappell, alleged the like conspiracy on Jan. 9, 1901, and on divers days between Jan. 9, 1901, and Mar. 4, 1901, setting out dates of publication, in reference both to the hearing before the magistrates and to the trial at the assizes. Count 16, in regard to the same dates of publication, alleged an unlawful conspiracy to compose, print, and publish articles which were calculated and tended, as they, the accused, knew, to prejudice the minds of the committing magistrate and the jurors at the trial, and so to pervert and obstruct the due course of law and justice.

On behalf of the defendants it was contended (i) that there was no evidence on any of the counts of criminal intent, and no evidence that any of the statements were untrue, or that the accused desired or intended to procure a false verdict or to alter the course of justice; (ii) that on the counts which charged conspiracy there was no evidence of conspiracy by the defendants; (iii) that, as to counts 5, 6, 11, and 12, if the printing and publishing did not constitute attempts to pervert and obstruct justice as charged in the corresponding counts for attempts (3 and 4, 9 and 10), the printing and publishing was not a criminal offence; (iv) that if the matters charged in count 16 charged any offence, the offence was the conspiracy

A already charged in the previous counts. On behalf of Tibbits it was contended that the evidence that he was the editor of the "Weekly Dispatch" was not sufficient in which the jury could find that he printed and published the incriminated articles. With regard to Windust, it was contended that there was no evidence that he wrote the articles which appeared in the "Weekly Dispatch." KENNEDY, J., overruled these objections, and the jury convicted both the defendants.

B The question reserved by KENNEDY, J., was whether all or any and which of the counts of the indictment alleged a criminal offence, and whether there was evidence adduced at the trial upon which the accused persons, or either and which of them, could properly be found guilty on all or any and which of the counts in the indictment.

Foote, K.C., and Evans Austin for the defendants.

C *The Solicitor-General (Sir Edward Carson, K.C.), H. Sutton, C. W. Mathews, and Guy Stephenson for the Crown.*

Cur. adv. vult.

Nov. 9, 1901. The judgment of the court was read by

D **LORD ALVERSTONE, C.J.**—This case was reserved by KENNEDY, J., at the last Summer Assizes at Bristol. Indictments were preferred against two defendants, Charles John Tibbits and Charles Windust. The indictments contained sixteen counts, upon each of which the defendants were found guilty. The charge contained in the indictments related to the publication of certain matters in a newspaper called the "Weekly Dispatch," between Jan. 13, 1901, and Mar. 4, 1901, inclusive, and particularly to the issues of that newspaper dated Jan. 13 and Feb. 3, 1901. Prior to the publication of the first article, two persons named Allport and Chappell had been charged before the magistrates with offences under the Prevention of Cruelty to Children Act, 1894. Further charges of attempting to murder and of conspiracy to murder a child named Arthur Bertie Allport, and of a conspiracy to commit the offence against s. 1 of the Prevention of Cruelty to Children Act, 1894, were preferred against them. On Feb. 8 Allport and Chappell were committed to take their trial at the next Bristol Assizes, which had been fixed to commence on Feb. 20. Their trial on the indictment for the attempt to murder commenced before DAY, J., on Mar. 1 and terminated Mar. 5. They were found guilty and sentenced, Allport to fifteen years' penal servitude and Chappell to five years' penal servitude.

G The publications in the "Weekly Dispatch" which formed the subject of the indictment against Tibbits and Windust were statements relating to the case of Allport and Chappell, contained in issues of the "Weekly Dispatch" during the hearing of the case against Allport and Chappell before the magistrate and before and during the trial of the prisoners at the assizes. For the purpose of our judgment upon the questions reserved for consideration by this court I will shortly state the distinctions between the several counts of the indictment. [HIS LORDSHIP referred to the counts of the indictment as set out ante p. 898, and continued:] It is unnecessary to refer in detail to any of the incriminated articles, of which those of Jan. 13 and Feb. 3 were the most important. It is sufficient to say that the publication went far beyond any fair and bona fide report of the proceedings before the magistrates. They contained, couched in florid and sensational form, a number of statements highly detrimental to Allport and Chappell. Much of these statements related to matters of which evidence would not have been admissible against them in any event, and purported to be the result of investigations made by the "special crime investigator" of the newspaper. Under these circumstances it was contended on behalf of the prosecution that there was evidence upon which the jury might properly convict both the defendants upon all the counts of the indictment. Upon the argument before us we had no doubt upon the main questions which had been discussed, but, having regard to the nature of the proceedings and the importance of the case, we thought it

desirable that we should endeavour to lay down as clearly as possible the law applicable to such a case. Points were raised and argued on behalf of the defendant Windust as distinguished from the defendant Tibbits. It will be convenient to postpone the discussion of these points until we have dealt with the main questions of law raised on behalf of both prisoners.

It was not attempted to be argued by counsel for the defendants that the publication of such articles was lawful and that the persons publishing could not be punished. On the contrary, he contended that the publication of such articles was a contempt of court, and could only properly be punished as such either by summary proceedings or indictment for contempt. He further argued that there was no evidence of any intention on the part of either of the defendants to pervert or interfere with the course of justice, and that any inference which might otherwise be drawn from the contents of the articles that they were calculated to pervert or interfere with the course of justice was negatived by the fact that the defendants Allport and Chappell had been subsequently convicted.

That the publication of such articles did constitute a contempt of court and could be punished as such is well established. One of the sorts of contempt enumerated by HARDWICKE, L.C., in 1742 (2 Atk. at p. 471) is prejudicing mankind against persons before the case is heard, and he added the important words :

“There cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters.”

R. v. Jolliffe (1) shows that a criminal information lay for distributing in the assize town, before the trial *à nisi prius*, handbills reflecting on the conduct of a prosecutor, and in the course of his judgment in that case LORD KENYON made the following very relevant observations (4 Term Rep. at p. 289) :

“Now it is impossible for any man to doubt whether or not the publication of these papers be an offence. Even the charge on the prosecutor would of itself warrant us to grant the information; but this is a minor offence when compared with that of publishing the papers in question during the pendency of the cause at the assizes and in the hour of trial. It is the pride of the constitution of this country that all causes should be decided by jurors who are chosen in a manner which excludes all possibility of bias and who are chosen by ballot in order to prevent any possibility of their being tampered with. But if an individual can break down any of those safeguards, which the constitution has so wisely and so cautiously erected, by poisoning the minds of the jury at a time when they are called upon to decide, he will stab the administration of justice in its most vital parts. And therefore I cannot forbear saying that if the publication be brought home to the defendant he has been guilty of a crime of the greatest enormity.”

Again, in *R. v. Fisher* (2) the printer, publisher, and editor were convicted for publishing a scandalous, defamatory, and malicious libel intending to injure one Richard Stephenson, charged with assault, and deprive him of the benefit of an impartial trial

“and to injure and prejudice him in the minds of the liege subjects of our lord the King and to cause it to be believed that he was guilty of the said assault and thereby to prevent the due administration of justice and to deprive the said Richard Stephenson of the benefit of an impartial trial.”

It was urged on behalf of the defendants that this was an indictment for libel, and that, therefore, it was no authority for the indictment in the present case. But if the judgment of LORD ELLENBOROUGH is examined, it will be noted that the main ground of the judgment is that the publication would tend to pervert the public mind and disturb the course of justice, and, therefore, be illegal, and we

A cannot doubt that if the attempt so to do be made or means taken, the natural
effect of which would be to create a widespread prejudice against persons about to
take their trial, an offence has been committed whatever the means adopted,
provided there be not some legal justification for the course pursued. *R. v. Williams*
(3), is another distinct authority for the same view in which it was laid down that
B any attempt whatever publicly to prejudge a criminal case, whether by a detail of
the evidence, or by a comment, or by a theatrical exhibition, is an offence against
public justice and a serious misdemeanour. The publication of proceedings publicly
heard in a court of justice, if fair and accurate, has now the protection of the
Law of Libel Amendment Act, 1888. The law, as laid down in the older cases, to
which we have referred, was summarised by BLACKBURN, J., in *Skipworth's Case*
(4) (L.R. 9 Q.B. at p. 232). With reference to the objection that the more proper
C proceedings should be by proceedings for contempt of court, we would refer to
the judgment of the court in *R. v. Gray*, ante p. 59, from which it clearly appears
that in many cases it is preferable to proceed by information or indictment, rather
than by motion for contempt.

We have no doubt whatever that the publication of the articles in this case,
D at the time when and under the circumstances in which they were published,
constituted a criminal offence by whomsoever they were published. We think that
the facts which bring the incriminated articles within the category of misdemeanour
abundantly appear upon the face of each count, and that under those circum-
stances it is perfectly immaterial whether the articles be described and charged
as libels or contempt, or not. With reference to the argument with which we were
E pressed, that there was no evidence of any intention to pervert the course of justice,
we are clearly of opinion, for the reasons given in the authorities to which we have
referred, that this is one of the cases to which the intent may properly be inferred
from the articles themselves, and the circumstances under which they were
published. It would indeed be far-fetched to infer that the articles were likely
F to have any effect upon the mind of either magistrate or judge, but the essence
of the offence is the conduct calculated to produce, so to speak, an atmosphere
of prejudice in the midst of which the proceedings must go on. Publications of
that character have been punished over and over again as contempt of court, where
the legal proceedings pending did not involve trial by jury, and where no one would
be induced thereby to swerve from the straight course. The offence is much worse
G where trial by jury is about to take place, but it certainly is not confined to such
cases.

We further think that if the articles are in the opinion of the jury calculated to
interfere with the course of justice, or pervert the minds of the magistrate or of the
jurors, the persons publishing are criminally responsible: see *R. v. Grant* (6).
We are also of opinion that the fact that Allport and Chappell, the persons referred
H to, were subsequently convicted, can have no weight in the decision of the ques-
tion raised before us. To give effect to such a consideration would involve the
consequence that the fact of a conviction, though resulting either wholly or in part
from the influence upon the minds of the jurors at the trial of such articles as
these justified their publication. This is an argument which we need scarcely say
reduces the proposition almost to an absurdity; and, indeed, its chief foundation
I would appear to be a confusion between the course of justice and the result
arrived at. I will add only this: a person accused of crime in this country can
properly be convicted only upon evidence which is legally admissible, and which
is adduced at his trial in legal form and shape. Assume the accused to be really
guilty of the offence charged against him. The due course of law and justice is
perverted and obstructed, nevertheless, if those who have to try him are induced
to approach the question of his guilt or innocence with minds into which prejudice
has been instilled by published assertions of his guilt, or imputation against his
life and character to which the law of the land refuses admissibility as evidence.

Counsel for the defendants attempted to restrict conspiracy to matters *germane* at least to those referred to in the statute *De Conspiratoribus* (33 Edw. 1, c. 2). It is obvious, however, that the statute is not giving an exhaustive definition, but other matters beyond those enumerated in that statute have been adjudged over and over again to be the subjects of criminal conspiracies. As to the expressions of WILLES, J., in *Maleahy v. R.* (7), upon which counsel for the defendants insisted so much, it is plain that WILLES, J., was speaking of a case in which the criminal intention had not been carried into effect, and says that in such a case the very promise to do it, such a promise as would be binding if for a lawful purpose, is an act which negatives the suggestion that the matter rests in intention only. He never said that when the unlawful purpose has been carried out, no indictment for conspiracy can be maintained unless the concerted action has been preceded by such a contract between the conspirators as, if the purpose had been lawful, would have given ground for a lawsuit. His definition is not of conspiracy, but of the kind of conduct which is sufficient to make the concerted action pass from the stage of intention to that of action.

We have now only to consider the special points which were taken on behalf of the defendant Windust as regards the first six counts, and both the defendants as regards the conspiracy counts. We agree that in such a case some evidence must be given that the defendants were really parties to the publication complained of: see *R. v. Holbrook* (8). The evidence against Windust submitted to the jury, as appears from the Case Stated, was as follows. In 1897 he was the "Crime Investigator" of the "Weekly Dispatch," and was engaged in June of that year in investigating a case then pending at the South London Sessions. On several of the occasions when Allport and Chappell were before the magistrates Windust was present in court taking notes of the proceedings. He was seen on May 2, 1901, at the office of the "Weekly Dispatch," and the articles in question purported to be written by the "Special Crime Investigator" of the paper. Under these circumstances we are of opinion that there was evidence to leave to the jury that Windust was party to and concerned in the publication of the articles, and was an accessory before the fact. As regards Tibbits, it was proved that he was the editor of the "Weekly Dispatch" at the time of the publication. He afterwards placed himself in communication with the Director of Public Prosecutions respecting the inquiries which were being made at Bristol as to the publication of papers. The articles formed an important part of the issues of the paper in question, and we think that in his case there was clear evidence to be submitted to the jury. There remains only to consider the conspiracy counts, on which the defendants were also found guilty. Inasmuch as they were also convicted on the other counts the point is not very important, but we think it right to say that there was, in our opinion, evidence for the jury as to the conspiracy counts also. Such articles could not be published without the concurrence of someone at Bristol and the person in fact editing the paper, and we are of opinion that there was evidence to go to the jury on which they might properly draw the conclusion that the defendants combined for the purpose of publishing the articles in question. For the above reasons we think that the conviction should be affirmed as against both defendants.

Conviction affirmed.

Solicitors: *Solicitor to the Treasury; Mellor, Smith & May.*

[*Reported by A. A. BETHUNE, Esq., Barrister-at-Law.*]

R. v. FARNHAM LICENSING JUSTICES. Ex parte SMITH AND OTHERS

[COURT OF APPEAL (Sir Richard Henn Collins, M.R., Mathew and Cozens-Hardy, L.J.J.), June 14, 16, 17, 23, 1902]

[Reported [1902] 2 K.B. 363; 71 L.J.K.B. 754; 86 L.T. 839; 51 W.R. 21; 18 T.L.R. 690; 66 J.P. 579]

Licensing—Licence—Renewal—Objection—Objection originated by justices—Legality—Competence of justices subsequently to adjudicate on renewal.

When considering whether or not to grant an application for the renewal of a licence licensing justices do not sit as a court, and, if objection is made to a renewal, there is no lis to which the objector can be a "party." His function is merely to inform the minds of the justices to enable them rightly to exercise their discretion whether to grant the application or not. Accordingly, when circumstances require it, the justices themselves, acting bona fide, may make, or cause to be made, in open court an objection to a renewal and direct notice to be served on the licensee requiring his attendance on a future day when the matter will be decided on evidence given on oath. Furthermore, justices who have made, or caused to be made, an objection are not thereby rendered incompetent subsequently to sit and adjudicate on the application for renewal.

Licensing—Justices—Grant or renewal of licence—Judicial proceeding—Use of information as to general circumstances of neighbourhood.

Per LORD ALVERSTONE, C.J.: Justices can only act on sworn evidence given before them, and if in any case it appeared that they had acted on information obtained otherwise than through the evidence, their proceedings ought to be set aside. But it would not invalidate the proceedings if the justices had become acquainted with the general circumstances of the district and made use of that information to bring to the minds of persons before them the points that they had to deal with. If a justice has private information with regard to a case he ought not to sit on that case nor do anything except go into the witness-box and give evidence.

Per DARLING, J.: The legislature has confided licensing to the magistrates because they are in a position to bring to bear on the question of granting licences their experience of the neighbourhood and its necessities. They are not to decide regardless of the evidence.

Per CHANSELL, J.: Justices are entitled to inquire - not judicially - into the general circumstances of the neighbourhood to fit them for performing their licensing duties, but when it gets to the rights or quasi rights of individuals about renewals it becomes a judicial matter and the justices must act judicially.

Notes. Considered: *Raven v. Southampton Justices*, [1904] 1 K.B. 430; *R. v. Tolhurst*, Ex parte Farrell, [1904-07] All E.R. Rep. 964. Applied: *Morgan v. Aylesford Licensing Justices* (1906), 94 L.T. 483. Considered: *R. v. Bath Compensation Authority*, [1925] 1 K.B. 685. Followed: *R. v. Leicester Justices*, Ex parte Allbrighton, [1926] All E.R. Rep. 191. Referred to: *R. v. Dodds*, Ex parte Roberts, [1904-07] All E.R. Rep. 658; *R. v. Woodhouse*, [1906] 2 K.B. 501; *Attwood v. Chapman*, [1914-15] All E.R. Rep. 1034.

As to renewal of licences, see 22 HALSBURY'S LAWS (3rd Edn.) 549-558 and s. 11 (2) of the Licensing Act, 1953; 33 HALSBURY'S STATUTES (2nd Edn.) 157. For cases see 30 DIGEST (Repl.) 32-36, 38, 39.

Cases referred to:

- (1) *Boulter v. Kent Justices*, [1897] A.C. 556; 66 L.J.Q.B. 787; 77 L.T. 288; 61 J.P. 532; 46 W.R. 114; 13 T.L.R. 538, H.L.; 30 Digest (Repl.) 75, 579.
- (2) *R. v. Downes* (1790), 3 Term Rep. 560; 100 E.R. 733; 30 Digest (Repl.) 84, 641.
- (3) *R. v. Farquhar* (1874), L.R. 9 Q.B. 258; 39 J.P. 166; 30 Digest (Repl.) 20, 121.
- (4) *R. v. Eales*, *Eales v. Philpotts, etc.*, *Deron Justices* (1880), 42 L.T. 735; 44 J.P. 553, D.C.; 30 Digest (Repl.) 35, 269.
- (5) *Baxter v. Leche* (1898), 79 L.T. 138; 62 J.P. 630; 14 T.L.R. 352; 42 Sol. Jo. 430; 30 Digest (Repl.) 20, 126.
- (6) *R. v. Anglesea Justices* (1895), 65 L.J.M.C. 12; 12 T.L.R. 4; 40 Sol. Jo. 35; 15 R. 614; sub nom. *R. v. Anglesea Justices, Ex parte Williams*, 59 J.P. 743; 30 Digest (Repl.) 18, 96.
- (7) *Sharp v. Wakefield*, [1891] A.C. 173; 60 L.J.M.C. 73; 64 L.T. 180; 55 J.P. 197; 39 W.R. 561; 7 T.L.R. 389, H.L.; 30 Digest (Repl.) 12, 51.
- (8) *Leeson v. General Council of Medical Education and Registration* (1889), 43 Ch.D. 366; 59 L.J.Ch. 233; 61 L.T. 849; 38 W.R. 303, C.A.; 34 Digest 544, 30.
- (9) *Allinson v. General Council of Medical Education and Registration*, [1894] 1 Q.B. 750; 63 L.J.Q.B. 534; 70 L.T. 471; 58 J.P. 542; 42 W.R. 289; 10 T.L.R. 304; 9 R. 217, C.A.; 34 Digest 544, 24.
- (10) *Evans v. Conway Justices*, [1900] 2 Q.B. 224; 69 L.J.Q.B. 636; 82 L.T. 704; 64 J.P. 467; 48 W.R. 577; 16 T.L.R. 425 C.A.; 30 Digest (Repl.) 69, 514.

Also referred to in argument:

- R. v. Antrim Justices*, [1901] 2 I.R. 133; 30 Digest (Repl.) 73, *228.
- R. v. Merthyr Tydfil Justices* (1895), 14 Q.B.D. 584; 54 L.J.M.C. 78; 49 J.P. 213; 1 T.L.R. 320, D.C.; 30 Digest (Repl.) 19, 116.
- R. v. London County Council, Ex parte Akkersdyke, Ex parte Fermentia*, [1892] 1 Q.B. 190; 61 L.J.M.C. 75; 66 L.T. 168; 56 J.P. 8; 40 W.R. 285; 8 T.L.R. 175, D.C.; 33 Digest 103, 698.
- Royal Aquarium and Summer and Winter Garden Society v. Parkinson*, [1892] 1 Q.B. 431; 61 L.J.Q.B. 409; 66 L.T. 513; 56 J.P. 404; 40 W.R. 450; 8 T.L.R. 352, C.A.; 33 Digest 104, 699.
- R. v. Sunderland Justices*, [1901] 2 K.B. 357; 70 L.J.K.B. 946; 85 L.T. 183; 65 J.P. 598; 17 T.L.R. 551; 45 Sol. Jo. 575, C.A.; 30 Digest (Repl.) 25, 164.
- R. v. Fraser* (1893), 9 T.L.R. 613; 37 Sol. Jo. 685; 57 J.P.Jo. 500, D.C.; 30 Digest (Repl.) 25, 155.
- R. v. Walsall Justices* (1854), 3 C.L.R. 100; 24 L.T.O.S. 111; 3 W.R. 69; 18 J.P. Jo. 757; 30 Digest (Repl.) 31, 212.
- R. v. Sylvester* (1862), 2 B. & S. 322; 31 L.J.M.C. 93; 5 L.T. 794; 26 J.P. 151; 8 Jur.N.S. 484; 121 E.R. 1093; 30 Digest (Repl.) 30, 197.
- R. v. Howard* (1889), 23 Q.B. 502; 60 L.T. 960; 53 J.P. 454; 37 W.R. 617; 5 T.L.R. 505; 30 Digest (Repl.) 17, 93.
- Whiffen v. Mulling (or Maidstone) Justices*, [1892] 1 Q.B. 362; 61 L.J.M.C. 82; 66 L.T. 333; 56 J.P. 325; 40 W.R. 293; 8 T.L.R. 155, C.A.; 30 Digest (Repl.) 68, 508.
- Dakin v. Parker*, [1894] 2 Q.B. 556; 71 L.T. 379; sub nom. *Daykin v. Parker*, 63 L.J.M.C. 246; 58 J.P. 835; 42 W.R. 625; 10 T.L.R. 579; 9 R. 574, C.A.; 30 Digest (Repl.) 18, 100.
- R. v. Bishop of Chester* (1728), 1 Barn. K.B. 52; 2 Stra. 797; 94 E.R. 36; 8 Digest (Repl.) 510, 2360.
- R. v. Smith* (1873), L.R. 8 Q.B. 146; 42 L.J.M.C. 46; 21 W.R. 382; sub nom. *R. v. Southport Justices*, 28 L.T. 129; 37 J.P. 214; 16 Digest (Repl.) 336, 1141.
- R. v. Bristol Licensing Justices, R. v. Gloucestershire Justices* (1893), 68 L.T. 225; 57 J.P. 486; 9 T.L.R. 273; sub nom. *R. v. Gloucestershire Justices, R. v. Bristol Licensing Justices*, 41 W.R. 379; 37 Sol. Jo. 269; 5 R. 276, D.C.; 16 Digest (Repl.) 336, 1143.

- A *R. v. Kent Justices* (1880), 44 J.P. 298, D.C.; 30 Digest (Repl.) 24, 152.
R. v. Sharman, Ex parte Denton, [1898] 1 Q.B. 578; 67 L.J.Q.B. 460; 78 L.T. 320; 62 J.P. 296; 46 W.R. 367; 14 T.L.R. 269; 42 Sol. Jo. 326, D.C.; 16 Digest (Repl.) 114, 7.
R. v. Kingston Justices, Ex parte Davey (1902), 86 L.T. 589; 66 J.P. 547; 18 T.L.R. 477; 46 Sol. Jo. 394, D.C.; 30 Digest (Repl.) 19, 107.
B *R. v. Ferguson* (1890), 54 J.P. Jo. 101, D.C.; 30 Digest (Repl.) 24, 153.
R. v. West Riding Justices, Drake's Case (1869), L.R. 5 Q.B. 33; 39 L.J.M.C. 17; 21 L.T. 490; 34 J.P. 4; 18 W.R. 259; 30 Digest (Repl.) 13, 52.

Appeals by licensing justices from decisions of the King's Bench Division (LORD ALVERSTONE, C.J., DARLING and CHANNELL, JJ.) discharging rules nisi for **C** mandamus which had been obtained by nine licence-holders at Farnham against the Farnham licensing justices who had refused applications for renewals of their licences made by the nine appellants.

In May, 1901, a special meeting of the justices of the Farnham division was held to consider a letter from the clerk of the peace of the county of Surrey, addressed to the clerk of the justices of the Farnham division, stating that the attention of the **D** county licensing committee had been called to the large number of licences in the districts of Farnham Urban and Farnham Rural; that there appeared to be one licensed house for every 155 of the population, which was largely in excess of any other parish in the county; and that the committee were of opinion that some steps should be taken whereby the licences of a substantial number of such houses should be discontinued. At this special meeting of justices a committee **E** of five justices, including the chairman, Mr. Howard, was appointed to consider the letter and report upon the subject referred to in it. The committee met from time to time and considered comparative statistics as to population, number of licences, and other information of a general character tending to show how the Farnham division compared with other divisions in the county, and how the county compared with neighbouring counties in the matter of ratio of population to **F** licences. On July 13, 1901, at a meeting of the justices, the committee made a report, which was adopted, and the committee were empowered to obtain further information as to the condition, position, and other circumstances of each licensed house in the Farnham urban district. The committee then directed the clerk to the justices to send to the owners of licensed houses and the licence-holders in the division the following letter:

G "The attention of the justices of the Farnham Petty Sessional Division having been called by the county licensing committee to the excessive number of licences in the division, a fact which cannot, in the opinion of the justices, be disputed, and the justices having appointed a committee to make inquiries in connection with the matter with a view to a reduction, in the first place, of **H** licences in the Farnham urban district where such excess is most pronounced, I am directed by the justices to so inform you, and to suggest that anything you may desire to say upon the subject addressed to me will receive their best consideration."

The committee held further meetings, and unanimously decided to inspect the fully **I** licensed houses in the Farnham urban district. Members of the committee did inspect all the licensed houses accordingly. Except in one instance the inquiries were made and information was obtained only from the licensee or the person actually in charge of the licensed premises at the time of the inspection, which person was in every case the wife or daughter of the licensee. The committee made a report to the justices in which the information obtained in the inspection of the houses was included. On Feb. 6, 1902, the report was presented to the justices and adopted by them. Certain recommendations by the committee upon the proposed procedure at the then forthcoming general annual licensing meeting were also adopted with some modifications.

On Mar. 1, 1902, the general annual licensing meeting was held. The justices present included members of the committee. Before the meeting no notice of objection to the renewal of any of the licences in the division had been given. When the first application for a renewal was reached, a Mr. Hayes rose in court and stated that he objected to the renewal of all the licences in Farnham Urban. The chairman of the justices thereupon directed Mr. Hayes to give the requisite seven days' notice of his objection for the adjourned meeting on Mar. 12. The chairman then, on behalf of the majority of the justices, made objection to the renewal of the forty-five alehouse licences in the Farnham urban district, and the applications for renewals of such licences were directed to stand adjourned to the adjourned meeting. The chairman stated publicly that the reason why the majority of the justices thus raised objection to the houses was in order that every one of the licensees might have equal opportunities of bringing evidence before the justices, and that the justices might be thus enabled to decide such cases with perfect justness and fairness. At the conclusion of the meeting the justices instructed their deputy clerk to serve formal notice in each case, requiring the licensee to attend in person at the adjourned licensing meeting, and stating the grounds of objection, which were based on the report of the committee. Such notices were served accordingly. In the case of ten of the licensed alehouses notices of objection were also given by Mr. Hayes.

At the commencement of the adjourned licensing meeting on Mar. 14, counsel on behalf of the holders of licences who had been served with notice of objection objected that the justices themselves, sitting at the general annual licensing meeting, could not, under s. 42 of the Licensing Act, 1872, be objectors to the renewal of licences. It was further objected that all and every the justices who had been parties to the service of notices of objections to renewals were disqualified from sitting and adjudicating upon the grounds: (i) That such justices were in fact the prosecutors or complainants, and could not adjudicate in their own cause; (ii) upon the general ground of "bias" in the legal sense, arising from their resolution, which was either a resolution not to renew a particular licence or a resolution not to renew any of the licences in the district; (iii) upon the ground of bias in consequence of having received and acted upon the report of the majority of the committee as to the proposed reduction of licences in the division, and having been thereby influenced by statements not upon oath. The justices, after consideration, overruled the objections, and proceeded to hear the cases. In his affidavit, sworn in opposition to the applications for the rules, the chairman of the justices stated that the reasons which actuated him, and which he knew also influenced his colleagues, were that the justices had arrived at no previous decision whether to renew or not to renew any of the licences in the district, and that in causing notices requiring the personal attendance of licensees to be served they were not in any way taking sides or committing themselves to any particular view as to the propriety or otherwise of renewing any licence, but had merely taken the steps which the statute had imposed upon them of putting matters in proper trim for fully considering, after due notice to the applicants, each case upon its merits, and upon sworn evidence, which alone they intended to have regard to. The justices proceeded to hear the evidence on oath in the several cases. Mr. Hayes was represented by counsel, who conducted the case for the objector in the cases with respect to which Mr. Hayes had given notice of objection. In the cases in which notice of objection had been given only by the justices the affidavits in support of the rules stated that the chairman of the justices conducted the case for the opposition and called and examined witnesses in support of the objections. This was denied by the chairman in an affidavit in reply, according to which what actually took place was that, when the cases were called on, the superintendent of police, following the course of procedure adopted in the preceding cases, stepped into the witness-box and gave the Bench testimony upon oath within the grounds stated in the notice of objection served upon the applicant. The

A Chairman, on behalf of the Bench, put some supplementary questions to him, and he was then cross-examined by the advocate for the applicants, who, at the close of the superintendent's evidence, conducted the case of and called evidence on behalf of the applicants. In the result the justices refused to renew the licences. The chairman of the justices stated in his affidavit that, in arriving at his decision to refuse the renewal of the licences in question, he did not entertain or take into consideration, nor was his decision based upon or affected by any evidence, matter, or thing save the evidence given upon oath and the admissions made in open court during the hearing of the applications.

B The applicants for the renewal of the nine licences in question obtained rules nisi for mandamus directing the justices to hear the applications for mandamus according to law.

C By the Licensing Act, 1872, s. 42 :

D "Where a licensed person applies for the renewal of a licence the following provisions shall have effect: (1) He need not attend in person at the general annual licensing meeting, unless he is required by the licensing justices to attend. (2) The justices shall not entertain any objection to the renewal of such licence, or take any evidence with respect to the renewal thereof, unless written notice of an intention to oppose the renewal of such licence has been served on such holders not less than seven days before the commencement of the general annual licensing meeting: Provided that the licensing justices may, notwithstanding no notice has been given, on an objection being made, adjourn the granting of any licence to a future day, and require the attendance of the holder of the licence on such day, when the case will be heard and the objection considered, as if the notice hereinbefore prescribed had been given. (3) The justices shall not receive any evidence with respect to the renewal of such licence which is not given on oath. Subject as aforesaid licences shall be renewed, and the powers and discretion of justices relative to such renewal shall be exercised as heretofore."

E F By the Licensing Act, 1874, s. 26 :

G "Whereas by s. 42 of the principal Act it is enacted that a licensed person applying for the renewal of his licence need not attend in person at the general annual licensing meeting unless he is required by the licensing justices so to attend: Be it enacted that such requisition shall not be made, save for some special cause personal to the licensed person to whom such requisition is sent. It shall not be necessary to serve copies of notices of any adjournment of general annual licensing meeting on holders of licences or applicants for licences who are not required to attend at such adjourned annual general licensing meeting. A notice of an intention to oppose the renewal of a licence served under s. 42 of the principal Act shall not be valid unless it states in general terms the grounds on which the renewal of such licence is to be opposed."

H In the course of his judgment in the Divisional Court **LORD ALVERSTONE, C.J.**, said: The first and most important thing is, I think, to lay down certain general principles which are derived or can be deduced from the cases, and then consider what are the rights of the justices and of the parties in regard to this matter, having regard to these general principles. I think it is quite clear that the justices can only act upon sworn evidence given before them, and if in any case it appeared to the court that the justices had acted upon information obtained otherwise than through the evidence, their proceedings would be, and ought to be, set aside. I think it is further equally clear, not so much from the decisions as from the legislation and the general principles applicable to the state of circumstances with which the legislation is dealing, that it would not invalidate the proceedings

if the justices had become acquainted with what I may call the general circumstances of the case, and made use of that information to bring to the minds of persons who were before them the points that they had to deal with. There is only one other point which I wish to mention, because it seems to me an important one—namely, that, if in any particular case a justice has private information in regard to that particular case, he ought not, in my opinion, to sit upon that case, nor ought he to do anything except go into the witness-box and give evidence. Or, in other words, if a case ever arises of a justice having particular knowledge in regard to a particular individual or against a particular individual, or with regard to a particular house, that knowledge can only be made available or can only be utilised for the purpose of the case by means of his giving evidence as a witness, subject to cross-examination in the ordinary way. . . . I think it is going a great deal too far to say that applying their general knowledge of the district to the cases that they were going to sit upon, or applying the information so obtained, would invalidate the proceedings, provided that everything on which they wish to act or intend to act, is brought to the minds of the persons against whom it can possibly be used.

DARLING, J., said: To my mind the legislature has confided licensing to the magistrates because they are persons in a position to bring to bear upon the question of granting licences their experience of the neighbourhood and of the necessities of the neighbourhood. They are not to decide, if evidence is brought before them, regardless of the evidence; but when it is provided that licences should be renewed, as I say, the justices must come to the licensing committee with some sort of opinion on the question such as I have indicated.

CHANNELL, J., said: I think that the licensing justices are clearly entitled to go in their own way to make themselves acquainted with the character of their district, with the amount of public-house accommodation that there is existing in it, and all matters of that sort. A large number of the justices—local gentlemen—would probably have the information. Justices who have only recently come into the district are fully entitled to inquire, and not judicially to inquire, into the general circumstances of the neighbourhood to fit them for performing their licensing duties, to give them a knowledge of the place and the wants of it, and whether the public-house accommodation is too much or too little, and things of that sort. When it gets to the rights or quasi rights of individuals about renewals—whether a particular individual should or should not have his licence renewed—then it is a different matter; it then becomes a judicial matter. In that matter it seems to me the justices must act judicially. The proceeding is at any rate quasi judicial, and the justices must not act upon information acquired behind the backs of the parties without giving the parties the fullest information to enable them to understand what it is the justices are acting upon, and without giving them an opportunity of inquiring about it and seeing whether they agree with it, or what answer they have got to make, or what they say about those facts.

The Divisional Court discharged the rules and the applicants appealed.

Danckwerts, K.C., Horace Arory, K.C., Stimson, and W. O. Willis for Jane Smith, the licence-holder in the first appeal.

Disturnal for the licence-holders in the eight other appeals.

Frederick Low, K.C., and Hohler for the justices.

Cur. adv. vult.

June 23, 1902. The following judgments were read.

SIR RICHARD HENN COLLINS, M.R.—This is an appeal from decisions of the Divisional Court discharging rules nisi addressed to the licensing justices of the Farnham Petty Sessional Division of the county of Surrey, calling upon them

A to show cause why writs of mandamus should not issue commanding them to hold a further adjournment of the annual licensing meeting and to hear and determine according to law certain applications for the renewal of licences. The case is one of importance, as the question raised goes to the root of the law and practice in the matter of the renewal of licences.

B The circumstances are shortly these. In February, 1891, a letter was addressed by the clerk of the peace of the county to the clerk of the Farnham justices informing him that the attention of the county licensing committee had been called to the large number of licences existing in the Farnham Urban District and the Farnham Rural District, pointing out that the proportion was largely in excess of any other parish in the county, and stating that it was the opinion of the committee—that is, the confirming committee—that steps should be taken whereby the licences of a substantial number of such houses should be discontinued, and inviting the justices to consider this question at their next annual licensing meeting. The justices, as appears by the affidavit of their chairman, addressed themselves to the consideration of the question raised by this letter, and appointed a committee to consider the statistics referred to in the letter. Upon the report of this committee, which was unanimously adopted, the committee were authorised to inquire into the condition, position, and circumstance of each licensed house in the Farnham district, which they accordingly proceeded to do—first, by framing questions addressed to the owners of the houses, and afterwards by personal inspection, the results of which were duly reported to the licensing justices, with recommendations which were adopted by them with one dissentient. It is clear from their report that they were of opinion that the only fair and satisfactory way of dealing with the question was to cause objections to be served on all the owners of licensed houses, so that the case of each of them might be formally inquired into, and for this purpose authority was given to the justices' clerk to object to such renewals on the general ground that the houses were not required, and also on special grounds set out in the notice. These objections were signed by the clerk stating that he was acting under the instructions of the justices present at the annual licensing meeting.

F At the general annual licensing meeting held on Mar. 1, a certain Mr. Hayes objected to the renewal of all the licences in urban Farnham and the chairman of the justices, on behalf of the justices, made objection to the renewal of the forty-five licences in the Farnham urban district, stating that the reason why the justices thus raised objections was "in order that every one of the licensees might have equal opportunities of giving evidence before them, and the justices might thus be enabled to decide with justice and fairness." The meeting was adjourned until Mar. 14 following, and instructions were given to Mr. Mason, the deputy clerk, to serve formal notice in each case, requiring the licensees to attend in person and stating the grounds of objection. When the cases came on for hearing, evidence on oath was given in support of the objections, and questions were put by the chairman based on the facts collected by the committee. A copy of the report itself had been placed by the justices in the hands of counsel for the applicants. The rules nisi were obtained on the ground that the justices were incapacitated from dealing with the question of the renewal of licences, inasmuch as they were at once parties and judges, that they had acted upon evidence not taken upon oath as provided by sub-s. (3) of s. 42 of the Licensing Act, 1872 [see now Licensing Act, 1953, s. 11 (5)], and that they must be deemed in law to be biased on the ground that they had predetermined to refuse the renewal of some of the licences and had already inquired into the cases.

I In considering how far these points are material it is necessary to understand precisely what is the character in which the justices are required by law to deal with questions of renewal. Whatever views may have been held as to their position before *Boulter v. Kent Justices* (1) was decided in the House of Lords, it is now clear that in the granting or refusing of renewals the justices do not sit as a court.

and that the transaction itself is in no sense a *lis* to which there are parties. The objector is not a "party"; his function is merely to inform the mind of the tribunal to enable it rightly to exercise its discretion whether to grant the privilege of a licence or not. This point is so material to the true appreciation of the cardinal consideration in these cases that I propose to read one or two passages from the judgment of LORD HALSBURY, L.C., and LORD HERSCHELL, in the case I have just referred to. LORD HALSBURY said ([1897] A.C. at p. 562):

"The difference between the procedure of a court and of the licensing meeting is not only one of nomenclature. Where justices are acting as a court of any sort they must proceed according to the regular rules which are applicable to all courts of justice; but in respect of an application for a licence or its refusal they may and constantly do receive representations not on oath."

He then quoted LORD KENYON, who in 1790, in *R. v. Downes* (2), when holding a licence bad because it was granted at a private meeting, did not rely upon the general principle that all courts of justice must be open, but upon the ground that the statute directed it, and added that the construction of the then statute law was advantageous to the public because it was

"of importance to the public that licences of this sort should be granted openly and not by stealth, in order that they may have an opportunity of objecting to the granting of these licences to particular persons on the ground of unfitness."

LORD HALSBURY added (*ibid.* at pp. 562-564):

"The Acts referred to by the learned judge were repealed by the [Alehouse Act, 1828]. But a careful distinction appears to me always to have been observed between the same bodies acting as a court and deciding questions of licensing at a licensing meeting of the justices. . . . But if I am right in the distinction I have drawn between a magistrates' meeting for licensing purposes and courts, although consisting of the same persons, it would be the height of absurdity to suppose that the legislature intended to include in the definition and to make applicable to that definition persons who were in fact justices of the peace, but who in the particular matter here referred to—namely, 'licensing'—were not occupying the position of judges at all, but were exercising the discretionary jurisdiction as to how many public-houses they would permit in a district, or what persons should carry them on."

LORD HERSCHELL said as follows (*ibid.* at p. 569):

"Persons objecting to the grant of a licence are not, I think, parties to the proceedings on the application in any proper sense of the term. The question is not one *inter partes* at all. The justices have an absolute discretion to determine, in the interest of the public, whether a licence ought to be granted, and every member of the public may object to the grant on public grounds, apart from any individual right or interest of his own. The applicant seeks a privilege. A member of the public who objects merely informs the mind of the court to enable it rightly to exercise its discretion whether to grant that privilege or not. A decision that a licence should not be granted is a decision that it would not be for the public benefit to grant it. It is not a decision that the objector has a right to have it refused. It is not, properly speaking, a determination in his favour. It is, I think, a fallacy to treat the refusal as necessarily induced by a particular objector. Every member of the local community might object. Would they all, then, become 'the other party'? There is, in truth, no *lis*, no controversy *inter partes*, and no decision in favour of one of them and against the other, unless, indeed, the entire public are regarded as the other party, for if a licence be refused on the ground that it was not needed to supply the legitimate wants of the neighbourhood, the decision is really in favour of the public at large. The provision contained in sub-s. (2)

A [of s. 31 of the Summary Jurisdiction Act, 1879] seems, then, to me, an additional reason for holding that an appeal from the act of the justices in refusing a licence is not an appeal from a 'conviction or order' of a court of summary jurisdiction."

B The standard, therefore, to be applied in determining whether justices have disqualifed themselves from dealing with the renewal of licences is not in any sense that applicable to judges dealing with litigation. Moreover, their position in relation to the right of objecting is not *res integra*. Since *R. v. Farquhar* (3), at all events, decided in 1874, the practice has been that they might, when circumstances required it, themselves make or cause to be made an objection, at all events provided they adjourned for the purpose of hearing it and caused the necessary notice to be served requiring attendance upon a future day. I think this practice was founded on a true view of the law for reasons which I will state hereafter, but, whether it is or not, I think it has been treated as law for nearly thirty years, and ought not to be now disturbed. In *R. v. Eales* (4), decided in 1880 [a case under the Wine and Beerhouse Act, 1869], it is thus referred to by COCKBURN, C.J. He says (42 L.T. at p. 737):

D "And although by a practice founded upon a dictum in the case of *R. v. Farquhar* (3) an objection may be made by the justices themselves, it must be upon one of those four grounds, and the particular ground of such objection should be notified to the appellants in order that an opportunity may be given to meet it."

E He there treats the practice as established and in no way dissents from it. It has been treated as law in more than one case referred to in argument, and was formally decided to be so in 1898 in *Barter v. Leche* (5). It is true that a different view was taken by HAWKINS, J., in *R. v. Anglesea Justices* (6), but in the same case that learned judge upheld a decision based upon a notice given by the chief constable apparently at the instance of the licensing justices themselves. And on the general question whether there is such incompatibility between the position of the justices who adjudicate and that of an objector that the two cannot be combined, it seems to me to be immaterial whether the objection is made personally by the justices or by somebody else at their instance, and from the reported cases it seems to be a very common practice, and one that has never been questioned, for the objection to be made at the instance of the justices, if not in their name. The observations of HAWKINS, J., in the case referred to are very valuable as to the discretion of justices, and their right to discuss among themselves matters affecting the expediency of renewals, and their right to take steps to have a full investigation of them.

G On the same point LORD HALSBURY, in *Sharp v. Wakefield* (7) said ([1891] A.C. at p. 178):

H "By the express language of the statute [the Alehouse Act, 1828] which is still the governing statute, the grant of a licence is expressly within the discretion of the magistrates. For the reasons to be stated presently, I am of opinion that no legislation has ever altered that provision; but, if one were to argue a priori, what possible reason could there be for limiting the discretion of the justices to the first grant of the licence? It is not denied that for the purpose of the original grant it is within the power and even the duty of the magistrates to consider the wants of the neighbourhood with reference both to the population, means of inspection by proper authorities, and so forth."

I The key to the position appears to be that the justices in dealing with licences are not a judicial body; that they are deliberately appointed because from their circumstances they are likely to have local knowledge; and it cannot have been the intention of the legislature that they should divest themselves of all such knowledge in dealing with questions of licences. It would be a great public misfortune

if they were bound to determine the question merely on materials provided by the individual who happened to object, and were constrained to sit in silence although they had reason to suppose that there were very good grounds which ought to be inquired into before the matter was decided, and yet, if they were debarred from making an objection or causing one to be made, these facts never could be inquired into, and the licence would have to be disposed of without the necessary investigation.

I think, therefore, that the practice is not only inveterate but is founded on a true view of the function of justices in relation to the matter. If that be so, the standard to be applied in considering the question of bias must be one which admits the right of the justices to be at one and the same time objectors and judges in the sense in which they are judges in such matters, and, therefore, the standard laid down in such cases as *Leeson v. General Council of Medical Education and Registration* (8) and *Allinson v. General Council of Medical Education and Registration* (9) is not applicable to them. They fall outside their principle for two reasons—first, that they are empowered by law to fill the two capacities; and secondly, that, rightly understood, the two capacities are not incompatible in the sense in which in those cases they were assumed to be incompatible, because, as has already been pointed out, in making the objection they do not in any sense become parties to the litigation or anything analogous thereto. They are simply taking the only or the best available course to enable matters vital to the exercise of their discretion to be formally and fairly considered openly before them.

Assuming, therefore, what I regard as clearly established by the evidence, that what was done by the justices in this case was honestly done to enable them to secure a full investigation of the facts for the purpose of avoiding the injustice which might arise if they had to deal with the question without such materials, and upon one or more isolated applications only, I think they were within their rights in doing what they did, and were not thereby debarred from sitting and deciding upon the question of renewals. Their original and fundamental discretion in the matter of granting or refusing applications for new licences remains when they are invited to deal with renewals, except so far, and only so far, as it is conditioned by s. 42 of the Act of 1872, as amended by s. 26 of the Licensing Act, 1874, which relates to procedure only: see *Sharp v. Wakefield* (7). In my opinion, the course the justices took involved no predetermination of any point, but merely secured a full and informed discussion of the whole subject. It is not denied that on the hearing all the formalities of s. 42 were complied with. The justices indeed contend that they could have exercised their discretion without complying with these conditions, but I think *Evans v. Conway Justices* (10) debars them from advancing that contention in this court. I agree, therefore, with the decision of the Divisional Court, and it is not necessary to discuss in detail the numerous cases which were referred to in argument before us. The appeal must be dismissed.

MATHEW L.J.—The grounds relied upon in support of the appeal were—(i) That the justices were prohibited from being themselves the objectors to the renewal of the licence; (ii) that they were disabled from adjudicating upon the grounds of objection; and (iii) that their decision was invalidated on the ground of personal interest in the result, or manifest bias against the applicants.

As to the first point, if the jurisdiction of the justices depended upon the Alehouse Act, 1828, there would seem to be no question that objections to a renewal might be made by the Bench sitting in open court, and that upon giving the applicant the opportunity of being heard, the justices had an absolute discretion to grant or refuse the renewal. But it was argued that the discretion of the justices could no longer be exercised freely, and that their jurisdiction was fettered by the provisions of the Licensing Act, 1872. Attention was called to the language of s. 42, and it was contended that the jurisdiction of the magistrates

A disponent upon the objection being made by some one who was not a member of the Bench. No reason was given for this supposed change of the law. It would smother nothing to the applicant from what quarter the objection came. A third person would be entitled to object without giving a reason, and might then withdraw and be no party to the subsequent proceedings. The grant of a renewal was for the magistrates only, and would seem to depend in every case upon the result of the subsequent inquiry upon sworn testimony. But it was said that the inference from the language of the section was clear, and that the object of the Act was to provide for a new method of procedure in all cases. Section 42, as modified by the later Act of 1874, is in the following terms: [HIS LORDSHIP read the section.] Sub-section (1) would seem to assume that an objection might be made from the Bench, and that the applicant might be required to attend in person upon having proper notice given him in accordance with sub-s. (2). He would thus learn the grounds upon which his attendance was considered by the justices to be necessary. The proviso to sub-s. (2) leads to the same conclusion. It would appear, therefore, that the justices may entertain any objections to the renewal whether made previously or not and take evidence upon them. Further, even if, contrary to what would seem to be the true meaning of the statute, sub-ss. (1) and (2) must be taken to apply only when the Bench are not the objectors, the last clause in the section preserves their former powers and discretion. They continue to possess the authority conferred upon them by the Act of 1828. This is in accordance with the valuable judgment of HAWKINS, J., in *R. v. Anglessea Justices* (6). I see no reason to doubt the authority of the cases referred to by the Master of the Rolls, which sanction the conclusion that objections may be made from the Bench in open court, and may afterwards be investigated upon proper notice to the applicant to attend and answer the objections. The argument for the applicants for the rules would involve the consequence that the magistrates, if there were no objector, would be bound to renew the licence, though they knew or had been furnished with reliable information that the application ought to be refused.

But then it was said that, even though objections might be made from the Bench, the justices, who were parties to the notice to the applicant to attend, could not afterwards sit and adjudicate upon the application. The proceedings would have been regular under the Act of 1828, and it seems to me that there is no ground for saying it was impliedly forbidden by the Act of 1872. It was, however, urged that the inquiry was in the nature of the trial of an action between the justices and the applicant, and that those who had instigated the proceedings could not adjudicate upon what was described as their own cause. But, as has been laid down in the cases referred to by the Master of the Rolls, in licensing cases there is no lis, and nothing in the nature of a suit or a prosecution. The duty of the justices is to arbitrate impartially, not between themselves and the holder of the licence, but between that person and the public. The fact that the magistrates had obtained the report which was so much complained of by the counsel for the applicants was the ground upon which we are asked to say that the justices had made themselves parties to the opposition in each case, and were attempting to adjudicate on their own behalf. The form of the report, it was said, showed that the justices must have arrived at the conclusion that the applicants' premises were not required, and that the subsequent inquiry was only designed to support a foregone decision. But I am wholly unable to adopt this reasoning. The report seems to me to contain no more than the information necessary to enable the magistrates to enter upon the consideration of the question whether there were too many licensed houses in the district. The document was neutral in its character, and contained no indication of an opinion as to the claim for renewal of the appellant or any other occupier of licensed premises. The justices seem to have acted with perfect fairness and to have been guided to the conclusions at which they arrived, not by anything contained in the report, but by the sworn

evidence laid before them. The objection that the justices had what was described as an interest in the result of each inquiry took another shape in the suggestion that they were shown to have been influenced by bias. There is no ground for any such conclusion. The magistrates proceeded from first to last with commendable care, and seem to have had no other motive than the desire of honourable men to discharge their duties faithfully.

COZENS-HARDY, L.J.—In this case I should be content to say that, for the reasons assigned by the Master of the Rolls, I agree that the appeal must be dismissed. But, having regard to the great importance of the questions which have been raised as to the precise powers and duties of justices with respect to renewals of licences, it is right that I should state shortly, in my own words, the conclusions at which I have arrived.

I do not propose to re-state the facts. It cannot be disputed that, under the Act of 1828 the justices had an absolute discretion to grant or refuse applications for new licences and applications for the renewal of old licences. Their functions in this matter were administrative rather than judicial, and they were entitled to rely upon their general knowledge of the needs of the locality as well as upon any evidence which might be adduced. The Act of 1828 is still the governing statute, except so far as it has been modified by the Acts of 1872 and 1874 [The Alehouse Act, 1828, was repealed by the Licensing (Consolidation) Act, 1910, itself repealed by the Licensing Act, 1953]. With respect to new licences, there are very material modifications to which it is not necessary to refer in detail. With respect to renewals, the material section—viz., s. 42 of the Act of 1872, as amended by s. 26 of the Act of 1874—need alone be considered. In two cases the effect of this section has been discussed in the House of Lords. In *Sharp v. Wakefield* (7) it was held that the old discretion of the justices under the Act of 1828 was not affected, and that s. 42 only dealt with procedure. The attempt to establish a vested right to the renewal of a licence, except on some ground personal to the applicant, failed. In *Boulter v. Kent Justices* (1) it was held that justices in granting or refusing to grant an application for renewal are not a court, and that the objector contemplated by s. 42 is not a litigant, and that in short there is no lis. In the face of those decisions, it has been strenuously argued before us that the effect of this section is to prevent the justices from exercising their discretion and discharging the duties imposed upon them in the public interest unless some outsider appears and objects to a renewal, or, in other words, that they are powerless themselves to require the attendance of the licence-holder with a view of considering whether his licence should be renewed.

I cannot adopt this view. It seems to me that there is no reason why the justices should not on their own initiative direct the licence-holder to attend on a subsequent day, inform him of the grounds of objection, and then deal with the matter in due course at the adjourned meeting. The view has been repeatedly expressed and acted upon since 1874 that the justices may themselves start an objection. This conclusion seems to me necessary to enable the magistrates to perform their duty. The House of Lords held in *Boulter v. Kent Justices* (1) that there is no lis between an objector and a licence-holder, and no right to recover the costs occasioned by an unsuccessful objection. In short, I regard the objection as merely a mode of informing the licence-holder that his case will be considered and that he must be prepared to deal with certain specified points.

It is not necessary to consider whether the justices can act solely upon their own local knowledge—for example, as to the number of public-houses compared with the population, or whether they must in all cases act upon sworn evidence. In the present case the evidence was all taken upon oath. If I am right in the view that magistrates may themselves take, or direct their officer or agent to take, objection, all difficulty seems to be removed. It cannot be wrong to obtain careful and accurate information before taking, and with a view to taking such objection.

A No question of bias as against a particular licence-holder arises. In making the preliminary investigation and considering whether the number of licensed houses was in excess of the needs of the district the justices were simply preparing to discharge the important duties, mainly administrative, imposed upon them by the Act of 1828. In directing all the licence-holders to be served, and in taking sworn evidence upon each separate application, they seem to me to have acted with praiseworthy care. They were not adjudicating upon any rights. They were not prosecutors. In truth, there was no prosecution. They were only determining whether in the public interest a lucrative privilege should or should not be conferred. There is no ground for suggesting that they exercised their discretion capriciously or without regard to the circumstances of each individual case or without considering the requirements of the locality. For these reasons I agree with the Divisional Court that the rule for a mandamus must be discharged.

Appeal dismissed.

Solicitors: W. Montgomery White, for Edgar Kempson, Farnham; Prior, Church & Adams, for Hollest, Mason & Nash, Farnham.

[Reported by E. MANLEY SMITH, ESQ., Barrister-at-Law.]

ROGERS v. HOSEGOOD

COURT OF APPEAL (Lord Alverstone, M.R., Rigby and Henn Collins, L.JJ.), June 20, 21, July 5, 1900]

[Reported [1900] 2 Ch. 388; 69 L.J.Ch. 652; 83 L.T. 186; 48 W.R. 659; 16 T.L.R. 489; 44 Sol. Jo. 607]

Sub. of Land—Covenant running with the land—Restrictive covenant—Benefit—Presumption—Clear annexation to land—Need to prove special bargain or assignment—Purchaser ignorant of covenant—Building plot—"One dwelling-house"—Erection of flats.

When the benefit of a restrictive covenant has once been clearly annexed to a piece of land, the presumption is that it passes by assignment of that land, and may be said to run with it, as well in equity as in law, without proof of special bargain or representation on the assignment. In such case the covenant runs with the land because the purchaser has bought something which inhered in or was annexed to the land bought and the purchaser's ignorance of the existence of the covenant does not defeat the presumption.

In 1869 B. purchased a plot of land from C. & Co. and their mortgagees and covenanted with C. & Co., alone, to erect thereon not more than one messuage or dwelling house, to be used as a private residence only, and that no trade or business should be carried on upon it. The covenants were expressed in the deed of conveyance to be intended to enure for the benefit of C. & Co., their heirs and assigns and others claiming under them, to any of their lands "adjoining or near to" that purchased by B. In 1873, M. bought a plot of land from C. & Co., "adjoining or near to" that purchased by B., and built a house on it. The conveyance to M. contained no express assignment of the benefit of the covenants entered into by B. The defendant purchased his plot from the devisees of B., who had died in 1872. The plaintiffs, as trustees under the will of M., brought an action to enforce the restrictive covenant against the defendant and to restrain him from building a large block of residential flats on the plot purchased from the devisees of B.

Held: (i) the benefit of the covenant ran with the land and could be enforced by the trustees of M.

(ii) the erection of a large block of residential flats of the type proposed was a breach of the covenant, and furthermore would be a breach even if the number of houses had been unrestricted.

Notes. For the benefit and burden of covenants relating to land under s. 78 and s. 79 of the Law of Property Act, 1925, and for registration of a restrictive covenant as a class D. land charge under s. 10 of the Land Charges Act, 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 598, 600 and 1076 respectively.

This decision should be compared with that in *Kimber v. Admans*, post p. 924.

Considered: *Muller v. Trafford*, [1901] 1 Ch. 54; *Formby v. Barker*, ante p. 445. Applied: *Re Nisbet and Potts' Contract*, [1904-7] All E.R. Rep. 865. Considered: *Forster v. Elvert Colliery Co.*, *Quin v. Same*, *Seed v. Same*, *Morgan v. Same*, [1908] 1 K.B. 629. Distinguished: *Reid v. Bickerstaff*, [1908-10] All E.R. Rep. 298. Considered: *Ricketts v. Enfield*, [1909] 1 Ch. 544; *Wilkes v. Spooner*, [1911] 2 K.B. 473. Applied: *Long v. Gray* (1913), 58 Sol. Jo. 46. Considered: *L.C.C. v. Allen*, [1915-15] All E.R. Rep. 1008. Distinguished: *Milbourn v. Lyons*, [1914] 2 Ch. 231. Applied: *Day v. Waldron* (1919), 88 L.J.K.B. 937. Distinguished. *Ires v. Brown*, [1919] 2 Ch. 314; *Chambers v. Randall*, [1922] All E.R. Rep. 565. Considered: *Torbay Hotel v. Jenkins*, [1927] 2 Ch. 225. Followed: *Re Sunningfield*, [1931] All E.R. Rep. 837. Considered: *Re Union of London and Smith's Bank, Ltd., Conveyance*, *Miles v. Easter*, [1933] All E.R. Rep. 355. Distinguished: *Re Ballard's Conveyance*, [1937] 2 All E.R. 691. Considered: *Smith v. River Douglas Catchment Board*, [1949] 2 All E.R. 179; *Marten v. Flight Refuelling, Ltd.*, [1961] 2 All E.R. 696. Referred to: *Ilford Park Estates v. Jacobs*, [1903] 2 Ch. 522; *Woodall v. Clifton*, [1904-7] All E.R. Rep. 268; *Westthoughton U.C. v. Wigan Coal and Iron Co.*, [1919] 1 Ch. 159; *Lord Northbourne v. Johnston*, [1922] All E.R. Rep. 144; *Kelly v. Barrett*, [1924] All E.R. Rep. 503; *Drake v. Gray*, [1936] 1 All E.R. 363; *Zeland v. Driver*, [1937] 3 All E.R. 795; *Laurence v. South County Freeholds, Ltd.*, [1939] 2 All E.R. 503; *Newton Abbot Co-op. Soc., Ltd. v. Williamson and Treadgold, Ltd.*, [1952] 1 All E.R. 279; *Weg Motors, Ltd. v. Hales*, [1961] 3 All E.R. 181.

As to the right to benefit of covenants running with the land, see 34 HALSBURY'S LAWS (3rd Edn.) 367 et seq.; and for cases see 40 DIGEST (Repl.) 339 et seq.

Cases referred to:

- (1) *Webb v. Russell* (1789), 3 Term Rep. 393; 100 E.R. 639; 40 Digest (Repl.) 328, 2697.
- (2) *Renals v. Cowlishaw* (1879), 11 Ch.D. 866; 48 L.J.Ch. 830; 41 L.T. 116; 28 W.R. 9, C.A.; 40 Digest (Repl.) 346, 2796.
- (3) *London and South Western Rail. Co. v. Gomm* (1882), 20 Ch.D. 562; 51 L.J.Ch. 530; 46 L.T. 449; 30 W.R. 620, C.A.; 40 Digest (Repl.) 331, 2716.
- (4) *Child v. Douglas* (1854), Kay, 560; 23 L.T.O.S. 140; 2 W.R. 461; 69 E.R. 237; on appeal, 5 De G.M. & G. 739; 23 L.T.O.S. 283; 2 W.R. 701, L.J.J.; 40 Digest (Repl.) 339, 2766.
- (5) *Tulk v. Moxhay* (1848), 2 Ph. 774; 1 H. & Tw. 105; 18 L.J.Ch. 83; 13 L.T.O.S. 21; 13 Jur. 89; 41 E.R. 1143, L.C.; 40 Digest (Repl.) 342, 2774.
- (6) *Spencer's Case* (1583), 5 Co. Rep. 16a; 77 E.R. 72; 31 Digest (Repl.) 153, 2907.

Also referred to in argument:

- Kimber v. Admans*, post p. 924; [1900] 1 Ch. 412; 69 L.J.Ch. 296; 82 L.T. 136; 48 W.R. 322; 16 T.L.R. 207; 41 Sol. Jo. 260, C.A.; 40 Digest (Repl.) 348, 2808.
- Congleton Corpn. v. Pattison* (1808), 10 East, 130; 103 E.R. 725; 31 Digest (Repl.) 152, 2903.
- Austerberry v. Oldham Corpn.* (1885), 29 Ch.D. 750; 55 L.J.Ch. 633; 53 L.T. 543; 49 J.P. 532; 33 W.R. 807; 1 T.L.R. 473, C.A.; 40 Digest (Repl.) 331, 2717.

- A** *Thomas v. Hayward* (1869), L.R. 4 Exch. 311; 38 L.J.Ex. 175; 20 L.T. 814; 31 Digest (Repl.) 165, 3007.
- Keates v. Lyon* (1869), 4 Ch. App. 218; 38 L.J.Ch. 357; 20 L.T. 255; 33 J.P. 340; 17 W.R. 338, L.J.J.; 40 Digest (Repl.) 343, 2780.
- Mason v. Shippen* (1846), 15 Sim. 377; 10 Jur. 650; 60 E.R. 665, L.C.; 40 Digest (Repl.) 344, 2784.
- B** *Master v. Hansard* (1876), 4 Ch.D. 718; 46 L.J.Ch. 505; 36 L.T. 535; 41 J.P. 373; 25 W.R. 570, C.A.; 31 Digest (Repl.) 189, 3207.
- Spicer v. Martin* (1888), 14 App. Cas. 12; 58 L.J.Ch. 309; 60 L.T. 546; 53 J.P. 516; 37 W.R. 689, H.L.; 31 Digest (Repl.) 180, 3127.
- Nottingham Patent Brick and Tile Co. v. Butler* (1886), 16 Q.B.D. 778; 55 L.J.Q.B. 280; 54 L.T. 444; 34 W.R. 405; 2 T.L.R. 391, C.A.; 40 Digest (Repl.) 343, 2781.
- C** *Vivyan v. Arthur* (1823), 1 B. & C. 410; 2 Dow. & Ry.K.B. 670; 107 E.R. 152; sub nom. *Vivyan v. Arthur*, 1 L.J.O.S.K.B. 138; 31 Digest (Repl.) 239, 3726.
- Vernon v. Smith* (1821), 5 B. & Ald. 1; 106 E.R. 1094; 31 Digest (Repl.) 400, 5295.
- Horsey Estate, Ltd. v. Steiger*, [1899] 2 Q.B. 79; 68 L.J.Q.B. 743; 80 L.T. 857; 47 W.R. 644; 15 T.L.R. 367, C.A.; 31 Digest (Repl.) 154, 2914.
- D** *Morton v. Woods* (1869), L.R. 4 Q.B. 293; 9 B. & S. 632; 38 L.J.Q.B. 81; 17 W.R. 414, Ex. Ch.; 21 Digest (Repl.) 327, 817.
- Cuthbertson v. Irving* (1860), 6 H. & N. 135; 29 L.J.Ex. 485; 158 E.R. 56; sub nom. *Irving v. Cuthbertson*, 3 L.T. 335; 6 Jur.N.S. 1211; 8 W.R. 704; 21 Digest (Repl.) 347, 956.
- E** *Western v. MacDermott* (1866), 2 Ch. App. 72; 36 L.J.Ch. 76; 15 L.T. 641; 31 J.P. 73; 15 W.R. 265, L.C.; 40 Digest (Repl.) 360, 2886.

F **Appeal** by the defendant from a decision of FARWELL, J., holding that the plaintiffs were entitled to enforce certain restrictive covenants, and that the building of a large block of flats was a breach of them. One of the plaintiffs, W. Rogers, had given notice of a cross-appeal from the holding that he could not maintain the action.

G The action was brought by William Rodrigues Rogers and by William Henry and George Gray (the two latter were trustees under the will of Sir John Everett, deceased) against Benjamin Hosegood for a declaration that the erection on certain land of a building to be used for flats would be an infringement of certain restrictive covenants contained in three deeds, dated May 31, 1869, July 31, 1869, and Oct. 30, 1876, claiming an injunction to restrain the erection on the land of any building other than a private residence and the carrying on of any trade or business on such land. The plaintiffs, other than Rogers, also claimed an injunction to restrain the erection on the land of any building which by reason of its consisting of flats or groups of flats or otherwise, should consist of more than one messuage or dwelling house with suitable outhouses and stabling.

H In 1869, immediately before the execution of the first deed of May 31, 1869, George Pluchnett, the plaintiff Rogers, Thomas Robertson and William Marriott Dunnage (hereafter referred to as "Cubitt & Co.") were carrying on business in partnership as builders and were the owners of the building land on each side of Palace Gate where it adjoined Kensington Road, which land they had already laid out in plots for the erection of large houses and mansions for residential purposes.

I By the first deed of May 31, 1869, one of the plots of the building land (since known as "Thorney House plot") marked yellow on the plan, was conveyed to William, Duke of Bedford in fee simple and by that deed the duke

"to the intent covenants hereinafter on his part contained may so far as possible bind the premises [thereby conveyed] and every part thereof into whosoever hands the same may come and may enure to the benefit of [Cubitt & Co., their heirs and assigns and others claiming under them to all or any of their lands adjoining or near to the premises [covenanted] for himself,

his heirs and assigns with [Cubitt & Co.] their heirs and assigns that no more than one messuage or dwelling house with such suitable outhouses and stabling (if any) as may be thought fit to erect in conjunction therewith shall at any one time be erected or be standing on [the Thorney House plot] and that such messuage shall be adapted for and used as and for private residence only. . . . and that no trade or business shall at any time be carried on in or upon [the Thorney House plot] or any part thereof."

The duke proceeded to erect on this plot a mansion called Thorney House. Finding that he wanted more ground he shortly afterwards purchased from Cubitt & Co. the adjoining plot, coloured blue on the plan, on the south of Thorney House and by the second deed, dated July 31, 1869, this plot was conveyed to him, his heirs and assigns, in the same way as the first plot. By the second deed the duke entered into a covenant regarding the second plot in precisely the same terms as that in the first deed in that any messuage or dwelling house to be erected should be adapted or used for private residence and that no trade or business should be carried on thereon; but the second deed contained no express covenant (as the first had done) that no more than one messuage or dwelling house should be erected on the plot so conveyed. By a deed, dated June 24, 1873, another plot, coloured brown on the plan, was conveyed to William, Duke of Bedford, but no express covenants were entered into regarding this plot. On Mar. 25, 1873, Cubitt & Co. conveyed to Sir J. E. Millais a plot of building land in Palace Gate near the Thorney House plot and to the adjoining plot coloured blue on the plan, and adjoining the plot coloured brown which separated it from the two plots coloured yellow and blue. The conveyance of Mar. 25, 1873, contained restrictive covenants by Sir J. E. Millais as to building and otherwise and he erected on the plot conveyed a large mansion house known as No. 2, Palace Gate.

William, Duke of Bedford died in 1872, and, as devisee under his will, Francis Charles Hastings, Duke of Bedford became entitled to the Thorney House plot and the adjoining plot, coloured blue on the plan. By a deed dated Oct. 30, 1876, Cubitt & Co., so far as they lawfully could, released Francis, Duke of Bedford, his heirs, executors, administrators and assigns and also the Thorney House plot and the adjoining plot, from the covenant entered into by William, Duke of Bedford, in the deed of May 31, 1869, restrictive of the number of messuages or dwelling houses to be erected on the Thorney House plot, but not otherwise, and also from the restriction (if any) imposed by the deed of July 31, 1869, respecting the number of messuages or dwelling houses to be erected on the adjoining plot, but not otherwise, and from all obligations to observe the covenants in the deeds respecting the limitation of houses to be built on the two plots, but not otherwise. By another deed of even date with the deed of Oct. 30, 1876, Francis, Duke of Bedford covenanted with Cubitt & Co., and with the individual partners of the firm to indemnify them from the deed of release and its consequences and further covenanted that every messuage erected on the Thorney House plot and the adjoining plot should be used for private residence only and that no trade or business should at any time be carried on, in or upon either of the plots. Sir J. E. Millais died in August, 1896, and the plaintiffs, W. H. Millais and George Gray were the trustees under the will, and accordingly the plot of land conveyed to the testator by the deed of Mar. 25, 1873, and the mansion erected on it vested in them as trustees. The other plaintiff, Rogers was owner of two other plots with mansions erected on them, Nos. 7 and 11, Palace Gate, which plots at the date of the above deeds had formed part of the building land belonging to Cubitt & Co. of which he was a partner and were not conveyed to him until after the date of the release. The defendant, Benjamin Hosegood, had recently acquired from the devisees of Francis, Duke of Bedford or from persons claiming under them, the Thorney House plot and the adjoining plot and also that plot coloured brown which separated the two plots from No. 2, Palace Gate, and also another piece of land on the east side of the plots and at the time of his purchase he had

A number of the deeds containing the restrictive covenants and the restrictive covenants themselves. The defendant proposed to pull down Thorney House and build upon the plots a large block of flats to be occupied as residential flats, about thirty or forty on eight floors. There was to be only one front entrance, divided into two portions for purposes of support, the entrance opening into a corridor leading into a lighting hall in the centre of the building. There was also to be a back entrance and a tradesmen's entrance. Each flat was to be self-contained and to have its own front door opening into corridors leading to the central hall or onto corridors leading to lifts and staircases. It was not proposed that any flat should open directly onto the street. It also appeared from the defence that it was not proposed that any part of the building should contain dining, coffee, reading, billiard or other rooms or kitchens for general use and no service was to be supplied.

The action came on for trial on Nov. 2, 1899. FARWELL, J., gave judgment in favour of the plaintiffs and held that the building of a large block of flats was a breach of the restrictive covenants. The defendant appealed.

Warmington, Q.C., Hughes, Q.C., and A. J. Allen for the defendant.

D Haldane, Q.C., and Christopher James for the plaintiffs.

Cur. adv. vult.

July 5, 1900. HENN COLLINS, L.J., read the following judgment of the court. —This case raises questions of some difficulty, but we are of opinion that the decision of FARWELL, J., is right, and ought to be affirmed. No difficulty arises as to the burden of the covenants in this case. The defendant is the assignee of the covenantor in respect of the two plots of land comprised in the conveyances of May 31. and July 31, 1869, and he took with notice of the covenants now sought to be enforced. Nor have we any hesitation in accepting the conclusion of FARWELL, J., that the buildings which the defendant proposes to erect will involve a breach of these covenants. The real and only difficulty arises on the question whether the benefit of these covenants has passed to the assigns of Sir John Millais as owners of the plot purchased by him on Mar. 25, 1872, there being no evidence that he knew of these covenants when he bought. Here again the difficulty is narrowed, because by express declaration on the face of the conveyances of 1869 the benefit of the two covenants in question was intended for all or any of the vendor's lands near to or adjoining the plot sold, and therefore for (among others) the plot of land acquired by Sir John Millais, and that they "touch and concern" that land within the meaning of those words so as to run with the land at law we do not doubt. Therefore, but for a technical difficulty which was not raised before FARWELL, J., we should agree with him that the benefit of the covenants in question was annexed to and passed to Sir John Millais by the conveyance of the land which he bought in 1872.

I A difficulty, however, in giving effect to this view arises from the fact that the covenants in question in the deeds of May and July, 1869, were made with the mortgagees only, and therefore in contemplation of law were made with a stranger to the land (*Webb v. Russell* (1)), to which, therefore, the benefit did not become annexed. That a court of equity, however, would not regard such an objection as defeating the intention of the parties to the covenant is clear; and, therefore, when the covenant was clearly made for the benefit of certain land with a person who in the contemplation of such a court was the true owner of it, it would be regarded as annexed to and running with that land, just as it would have been at law but for the technical difficulty. I think this is the plain result of the observations of HALL, V.C., in the well-known passage in *Renals v. Coughshaw* (2), of SIR GEORGE JESSEL, M.R., in *London and South Western Rail. Co. v. Gomm* (3), and of WOOD, V.C., in *Child v. Douglas* (4), which, we agree with FARWELL, J., are unquashed on this point by anything decided in the subsequent proceedings

in that case. Referring to *Tulk v. Moxhay* (5), SIR GEORGE JESSEL, M.R., in *London & South Western Rail. Co. v. Gomm* (3) said (20 Ch. D. at p. 583):

"The doctrine of that case, rightly considered, appears to me to be either an extension in equity of the doctrine of *Spencer's Case* (6) to another line of cases, or else an extension in equity of the doctrine of negative easements; such, for instance, as a right to the access of light, which prevents the owner of the servient tenement from building so as to obstruct the light. . . . Where there is a negative covenant expressed or implied, as, for instance, not to build so as to obstruct a view, or not to use a piece of land otherwise than as a garden, the court interferes on one or other of the above grounds. This is an equitable doctrine, establishing an exception to the rules of common law which did not treat such a covenant as running with the land [by which he clearly means the burden] and it does not matter whether it proceeds on analogy to a covenant running with the land, or on analogy to an easement. The purchaser took the estate subject to the equitable burden, with the qualification that, if he acquired the legal estate for value without notice, he was freed from the burden. That qualification, however, did not affect the nature of the burden; the notice was required merely to avoid the effect of the legal estate, and did not create the right, and if the purchaser took only an equitable estate he took subject to the burden, whether he had notice or not."

In an earlier passage, dealing with the covenant in question in the case—viz., a covenant by a purchaser and his assigns to resell, if called upon by the vendor (a railway company) and with the objection that it contravened the rule against perpetuities—he said (*ibid.* at p. 580):

"Whether the rule applies or not depends upon this, as it appears to me—Does or does not the covenant give an interest in the land? If it is a bare or mere personal contract it is, of course, not obnoxious to the rule; but in that case it is impossible to see how the present appellant can be bound. He did not enter into the contract, but is only a purchaser from Powell, who did. If it is a mere personal contract, it cannot be enforced against the assignee. Therefore the company must admit that it somehow binds the land. But if it binds the land it creates an equitable interest in the land."

These observations, which are just as applicable to the benefit reserved as to the burden imposed, show that in equity, just as at law, the first point to be determined is whether the covenant or contract in its inception binds the land. If it does, it is then capable of passing with the land to subsequent assignees; if it does not, it is incapable of passing by mere assignment of the land. The benefit may be annexed to one plot and the burden to another, and when this has been once clearly done the benefit and the burden pass to the respective assignees, subject, in the case of the burden, to proof that the legal estate, if acquired, has been acquired with notice of the covenant. The passage inclosed in a parenthesis in the report of the judgment of HALL, V.-C., in *Renals v. Cowlishaw* (2) (9 Ch.D. at p. 130) supports the same view, nor are the general observations or the decision of the case itself inconsistent with it. There, in the original conveyance which imposed the restrictive covenant, there was no expression, as there is in the present case, that the restriction was intended for the benefit of any part of the estate retained, and it is in reference to such a case that he said (9 Ch.D. at p. 130):

"The plaintiffs . . . rest their case upon their being 'assigns' of the Mill Hill estate, and they say that, as the vendors to Shaw were the owners of that estate when they sold to Shaw a parcel of land adjoining it, the restrictive covenants entered into by the purchaser of that parcel of land must be taken to have been entered into with them for the purpose of protecting the Mill Hill estate, which they retained; and, therefore, that the benefit of that

A restrictive covenant goes to the assign of that estate, irrespective of whether or not any representation that such a covenant had been entered into by a purchaser from the vendors was made to such assigns, and without any contract by the vendors that that purchaser should have the benefit of that covenant. The argument must, it would seem, go to this length, viz., that in such a case a purchaser becomes entitled to [the benefit of] the covenant, even although he did not know of the existence of the covenant, and that although the purchaser is not (as the purchasers in the present case were not) purchaser of all the property retained by the vendor upon the occasion of the conveyance containing the covenants. It appears to me that the three cases to which I have referred show that this is not the law of this court; and that in order to enable a purchaser as an assign (such purchaser not being an assign of all that the vendor retained when he executed the conveyance containing the covenants, and that conveyance not showing that the benefit of the covenant was intended to enure for the time being for the benefit of each portion of the estate so retained, or of the portion of the estate of which the plaintiff is assign) to claim the benefit of a restrictive covenant, this at least must appear, that the assign acquired his property with the benefit of the covenant—that is, it must appear that the benefit of the covenant was part of the subject-matter of the purchase."

So in *Child v. Douglas* (4), SIR WILLIAM PAGE WOOD, V.-C., said (Kay at p. 571):

"Where part of the remaining property of the original vendor has been sold to another person, who must be considered to have bought the benefit of the former purchaser's covenant, and, more especially, when the subsequent purchaser has entered into a similar covenant on his own part, he must be considered to have done this in consideration of those benefits, and even whether he actually knew or was ignorant that this covenant was, in fact, inserted in other purchase deeds, because he must be taken to have bought all the rights connected with his portion of the land."

These authorities establish the proposition that, when the benefit has been once clearly annexed to one piece of land, it passes by assignment of that land, and may be said to run with it, as well in contemplation of equity as of law without proof of special bargain or representation on the assignment of it. In such a case it runs not because the conscience of either party is affected, but because the purchaser has bought something that inhered in or was annexed to the land bought. This is the reason why, in dealing with the burden, the purchaser's conscience is not affected by notice of covenants which were part of the original bargain on the first sale, but were merely personal and collateral, while it is affected by notice of those that touch and concern the land. The covenant must be one that is capable of running with the land before the question of the purchaser's conscience and the equity affecting it can come into discussion. When, as in *Renals v. Cowlishaw* (2), there is no indication in the original conveyance, or in the circumstances attending it, that the burden of the restrictive covenant is imposed for the benefit of the land reserved, or any particular part of it, then it becomes necessary to examine the circumstances under which any part of the land reserved is sold, in order to see whether a benefit, not originally annexed to it, has become annexed to it on the sale, so that the purchaser is deemed to have bought it with the land, and this can hardly be the case where the purchaser did not know of the existence of the restrictive covenant. But when, as here, it has been once annexed to the land reserved, then it is not necessary to spell an intention out of surrounding facts, such as the existence of a building scheme, statements at auction, and such like circumstances, and the presumption must be that it passes on a sale of that land, unless there is something to rebut it, and the purchaser's ignorance of the existence of the covenant does not defeat the presumption. We find nothing in the conveyance to Sir John Millais in any

degree inconsistent with the intention to pass to him the benefit already annexed to the land sold to him. We are of opinion, therefore, that Sir John Millais' assents are entitled to enforce the restrictive covenant against the defendant, and that his appeal must be dismissed.

It is, however, still necessary to consider the question raised by the cross-notice of Mr. Rogers. Mr. Rogers is one of the persons with whom the Duke of Bedford covenanted in a deed of Oct. 30, 1876,

"that every messuage to be erected on the two plots, or either of them, should at all times thereafter be adapted for and used as and for a private residence only."

Mr. Rogers was a party to a deed of even date, whereby he and his partners released the duke from the covenants restricting the number of houses to be built on the plots contained in the conveyances of May, 1869, and July, 1869. He afterwards took an assignment from his partners of two other plots of the firm's building land, near to the Bedford and Millais plots. FARWELL, J., dismissed the action, so far as it set up any claim by Rogers, on the ground that the latter could not after the release above mentioned complain of the erection of several dwelling houses; and the learned judge did not consider that the proposed building would be a violation of the covenant with Mr. Rogers, that every house to be erected on the two plots, or either of them, or any part thereof, should at all times thereafter be adapted for and used as and for a private residence only.

We are of opinion, however, that such a block of flats as it is proposed to erect would involve a breach of this covenant. Though we agree, as we have said, that such a building does involve a breach of the covenant that no more than one messuage or dwelling house should be erected or standing on the plot, and that such messuage should be adapted for and used as and for a private residence, we think it is also a breach of the covenant in question. Though the proposed building is certainly not one messuage or dwelling house only adapted for and used as a private residence, neither does it seem to us to constitute several separate dwelling houses "adapted for and used as private residences only," within the meaning of the covenant. We think residential flats, involving the use of a public entrance and staircase, do not answer the description of private residences contemplated by the words quoted. The covenant must, we think, be construed in an ordinary or popular, and not in a legal and technical, sense; and we do not think that residential flats, though for many purposes separate dwelling houses, come within the popular description of the class of buildings which it was intended to permit. The cross-appeal of Mr. Rogers must therefore be allowed.

Solicitors: *Parker & Thomas; Stibbard, Gibson & Co.*

[*Reported by W. C. Biss, Esq., Barrister-at-Law.*]

Re BORN. CURNOCK v. BORN

[QUEEN'S BENCH DIVISION (Farwell, J.), June 20, 1900]

Reported 1900 2 Ch. 433; 69 L.J.Ch. 669; 83 L.T. 51; 49 W.R. 23; 14 Sol. Jo. 611

Solicitor—Charging order—Discretion of court—Delay by applicant—Effect—Solicitors Act, 1860 (23 & 24 Vict., c. 127), s. 28.

The jurisdiction under the Solicitors Act, 1860, s. 28, to grant a charging order over a fund in court **held** to be discretionary. Mere delay where no intervening rights had arisen was not sufficient to deprive a solicitor of his right to such order. The Act had not abrogated the common law lien, and a charging order might be made in aid of such lien.

Notes. The Solicitors Act, 1860, has been repealed. See now the Solicitors Act, 1957, s. 72.

Applied: *Re Meter Cabs, Ltd.*, [1911-13] All E.R. Rep. 1118. Referred to: *The Birmingham Wood*, [1907] P. 1; *Re Clayton, Collins v. Clayton*, [1940] 2 All E.R. 233.

As to charging orders, see 36 HALSBURY'S LAWS (3rd Edn.) 184 et seq.; and for cases see 42 Digest 290 et seq. For the Solicitors Act, 1957, s. 72, see 37 HALSBURY'S STATUTES (2nd Edn.) 1116.

Case referred to:

- (1) *Haymes v. Cooper, Cooper v. Jenkins* (1864), 33 Beav. 431; 3 New Rep. 627; 33 L.J.Ch. 488; 10 L.T. 87; 10 Jur.N.S. 303; 12 W.R. 539; 55 E.R. 435; 42 Digest 289, 3242.

Summons in a creditor's action for the administration of the estate of G. E. Born, deceased, taken out by a firm of solicitors formerly employed by a limited company in prosecuting and recovering a claim against the estate, asking for an order charging their costs on the company's share of the fund in court to the credit of the action.

In January, 1897, the claim was made and allowed in the action. In 1897, the company closed their office and ceased to carry on business. On July 28, 1899, the company's name was struck off the register under the Companies Act, 1880, s. 7. On Mar. 14, 1900, a compulsory winding-up order was made on the application of a creditor. On Mar. 19, 1900, the present summons was issued by leave of the winding-up court. The application was opposed by the official receiver.

F. Maugham for the applicants.

W. H. Cozens-Hardy for the official receiver.

FARWELL, J. This is an application in a creditor's administration action for a charging order on a fund in court. The claim was made some time in January, 1897, and was apparently admitted about the same time. On Mar. 14, 1900, the company went into liquidation, and the fund is now in court.

It is said by the applicants that the jurisdiction under the Solicitors Act, 1860, is discretionary, and I agree that it is so. The reasons which were urged why the application should not be granted are, first, delay, because for two and a half years the applicants took no steps. But, if they have not done so, no intervening rights appear to have arisen between the date when the claim was allowed and the presentation of this summons. Mere delay without any other rights intervening is not of itself a sufficient reason. Then it is said that the statute has abrogated the common law lien. I think that this is not so, and it has been so decided in *Haymes v. Cooper* (1). The Master of the Rolls says (33 L.J.Ch. at p. 490):

"The solicitor's lien is the first charge upon the fund. The Act was not intended to deprive him of any benefit which he previously enjoyed. The

power conferred on the court by s. 28 was not intended to take away the rights which the solicitor previously possessed. It has always been considered that a solicitor has an inherent right to the payment of his costs out of any fund he has recovered by his exertions, and that the court would not part with the fund when once in its control, unless with his consent or on payment of his costs."

The common law right therefore remains.

This is, however, an application to give effect to the statutory right and not to the common law right, and it seems to me to be material, in considering whether it is in my discretion to give the applicants the statutory charge or leave them to their common law right, to see whether I am giving the applicants something they have not got without my order. It is clear that they have a common law lien on this fund, and it would be monstrous if they had not, for had it not been for their exertions there would have been no such fund at all. Justice seems to me to call for the assistance of such a lien. I am asked to give effect to the statutory order in aid of the common law lien, which I do and make the order.

Solicitors : *Edwin Andrew & Co.; J. W. Browne.*

[*Reported by P. S. OSWALD, Esq., Barrister-at-Law.*]

KIMBER v. ADMANS

[COURT OF APPEAL (Sir Nathaniel Lindley, M.R., Rigby and Vaughan Williams, L.JJ.), February 16, 1900]

[Reported [1900] 1 Ch. 412; 69 L.J.Ch. 296; 82 L.T. 136; 48 W.R. 322;
16 T.L.R. 207; 44 Sol. Jo. 260]

Sale of Land—Restrictive covenant—Building estate—Restriction on number of houses—Block of flats—"House."

Land for building was sold subject to a covenant restricting the number of houses to be built. The purchaser proposed to erect blocks of flats.

Held: "house" in such a covenant referred to the building as a whole and not to the interior portions of the building, and, accordingly, the erection of blocks of flats did not infringe the covenant.

Notes. This decision should be compared with that in *Rogers v. Hosegood*, ante p. 915.

Distinguished: *Hford Park Estates v. Jacobs*, [1903] 2 Ch. 522. Considered: *Sunderland and South Shields Water Co. v. Hilton* (1928), 97 L.J.K.B. 516. Referred to: *Goodchild v. Romford Borough Council*, [1940] 2 All E.R. 309.

As to covenants running with the land, see 34 HALSBURY'S LAWS (3rd Edn.) 367-369; and for cases see 40 DIGEST (Repl.) 344 et seq.

Cases referred to in argument:

Yorkshire Fire and Life Insurance Co. v. Clayton (1881), 8 Q.B.D. 421; 51 L.J.Q.B. 82; 45 L.T. 697; 45 J.P. 569; 30 W.R. 174; 1 Tax Cas. 479, C.A.; 42 Digest 681, 929.

Lee v. Gausel (1774), 1 Cowp. 1; Loft, 374; 98 E.R. 935; 15 Digest (Repl.) 1134, 11, 397.

A Appeal from an order of COZENS-HARDY, J.

On a sale of land in 1885, one of the conditions which the purchaser covenanted to observe was

"No house shall be erected on any lot of less value than £500, and not more than two houses shall be erected on any one lot."

B The defendant, who had purchased two plots, proposed to erect blocks of flats, each block being of more value than £500, but the plaintiff contended that each flat was a house within the covenant, and applied for an injunction to restrain the defendant from building them.

C COZENS-HARDY, J., held that the covenant had not been broken, and the plaintiff appealed.

Cozens-Hardy for the plaintiff.

Buckmaster for the defendant.

D **SIR NATHANIEL LINDLEY, M.R.** I have not the slightest hesitation in saying that the decision of COZENS-HARDY, J., is right, in spite of the ingenious argument we have heard on behalf of the plaintiff. A property was sold for building purposes in lots, and each lot is said to have been sold subject to the covenant to which we have been referred. What is the meaning of the word "house" in this covenant? In my opinion, it does not refer to the mode in which the building is sub-divided and let, but to the aggregate of the rooms making up the building. No doubt for some purposes a portion of a house is treated as a house, as for the purpose of rating or the franchise, but I cannot agree that the word "house" is used in this sense in this covenant. In covenants of this kind, no one would apply the word "house" to the interior portions of the building. It would be taken as meaning the whole structure. There is no doubt that this covenant refers to the building as a whole, and not to the interior parts. The appeal must be dismissed.

F **RIGBY, L.J.** I agree.

G **VAUGHAN WILLIAMS, L.J.** I agree. I assent to the argument on behalf of the plaintiff to this extent, that, in construing this restrictive covenant, one must ask oneself what is the object of the covenant, and, if I could see no object in the covenant, if it was simply limited to the bricks and mortar erection, I should be disposed to put a meaning on the word "house" which would cover the user of the house as distinguished from the physical erection. I do not, however, find myself in that position, and I do not think that anyone familiar with building estates near London would have any difficulty in ascertaining the object of this covenant if the word "house" is construed as meaning the physical erection and not the interior arrangement.

H *Appeal dismissed.*

Solicitors : *Todd, Dennes & Lamb ; Cree & Son.*

[*Reported by W. C. BISS, Esq., Barrister-at-Law.*]

MONTGOMERIE & CO., LTD. v. WALLACE-JAMES

[House of Lords (The Earl of Halsbury, L.C., Lord Shand, Lord Davey, Lord Robertson and Lord Lindley), November 16, 17, 19, 20, 23, December 18, 1903]

[Reported [1904] A.C. 73; 73 L.J.P.C. 25; 90 L.T. 1]

House of Lords Appeal to Jurisdiction—Review of finding of fact—Concurrent findings of courts below—Onus of proving judgment appealed from wrong—Circumstances in which current findings affirmed.

There is no rule of practice in the House of Lords that the House will not entertain an appeal on a question of fact where there have been concurrent findings in the courts below.

Per LORD DAVEY: In every case the appellant assumes the burden of showing that the judgment appealed from is wrong, and when it depends on an estimate of probabilities or inferences so nicely balanced that it is impossible to say that a decision either way would be wrong, every material fact having received due consideration, your Lordships would, I make no doubt, be disposed to affirm the concurrent decisions of the courts below.

Dicta of LORD HERSCHELL, L.C., in *Gray v. Turnbull* (1) (1870), L.R. 2 Sc. & Div. 53, *The P. Caland* (2), [1893] A.C. 207 and *McIntyre Bros. v. McGavin* (3), [1893] A.C. 268, 275, explained.

Notes. Considered: *Dominion Trust Co. v. New York Life Insurance Co.*, [1919] A.C. 254; *Mersey Docks and Harbour Board v. Procter*, [1923] All E.R. Rep. 134. Applied: *Bramford's Road Transport, Ltd. v. Evans*, [1953] 2 All E.R. 1308.

As to jurisdiction of House of Lords on questions of fact, see 9 HALSBURY'S LAWS (3rd Edn.) 363-364; and for cases in which concurrent findings of fact were made in the courts below, see 36 DIGEST (Repl.) 373-374.

Cases referred to:

(1) *Gray v. Turnbull* (1870), L.R. 2 Sc. & Div. 53.

(2) *P. Caland and Freight (Owners) v. Glamorgan Steamship Co., Ltd.*, *The P. Caland*, [1893] A.C. 207; 62 L.J.P. 41; 68 L.T. 469; 9 T.L.R. 309; 7 Asp.M.L.C. 317; 1 R. 138, H.L.; 36 Digest (Repl.) 373, 139.

(3) *McIntyre Bros. v. McGavin*, [1893] A.C. 268; 69 L.T. 389; 57 J.P. 548; I.R. 246, H.L.; 36 Digest (Repl.) 373, 140.

Appeal from a judgment of the First Division of the Court of Session, Scotland, which affirmed the decision of the Lord Ordinary.

The respondent, J. G. Wallace-James, brought this action against the appellants, *Montgomerie & Co.*, for a suspension and interdict to prohibit the appellants from encroaching upon a piece of land in the burgh of Haddington alleged to have been from time immemorial dedicated to the public use for public recreation, playing games, bleaching and drying clothes.

The main question was one of fact, namely, whether the land in question had been so used from time immemorial, that is for a period of forty years. The Lord Ordinary, and on appeal the First Division of the Court of Session, held that the land in question had been so used from time immemorial.

Clyde, K.C., and *Constable* (both of the Scottish Bar) for the appellants.

The Lord Advocate (Scott-Dickson, K.C.), *Wilson, K.C.*, and *Lawrie* (all of the Scottish Bar) for the respondent.

The House took time for consideration.

Dec. 18, 1903. The following opinions were read.

THE EARL OF HALSBURY, L.C.—I think that this appeal should be allowed. It is simply a question of fact, and doubtless, where a question of fact has been decided by a tribunal which has seen and heard the witnesses, the greatest weight ought to be attached to the finding of such a tribunal. It has had the opportunity of observing the demeanour of the witnesses, and judging of their veracity and accuracy in a way that no appellate tribunal can do. But where no question is raised as to truthfulness, and the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an appellate court. [His Lordship then discussed the facts and evidence in the case.]

LORD SHAND.—I am also of opinion that this appeal should be sustained, and the action dismissed with costs. It is with great reluctance that I come to the conclusion that an appeal should be sustained against concurrent judgments of the Lord Ordinary and the division of the court on a question which is entirely one of fact. The Lord Advocate pressed strongly upon the House that the judgment should be affirmed, because the case, which turns on fact, had been decided by the Lord Ordinary, who saw the witnesses, and himself heard their evidence, and his judgment has been sustained by the unanimous judgment of the learned judges of the division on appeal. No one is disposed to give greater importance to such circumstances than I am, but the facts of the case as proved seem to me clearly to show (i) a complete failure on the part of the complainer to establish the alleged immemorial possession for forty years, on which the case depends, and (ii) that important facts in the evidence as to the character of the alleged public uses have been overlooked or dis-regarded in the matters to which I shall immediately refer, and that these uses are quite insufficient to establish the rights claimed, or any of them, to which effect has been given by the judgments complained of. [His Lordship went on to discuss the evidence.]

LORD DAVEY. Before I address myself to a consideration of the evidence in the case, I desire to make an observation of a general character. It was pressed upon your Lordships by the counsel for the respondent that this House would not disturb the concurrent findings of two courts below upon a question of fact, and reference was made to what was said in *Gray v. Turnbull* (1), *The P. Caland* (2), and *McIntyre Bros. v. McGavin* (3). But when these observations are carefully read it will be found that they do not lay down any rule of practice, such as is followed by the Judicial Committee, at any rate in Indian appeals, that this House will not entertain an appeal on a question of fact where there have been concurrent findings in the courts below.

I do not disagree with what **LORD HERSCHELL, L.C.**, is reported to have said in *The P. Caland* (2) if it be regarded merely as a guide to the judgment of the tribunal, and not as a rule of law or practice. In all cases your Lordships should and would pay the greatest respect to the concurrent findings of two courts on a question of fact. When the question depends on the credibility of witnesses, the opinion of the judge who heard the evidence would in most cases be conclusive. In every case the appellant assumes the burden of showing that the judgment appealed from is wrong, and when it depends on an estimate of probabilities or inferences so nicely balanced that it is impossible to say that a decision either way would be wrong, every material fact having received due consideration, your Lordships would, I make no doubt, be disposed to affirm the concurrent decisions of the courts below. Some noble and learned Lords have lamented that an appeal lies to this House on questions of fact, but, so long as that is the law, I think that this House cannot decline the duty of forming and expressing its own judgment, after taking into account all the considerations to which I have referred. [His Lordship went on to discuss the evidence, and concluded as follows:] I am of opinion that the respondent has failed to sustain the issue tendered by him, and I agree that the appeal should be allowed.

LORD ROBERTSON, concurred.

LORD LINDLEY.—I also have carefully examined the evidence in order to see if it justified the inference that there had been forty years' user as of right of the piece of land in question as alleged by the respondent. I have come to the conclusion that the evidence falls far short of what is necessary to establish any such user. I entirely concur in thinking that there is no law or settled practice of this House to prevent it from differing even from two concurrent findings of fact if, on a careful consideration of the evidence, this House comes to the conclusion that those findings are wrong. The appeal ought, in my opinion, to be allowed with costs in the usual way.

Interlocutors appealed from reversed, and appeal allowing with costs in this House and in the courts below.

Solicitors: *J. Kennedy*, for *T. S. Paterson*, Edinburgh; *A. & W. Beveridge*, for *Patrick & James*, Edinburgh.

[Reported by *C. E. MALDEN, Esq., Barrister-at-Law.*]

NICKOLL AND KNIGHT v. ASHTON

[COURT OF APPEAL (A. L. SMITH, M.R., VAUGHAN WILLIAMS and ROMER, L.J.J.), April 17, May 3, 1901]

[Reported [1901] 2 K.B. 126; 70 L.J.K.B. 600; 84 L.T. 804; 49 W.R. 513; 17 T.L.R. 467; 9 Asp.M.L.C. 209; 6 Com. Cas. 150]

Contract—Frustration—Implication of term—Sale of goods—Non-delivery—Defence—Shipment of goods by named ship—Damage to ship without default of sellers—Liability to load cargo by contract date.

By a contract in writing sellers agreed to sell to buyers a cargo of cotton seed "to be shipped at Alexandria . . . during the month of January, 1900, per steamship O." After the date of the contract the O. was stranded in the Baltic owing to perils of the sea, and so, without any default by the sellers, it became impossible for her to load in accordance with the contract. In an action by the buyers for breach of the contract,

Held by A. L. SMITH, M.R., and ROMER, L.J., VAUGHAN WILLIAMS, L.J., dissentiente: it was clear from the terms of the contract that the parties had deliberately agreed that the shipment of the seed should be, not in any ship or ships, but in a particular named ship; they must have known from the beginning that the performance of the contract would become impossible unless the O. continued to exist as a cargo-carrying vessel down to and during January, 1900; on its true construction the contract was not a positive and absolute contract, but was subject to the implied term that the parties should be excused if, before breach, performance of the contract became impossible for the reason stated, and, therefore, the action failed.

Observations of BLACKBURN, J., in *Taylor v. Caldwell* (1) (1863), 3 B. & S. 826, applied.

Notes. Considered: *Chandler v. Webster* (1904), 73 L.J.K.B. 401; *Krell v. Henry*, ante p. 20; *Dunford v. Cia. Anomina Maritima Union* (1911), 104 L.T. 811. Applied: *Re Shipton, Anderson and Harrison*, [1915] 3 K.B. 676. Considered:

- A** *Seville and United Kingdom Carrying Co. v. Mann* (1915), 32 T.L.R. 192; *Metro-politan Water Board v. Dick, Kerr & Co.*, [1917] 2 K.B. 1. Referred to: *Tredegar Iron and Coal Co. v. Hawthorn* (1902), 18 T.L.R. 716; *Blakeley v. Muller, Hobson v. Pattenden* (1903), 88 L.T. 90; *Horlock v. Bcal*, [1916-17] All E.R. Rep. 81; *Leiston Gas Co. v. Leiston-cum-Sizewell U.D.C.*, [1916-17] All E.R. Rep. 329; *Yamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co.*, [1916] 1 K.B. 485; *Blackburn Bobbin Co. v. Allen* (1918), 87 L.J.K.B. 1085; *Walton Harvey, Ltd. v. Walker and Homfrays, Ltd.*, [1930] All E.R. Rep. 465; *Imperial Smelting Corp., Ltd. v. Joseph Constantine Steamship Line, Ltd.*, [1940] 1 K.B. 812.

B As to the implication of terms in and frustration of a contract, see 8 HALSBURY'S LAWS (3rd Edn.) 121-124, 185-194; and for cases see 12 DIGEST (Repl.) 417 et seq., 681 et seq.

C Cases referred to:

- (1) *Taylor v. Caldwell* (1863), 3 B. & S. 826; 2 New Rep. 198; 32 L.J.Q.B. 164; 8 L.T. 356; 27 J.P. 710; 11 W.R. 726; 122 E.R. 309; 12 Digest (Repl.) 418, 3242.
- (2) *Appleby v. Myers* (1867), L.R. 2 C.P. 651; 36 L.J.C.P. 331; 16 L.T. 669, Ex. Ch.; 12 Digest (Repl.) 696, 5334.
- D** (3) *Robinson v. Davison* (1871), L.R. 6 Exch. 269; 40 L.J.Ex. 172; 24 L.T. 755; 19 W.R. 1036; 12 Digest (Repl.) 697, 5338.
- (4) *Howell v. Coupland* (1874), L.R. 9 Q.B. 462; 30 L.T. 677; affirmed (1876), 1 Q.B.D. 258; 46 L.J.Q.B. 147; 33 L.T. 832; 40 J.P. 276; 24 W.R. 470, C.A.; 12 Digest (Repl.) 429, 3304.
- E** (5) *Keaton v. Pearson* (1861), 7 H. & N. 386; 31 L.J.Ex. 1; 10 W.R. 12; 158 E.R. 523; 41 Digest 452, 2839.
- (6) *Baily v. De Crespigny* (1869), L.R. 4 Q.B. 180; 10 B. & S. 1; 38 L.J.Q.B. 98; 19 L.T. 681; 33 J.P. 164; 17 W.R. 494; 12 Digest (Repl.) 420, 3249.

Also referred to in argument:

- F** *Hills v. Sughrue* (1846), 15 M. & W. 253; 153 E.R. 844; sub nom. *Mills v. Sughrue*, 6 L.T.O.S. 414; 12 Digest (Repl.) 431, 3311.
- Ashmore & Son v. C. S. Cox & Co.*, [1899] 1 Q.B. 436; 68 L.J.Q.B. 72; 15 T. L.R. 55; 4 Com. Cas. 48; 12 Digest (Repl.) 432, 3318.

Appeal by the plaintiffs from a decision of MATHEW, J., at the trial of an action without a jury.

- G** The action was brought to recover damages for breach of a contract to ship a cargo of Egyptian cotton seed. The contract was dated Nov. 24, 1899, the material parts being as follows:

H "Sold this day to Messrs. Nickoll and Knight, the following Egyptian cotton seed, namely, a cargo to consist of from 1,600 tons to 1,900 tons, to be shipped at Alexandria, and/or Port Said, and/or Ismalia, during the month of January, 1900, per steamship *Orlando*, at £6 3s. 9d. per ton . . . the vessel to go to any safe floating port in the United Kingdom. . . . Clause 5. In case of prohibition of export, blockade, or hostilities, preventing shipment, this contract or any unfulfilled part thereof is to be cancelled."

I After this contract had been made the steamship *Orlando*, being then in the Baltic, was stranded by perils of the sea. On Dec. 20 the sellers gave notice to the buyers that the ship was so badly damaged that it would be impossible for her to load before March. On Dec. 28 the buyers informed the sellers that, as the performance of the contract was rendered impossible, they considered it as cancelled, and in February, 1900, they began the present action for damages for breach of contract, claiming the difference between the agreed price £6 3s. 9d. per ton and £7 13s. 9d. per ton, which was the market price on Jan. 31, 1900. At the trial of the action MATHEW, J., held that the contract was subject to an implied condition that its performance was to be subject to the continued existence of the ship and

her fitness to take cargo, so that performance of the contract was excused by its becoming impossible through loss or damage of the ship by sea peril, and he gave judgment for the sellers. The buyers appealed.

Walton, K.C., and *Hollams* for the buyers.

Bray, K.C., and *Edward Bray* for the sellers.

Cur. adv. vult.

May 3, 1901. **A. L. SMITH, M.R.** read the following judgment. This is an action for damages by the buyers of a cargo of Egyptian cotton seed against the sellers for not shipping the same pursuant to a contract dated Oct. 24, 1899, and the question is whether upon its true construction the contract is a positive and absolute contract to ship the seed, or a contract subject to any, and what, implied condition. The contract upon which the question arises, so far as material, is as follows:

"Sold this day to Messrs. Nickoll and Knight, the following Egyptian cotton seed--namely, a cargo to consist of from 1,600 tons to 1,900 tons, to be shipped by the steamship *Orlando* at Alexandria . . . during the month of January, 1900. (Signed) Ashton & Co."

Clause 5 is as follows:

"In case of prohibition of export, blockade, or hostilities preventing the shipment, the contract or any unfulfilled part thereof is to be cancelled."

It is perfectly plain upon the face of the signed contract that the parties deliberately agreed that the shipment of the seed should not be in any ship or ships, but in one particular named ship, for the words in print "ship or ships" are obliterated, and the words "per steamship *Orlando*" are inserted in writing in their place; and it is equally plain that the contract could only be performed by the defendants shipping the seed contracted for in the steamship *Orlando* during the month of January, 1900, and in no other ship.

Is a contract such as this a positive and absolute contract by the shipper to ship on board the named ship the contracted cargo, or is it a contract subject to any, and what, implied condition? I find in the judgment of **BLACKBURN, J.**, delivering the unanimous judgment of the Court of Queen's Bench in 1863 in *Taylor v. Caldwell* (1), which case has been followed and applied in the Exchequer Chamber in *Appleby v. Myers* (2), in the Court of Exchequer in *Robinson v. Darison* (3), and in the Queen's Bench and Court of Appeal in *Howell v. Coupland* (4), that a rule as to the construction of certain contracts has been laid down, which rule is as follows (3 B. & S. at pp. 833, 834):

"Where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done: there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

In my judgment, the contract in the present case falls directly within this rule, for, from the beginning, the parties must have known that the performance of the contract would become impossible unless the particular thing specified--that is, the steamship *Orlando*--continued to exist as a cargo-carrying ship down to and during the month of January, 1900. I have no doubt that the true construction of the contract is that it is not a positive and absolute contract as contended for by

A the plaintiffs, but is a contract subject to the condition that the parties shall be excused if, before breach, performance becomes impossible by reason of the particular specified thing—that is, the steamship *Orlando*—ceasing to exist as a cargo-carrying ship without the defendants' default.

B But it is argued that, although there may be this implied condition, it only applies if the particular thing actually perishes; for instance, it is suggested that if the roof of the music-hall in *Taylor v. Caldwell* (1) had alone been destroyed and the hall itself not burnt to the ground, the judgment in that case would not have been given, even although with the roof off the hall could not have been used for the purpose for which it was let, and it is said that, as the steamship *Orlando* did not actually perish, this case is not within the implied condition. I do not agree. In
C my judgment, if the ship ceased to exist as a cargo-carrying ship when the time for the performance of the contract arrived, so that it could not be used to ship the cargo in, the implied condition would attach. If the steamship had gone to the bottom before the month of January, 1900, and remained there during that month, so as to be wholly unable to take in a cargo, would not the ship have ceased to exist, whereby the performance of the contract became impossible, the ship being then
D at the bottom of the sea? Quoad the performance of the contract, it would have perished; and what is the difference in principle between the ship being at the bottom of the sea and being stranded upon a rock in the Baltic, as the *Orlando* was, and thereby wholly unable to take in a cargo pursuant to the contract? In either case, in my opinion, the performance of the contract became impossible by reason of the particular specified thing—i.e., the ship—ceasing to exist as a cargo-carrying ship,
E or, in other words, as regards that purpose having perished. This is not a case in which the thing contracted for is possible in itself, and the contracting party is only unable to perform it by causes beyond his own control, such as in the case of an unexpected sudden frost: *Kearon v. Pearson* (5). In such a case it is the party's own fault for undertaking unconditionally to fulfil a promise. In the present case, as before pointed out, he has not done so, for the promise he has made is conditional.
F It also seems to me that the suggested point of the detention of a ship by adverse winds clearly would not fall within the above rule, for in such a case the ship has not ceased to exist at all. It exists as a cargo-carrying ship, but is merely behind time on its voyage.

The next point taken by the plaintiffs was, that by reason of cl. 5 of the contract the implied condition of the continued existence of the ship was negated, and that
G it was only the matters mentioned in that clause which excused the performance of the contract. In my opinion, the matters mentioned in cl. 5 in no way negative the true construction of the contract, which is that the contract is not positive and absolute, and that cl. 5 affords an excuse for the not shipping of the cargo, over and above the perishing of the ship, which is the implied condition. In my judgment, it is not true to say that there is a warranty in this contract that the ship
H shall be in existence in January, 1900. I think that the judgment of MATHEW, J., is correct, and that this appeal must be dismissed.

VAUGHAN WILLIAMS, L.J., read the following judgment. I regret to say that I have come to a different conclusion from that arrived at by the Master of the Rolls, with which I understand ROMER, L.J., agrees.

I The question in this case is whether according to the true construction of the cotton seed cargo contract, there was an absolute contract by the sellers, the defendants, to load a cargo in January. In other words, did the sellers take upon themselves the risk of the ship declared by them under this contract being prevented by unforeseen circumstances beyond their control from loading a cargo at one of the ports of loading named in the contract during the month of January, 1900? It was argued by the plaintiffs that there was an absolute contract, and that the defendants did take the risk from which they had not in terms protected themselves. On the other hand, it was argued by the defendants that this was a case of a cargo

to be shipped by a particular vessel at a named port at a particular time, and that the obligation to load was made to depend on the arrival of that vessel at that port at the proper time; and that the defendants had not warranted that the vessel should be able and ready to take the cargo on board at the stipulated time, and, therefore, that the defendants were, in the event which happened, of the disability of the ship through perils of the sea, without default of the defendants, to take the cargo at Alexandria at the proper time, relieved from further performance of a contract which assumed the continued existence and safe arrival of the vessel in a condition fit to take the cargo. The obligation to ship the cargo, the defendants argued, was not absolute, but, in common with every other obligation in the contract, was conditional on the arrival in proper time of the declared vessel at Alexandria.

It was settled by the judgment of BLACKBURN, J., in *Taylor v. Caldwell* (1) (3 B. & S. at pp. 833, 834):

"where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done, there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

Prior to the decision in *Howell v. Coupland* (4) it used to be supposed that the doctrine as expressed by BLACKBURN, J., like the cases *de certo corpore* cited by him from the civil law, was based upon the assumption of the continued existence, at the date for the fulfilment of the contract, of something existing at the date of the making of the contract, which is obviously quite different from the present existence, at the date for fulfilment of the contract, of something to come into existence after the contract by the action of a party to it done in pursuance of the contract. The principle laid down in *Taylor v. Caldwell* (4) was, however, somewhat widened in *Howell v. Coupland* (4), for in that case it was decided that on a contract for the sale of a specific crop on particular land the seller is to be excused if the performance is prevented by the subject-matter of sale ceasing to exist, without default of the promisor, before the time of performance, even though the subject-matter of the contract was not in existence at the time of the contract as is assumed, as it seems to me, in the principle as stated by BLACKBURN, J.

The fact is that the answer to the question whether the obligation of the contract is dependent on the existence of some thing, or combination of things, at the time for fulfilment, or whether one party to the contract warrants the existence at that time of that thing, or combination of things, is always a question of intention of the parties to be gathered from the contract as expressed, and the subject of it. HANNEN, J., in *Baily v. De Crespigny* (6) thus expresses himself (L.R. 4 Q.B. at p. 185):

"There can be no doubt that a man may by an absolute contract bind himself to perform things which subsequently become impossible, or to pay damages for the non-performance, and this construction is to be put upon an unqualified undertaking, where the event which causes the impossibility was, or might have been, anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens."

A Can it be said that the non-arrival of the *Orlando* at Alexandria in January (the event which caused the impossibility) was not, or might not have been, anticipated and guarded against in the contract? Or can it be said that that event cannot be reasonably supposed to have been in the contemplation of the contracting parties, or that the general words were not used with reference to the possibility of the contingency which afterwards happened—namely, the non-arrival in time at Alexandria

B of the *Orlando* by reason of the perils of the sea? I do not think so, nor do I think business people would think so.

The time of loading is a condition introduced into the contract for the benefit of the buyers. It is a condition which the buyers could waive. The event which caused the impossibility of loading in January is an event against which the sellers could have insured. The selection of the vessel, the terms of the charter of that

C vessel, the risk the vessel selected would have to run by reason of the length of the preliminary voyage, are all matters within the control of the sellers. The buyers have no voice in the matter. Is it unreasonable to read the general words as throwing on the sellers the risk of the non-arrival of the selected ship within the contract time? The sellers might have excepted this risk, or insured against it. It seems to me that, in order to prevent general words covering a particular obligation, which in

D terms the general words are wide enough to include, the particular obligation must be of the essence of the contract, and, further, must be of the essence of the contract in such sense that neither party can waive the obligation, or, to express it in other words, the condition must be such that to waive it would be to make a new and a different contract. No doubt, where a contract is made with reference to certain anticipated circumstances, and where, without default of either party, it

E becomes wholly inapplicable to any such circumstances, it cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made; but, where a party to a contract promises the other party to do a certain thing, or to have a certain thing done, at or before a specified time, and fails to perform his promise, in such case, even though the thing promised to be done is of the essence of the contract, and a condition precedent, so that the

F promisor cannot claim to have the promisee carry out his side of the contract, this does not put an end to the contract in such sense that neither party can enforce any obligation under it against the other, but only gives the promisee the option to rescind the contract, unless indeed the anticipated circumstance which has failed to occur or continue is of such a character as to put an end in a commercial sense to the commercial speculation entered upon by the parties to the contract; but a

G circumstance which one of the parties to the contract can waive without putting an end to the commercial speculation cannot be such a circumstance.

In the present case nothing has caused it to be impossible for the sellers to supply cotton seed of the contract quality. The sellers, according to my view, took upon themselves to promise that the owners of the *Orlando* should have her at Alexandria

H ready to take the cargo at a specified time. The peril of the sea has made it impossible for the owners of the *Orlando* to have her there at that time, and made it impossible, therefore, for the sellers to load the *Orlando* at Alexandria in January. But this event has not made it impossible that the contract should be carried out. On the contrary, if the buyers choose to waive the time condition, the contract can be performed by loading the *Orlando* at Alexandria. Nothing in the facts of this

I case suggests that the delay for repairs was so long as to put an end to the commercial speculation intended by the parties to the contract. By reason of the perils of the sea the *Orlando* did not arrive at the time the shipowner contracted it should arrive, but the delay was not such that the voyage was frustrated, neither was the contract of sale. It follows that the plaintiffs had a good cause of action on the failure of the sellers to load the cotton seed, even though the perils of the sea made it impossible for the *Orlando* to arrive at Alexandria at the specified time. I have thought it right to express my opinion on this matter (which unfortunately is contrary to that of my brother), although it is not, for a reason which I will give.

of very great practical importance with regard to the result of the action, for I entirely agree with the opinion of MATHEW, J., as to the measure of damages in case the plaintiffs have a right of action, and, according to this measure, the sum paid into court, together with a denial of liability, is more than sufficient to satisfy the plaintiffs' cause of action.

ROMER, L.J.—A clear principle applicable to cases of this kind was laid down by BLACKBURN, J., in delivering the judgment of the Court of Queen's Bench in *Taylor v. Caldwell* (1). The passage of the judgment in which that principle is stated has already been read. It was laid down after a review of all the previous cases, and after very careful consideration. That judgment has often been followed, and has never been dissented from. The principle there laid down is one which works complete justice between the parties to contracts of this kind. It is a principle which is easy to follow, and one which affords a certain guide in a doubtful and difficult branch of the law. It is most useful to business people to know clearly the law on such a subject, and, therefore, I think that it is important that the principle, as laid down in the case referred to, should be adhered to, and not rendered doubtful or weakened by making exceptions to its application.

The question is whether that principle applies to the present case. In my opinion, it does. I think that the parties to this contract must from the beginning have known that it could not be fulfilled unless in January, 1900, the particular specified thing necessary for carrying it out—namely, the steamship *Orlando*—continued to exist, and, therefore, they must at the date of the contract have contemplated such continuing existence as the foundation of what was to be done under the contract. Is there here any implied warranty by the defendants that the ship shall continue to exist? There is clearly no express warranty to that effect, and, in my opinion, no such warranty can be implied. Some liability on the part of the vendors in respect of the ship must, I think, be implied, and no doubt many difficult cases with regard to the extent of that liability might arise. But it is not necessary in this case to consider exactly the extent of that liability, for I think that a warranty cannot be implied that the ship in question should continue to exist in January. That being so, the principle laid down in *Taylor v. Caldwell* (1) applies.

The only question that remains is whether the ship continued to exist in January, 1900, within the meaning of that principle. I think that she did not. She was not then in existence as a cargo-bearing ship or for the purposes of the contract. This point has been fully dealt with by the Master of the Rolls, and I need not add anything to what he has said in reference to it. I should perhaps add, with regard to the argument founded on cl. 5 of the contract, that that clause does not, in my opinion, affect the view which I have expressed, for the special circumstances dealt with in that clause all contemplate the existence of the ship. For these reasons I agree with the Master of the Rolls in thinking that the appeal should be dismissed.

Appeal dismissed.

Solicitors : *Hollams & Co.; Tilleards & Co.*

[Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.]

A BANK OF NEW SOUTH WALES v. GOULBURN VALLEY BUTTER CO., PROPRIETARY, LTD.

PRIVY COUNCIL (Lord Macnaghten, Lord Davey, Lord Robertson, Lord Lindley, Sir F. North and Sir Arthur Wilson), June 4, 5, July 9, 1902]

Reported [1902] A.C. 543; 71 L.J.P.C. 112; 87 L.T. 88; 51 W.R. 367;
18 T.L.R. 735]

Bank—Duty of bank—Improper conduct of account by customer—Notice to bank—Transfer of money from company's account to managing director's account—Liability of bank.

B. was the owner by himself or his nominees of all the shares in a company. He was also managing director and chairman of the board of directors. He carried on in his own name a business similar to that of the company, and the accounts of the two businesses were kept at the same branch of the bank. B. acquired his interest in the company with the avowed intention of working the two businesses together. He improperly transferred various sums by cheque from the company's account to his own account which was overdrawn.

Held: there was no duty on the part of the bank to inquire into the state of the account between B. and the company because there was nothing to excite suspicion or put them on inquiry, and so the bank was not affected with notice of any irregularity on B.'s part, and was not liable to account for the proceeds of the cheques.

Notes. As to liability of a bank for cheques drawn by a customer in breach of trust, see 2 HALSBURY'S LAWS (3rd Edn.) 195; and for cases see 3 DIGEST (Repl.) 205, 206.

Cases referred to:

(1) *Derwages v. Noble, Clayton's Case* (1816), 1 Mer. 572; 35 E.R. 781; 3 Digest (Repl.) 192, 370.

(2) *Gray v. Johnston* (1868), L.R. 3 H.L. 1; 16 W.R. 842, H.L.; 3 Digest (Repl.) 201, 411.

(3) *Thomson v. Clydesdale Bank, Ltd.*, [1893] A.C. 282; 62 L.J.P.C. 91; 69 L.T. 156; 1 R. 255, H.L.; 3 Digest (Repl.) 203, 425.

(4) *Union Bank of Australia, Ltd. v. Murray-Aynesley*, [1898] A.C. 693; 67 L.J.P.C. 123, P.C.; 3 Digest (Repl.) 196, 390.

(5) *Re Gross, Ex parte Kingston* (1871), 6 Ch.App. 632; 40 L.J.Bey. 91; 25 L.T. 250; 19 W.R. 910, L.J.J.; 3 Digest (Repl.) 196, 389.

Appeal from an order of the full court of the Supreme Court of the State of Victoria (MADDERN, C.J., HOLROYD and HOOD, J.J.), dated Oct. 11, 1900, reversing an order of the Primary Judge in Equity (HOPGINS, J.) in favour of the appellant bank in an action brought against them by the respondent company in respect of three sums, £1,022, £668 and £619 2s. 10d. with interest.

Haldane, K.C., E. F. Mitchell (of the Colonial Bar), and *J. K. Young* for the appellant bank.

Cohen, K.C., and Montague Lush, K.C. for the respondent.

JULY 9, 1902. LORD DAVEY.—This is an appeal from an order of the full court of the Supreme Court of the State of Victoria, reversing the judgment of the Primary Judge, HOPGINS, J., in an action in which the respondent company was plaintiff and the appellant, the Bank of New South Wales, was defendant.

The object of the action (so far as material) was to recover from the bank three sums of £1,022, £668, and £619 2s. 10d., which it was alleged had been improperly transferred from the company's account at the bank to the account of one Alexander Lindsay Ballantyne and so lost to the company. The company was incorporated in October, 1895, under the Companies Act, 1890, of the State of Victoria, with a capital

of £1,200 divided into forty-eight shares. The principal object of the company was to carry on the business of a creamery and butter factory, and deal in butter and other similar products, and it was empowered by its memorandum of association to carry on its business either singly or in connection with any other corporation, companies, firms or persons. The articles provided for the appointment of a managing director, and the directors were empowered to delegate to the managing director for the time being such of their powers and authorities as the directors should think fit. In and for some years prior to June, 1898, Alexander Lindsay Ballantyne was carrying on business in Melbourne as a dairy farm produce merchant, and kept his banking account at the Flinders Street branch of the bank. He was apparently in good credit and had been allowed to overdraw his account from time to time to the extent of about £4,000 against the security of bills for collection and boxes of butter. In May, 1898, Ballantyne arranged for the purchase of all the shares in the company with a view to the amalgamation of his own and the company's businesses. This arrangement was effected by two documents both dated June 3, 1898, and pursuant thereto all the shares were transferred to Ballantyne or his nominees, and Ballantyne and two of his nominees were elected directors. Ballantyne was elected chairman of the board, and on June 6, 1898, he was appointed managing director of the company. Ballantyne informed Mr. Earle, the manager of the Flinders Street branch of the bank, of his purchase of the shares. And on some day between May 31, and June 9 he called on Earle.

What then took place is thus stated by Earle, whom the courts below treated as an honest and credible witness :

"He asked me if I had any objection to his bringing the account of the Goulburn Valley Butter Co. from the Royal Bank to my bank. I said that I had no objection, and asked him if he was going to close up his own account. He said that he was not going to close it up, and I asked him why he did not keep one account for the whole business. He said that he wished to keep his old connection together, and thought that some of his old customers would deal with A. L. Ballantyne but would not deal with the Goulburn Valley Butter Co., and for that reason he would buy produce from his old customers in the name of A. L. Ballantyne and pay them with A. L. Ballantyne's cheque, but that the goods so bought would go into the Goulburn Valley Butter Co.'s works to be made up by them, sold by the company, and the proceeds of the sale paid into the company's account, and therefore the two accounts would require to be adjusted, and for that purpose he said that he would leave me two cheques signed in blank—one by the Goulburn Valley Butter Co., and one by himself, and I was to use these cheques as I thought fit for adjustment purposes."

Ballantyne's account of the interview was as follows :

"Q. : Anything else done the same day?—A. : I said to Mr. Earle that as I had undertaken to pay the company's debts—about £900 roughly speaking—within a fortnight, my account might be overdrawn, and that I would give him the company's cheque to hold in blank and one of my own cheques to adjust from time to time as occasion might arise. The company had not any assets, and were not able to pay the liabilities as they became due. Q. : Was anything said about goods?—A. : I said I would be supplying the company with goods myself during the whole of June, and that would be a reason for my account being bigger. Q. : Did you explain to him what goods?—A. : I told him I was going to amalgamate the two businesses together, and that with the idea of holding the goodwill of both my own business and the company's business I would draw cheques on both accounts. Eventually I purposed trading under the name of the Goulburn Co., altogether, so as to retain all the business I could."

On June 9, an account was opened in the name of the company at the Flinders Street branch of the bank, and two cheques, one signed by Ballantyne personally and one signed by him as managing director for the company, but both undated and

A bank in amount, were handed to Earle. At this date Ballantyne's account was overdrawn to the extent of £667 15s. against security. Some point was made of this in the court below, but their Lordships do not attach any importance to it, because it is clear that, applying the principle of *Clayton's Case* (1), the balance to his debit had run off before Sept. 5. Between June 9 and Sept. 5, both accounts were operated on by payment in of sums to credit, and the drawing of cheques on them. On Sept. 5, 1898, Ballantyne's account was overdrawn to the extent of £1,354 15s. 10d. against security amounting to £335, showing a net debit of £1,019 15s. 10d., while the company's account was in credit to the extent of £430 1s. 7d., and security was held by the bank amounting to £652, showing a net credit of £1,082 1s. 7d. On that date Ballantyne called at the bank, and Earle mentioned to him the state of the accounts. Ballantyne then suggested that the accounts should be adjusted by making a transfer from the company's account, and by his direction the company's blank cheque was filled up with the sum of £1,022, and dated Sept. 5, 1898, and it was initialled by Ballantyne. The amount of the cheque was on the same day debited to the company and credited to Ballantyne's account.

This is the first sum claimed in the action. On Sept. 30, 1898, a similar transaction took place. Another blank cheque of the company which had been given to Earle in place of the previous one was filled up by Ballantyne's directions with the sum of £668, and initialled by him. The amount was credited to Ballantyne's account, which was then overdrawn to the amount of £667 4s. 1d. This is the second amount in question. On Nov. 5, 1898, a cheque of that date of the company for £619 2s. 10d. was paid over the counter to the credit of Ballantyne's account in the ordinary way. At that date, Ballantyne's account was overdrawn to the extent of £619 2s. 10d. against security amounting to £228. This is the third and last sum claimed. To complete the story, it appears that, on Nov. 25, 1898, Ballantyne's account was in credit, and the company's account was overdrawn. Earle, without any communication with Ballantyne, filled up his blank cheque in favour of the company with the amount of £231 2s. 8d. and placed it to the credit of the company's account. This has not been objected to.

On Jan. 18, 1899, the company went into liquidation, and in the following March Ballantyne's estate was placed under sequestration. Earle stated in his evidence that he had no suspicion of Ballantyne's financial difficulties until December, 1898, and no attempt was made to fix him with earlier notice. It should be mentioned, as the court below attached some importance to it, that, in July, 1898, Ballantyne sold four of the company's shares to a Mr. Stone, and another share to a Mr. Shingler, who continued to hold them until the liquidation. In the view which their Lordships take of the transactions this circumstance does not, however, appear to them material.

The company's case as originally pleaded was, in effect, that the above-mentioned sums were paid to the bank in breach of Ballantyne's duty as managing director, for the purpose of discharging his private indebtedness to the bank, and that the bank had notice thereof; but in the course of the trial, the company obtained leave to amend, and set up the case that the transactions in question were ultra vires of the company. The Primary Judge found that the bank had acted in good faith and without notice of any irregularity and breach of trust on the part of Ballantyne, and that the transactions were not ultra vires of the company. The Full Court held that the transaction entered into if carried out would have been ultra vires, and that it was ultra vires as carried out whatever agreement was entered into. It is a little difficult to see what it exactly was that is said to have been ultra vires of the company. Ballantyne's proposal to work his own business in connection with that of the company as disclosed by him to Earle was certainly not ultra vires. Nor was the giving of blank cheques for the purpose of adjusting the two banking accounts in itself ultra vires. It is not a prudent or very business-like act of a manager of a company or anybody else to intrust another with a blank cheque, but no liability is incurred until the cheque is made use of, and the fact and extent of liability will then

depend on the circumstances of the case. If Earle had taken on himself to fill up a blank cheque on the company's account, he would very likely have imposed on the bank the obligation of showing that the company was at that date indebted to Ballantyne in the amount. But he did not do this. Both on Sept. 5 and on Sept. 30 the cheque was filled up under Ballantyne's direction and with an amount authorised by him on behalf of the company. The transaction, therefore, was precisely the same as if the company's cheque for the amount in favour of Ballantyne had been handed to the bank with directions to place the amount to Ballantyne's account. This was in fact the form of the third transaction in question. Counsel for the company admitted that, if Ballantyne was indebted to the company at the respective dates of the three cheques in the amounts for which they were drawn, no question could be raised.

The question, therefore, is narrowed to this: whether there was any duty on the part of the bank or its manager to inquire into the state of the account between Ballantyne and the company. There is no evidence that Earle knew that the company was not indebted to Ballantyne, or that the latter was not justified in filling up the cheques for the amounts they bear, and Earle states in his evidence that his belief was that any transfer which Ballantyne made was simply transferring money that the company was owing to him. The course of business as described to Earle would necessarily result in cross-accounts between Ballantyne and the company, and probably in the latter becoming indebted to Ballantyne, and, indeed, there would be no objection in the company making advances to Ballantyne to enable him to meet his engagements for butter on their account.

The law is well settled that, in the absence of notice of fraud or irregularity, a banker is bound to honour his customer's cheque (*Gray v. Johnstone* (2); *Thomson v. Clydesdale Bank* (3)), and is entitled to set off what is due to a customer on one account against what is due from him on another account, although the moneys due to him may in fact belong to other persons: *Union Bank of Australia v. Murray-Aynsley* (4). On the other hand, a banker is not justified of his own motion in transferring a balance from what he knows to be a trust account of his customer to the same customer's private account: *Re Gross, Ex parte Kingston* (5). Their Lordships are of opinion that Earle was not bound to inquire into the state of the accounts between the parties. He had no materials to enable him to do so, and it is difficult to suggest anyone of whom he could have made inquiry other than Ballantyne himself. Their Lordships, therefore, hold that the bank is not affected with notice of any irregularity on Ballantyne's part.

The learned Chief Justice seems to have thought that there was some agreement and intention on the part of Earle and Ballantyne to discharge the latter's previous indebtedness to the bank out of the company's money. Questions were also put to Earle in his cross-examination as to his view of the propriety of the transactions in other circumstances. It is possible that Earle was imperfectly acquainted with the law relating to joint stock companies, and that he placed some, and perhaps undue, reliance on the fact of Ballantyne being sole owner of the shares. But the bank is bound only by Earle's acts and knowledge, and not by his opinions on legal questions. In their Lordships' judgment, the evidence does not warrant the inference of an agreement between Earle and Ballantyne to discharge the latter's private debts out of the company's money, and the cheques were not in fact applied (as assumed by the Chief Justice) in discharge of Ballantyne's indebtedness existing on June 9.

Their Lordships will humbly advise His Majesty that the order of the full court of Oct. 11, 1900, should be discharged, and that there should be substituted for it an order dismissing the company's appeal to the full court with costs. The company will also pay the costs of this appeal.

Appeal allowed.

Solicitors: *Wadeson & Malleeson; Flegg & Son.*

[*Reported by C. E. MALDEN, ESQ., Barrister-at-Law.*]

EDWARD LLOYD, LTD. v. STURGEON FALLS PULP CO., LTD.

KING'S BENCH DIVISION (Bruce and Phillimore, J.J.), June 7, 8 and 28, 1901

[Reported 85 L.T. 162]

Warranty—Collateral to contract—Oral proof of warranty—Enlargement of warranty in contract—Proof of breach of warranty.

Oral evidence is admissible to prove a verbal warranty respecting a matter on which a written contract is wholly silent even though the only consideration for the warranty is the contract to which it is collateral, but not to enlarge the scope of a warranty which is contained in the written contract. Evidence is also admissible to prove a breach of warranty whether collateral or contained in the written contract.

Arbitration—Arbitrator—Jurisdiction—Amendment of pleadings—Discretion.

An arbitrator **held** to have a discretion to allow amendments to points of claim, defence, and counterclaim filed in the arbitration on such terms as he might think fit to enable the matters in dispute to be settled.

Notes. Considered: *Re Crighton and Law Car and General Insurance Corpn.*, 1910, 2 K.B. 738. Referred to: *Harrison v. Knowles and Foster*, [1917] 2 K.B. 606.

As to conditions and warranties, see 34 HALSBURY'S LAWS (3rd Edn.) 40 et seq.; and as to the powers of an arbitrator to amend see *ibid.*, vol. 2, pp. 34-38. For cases see 39 DIGEST 414 et seq., and 2 DIGEST (Repl.) 575, 576.

Cases referred to:

- (1) *Chanter v. Hopkins* (1838), 4 M. & W. 399; 1 Horn & H. 377; 8 L.J.Ex. 14; 3 Jur. 58; 150 E.R. 1484; 39 Digest 447, 753.
- (2) *Wain v. Warblers* (1804), 5 East, 10; 1 Smith, K.B. 299; 102 E.R. 972; 12 Digest (Repl.) 21, 1.
- (3) *Kain v. Old* (1824), 2 B. & C. 627; 4 Dow & Ry. K.B. 52; 2 L.J.O.S.K.B. 102; 107 E.R. 517; 39 Digest 475, 983.
- (4) *Morgan v. Griffith* (1871), L.R. 6 Exch. 70; 40 L.J.Ex. 46; 23 L.T. 783; 19 W.R. 957; 12 Digest (Repl.) 142, 894.
- (5) *Erskine v. Adeane* (1873), 8 Ch. App. 756; 42 L.J.Ch. 849; 29 L.T. 234; 38 J.P. 20; 21 W.R. 802, L.J.J.; 12 Digest (Repl.) 142, 895.
- (6) *De Lassalle v. Guildford*, [1901] 2 K.B. 215; 70 L.J.K.B. 533; 84 L.T. 549; 49 W.R. 467; 17 T.L.R. 384, C.A.; 12 Digest (Repl.) 143, 899.

Special Case stated by arbitrator.

On May 2, 1900, the claimants and the defendants agreed to refer to arbitration, "all points in dispute in reference to the contract for the sale and purchase of Sturgeon Falls."

On June 14 the claimants delivered their points of claim, accompanied by certain particulars. On July 9, 1900, the defendants delivered their points of defence and counterclaim, and on July 12 delivered further particulars of such points of defence and counterclaim. On July 19 the claimants delivered amended points of claim, and on July 21 the defendants delivered amended points of defence and counterclaim. The claimants delivered a reply on July 23. The defendants delivered further particulars of their points of defence and counterclaim on Aug. 11, 1900. The arbitration was duly entered upon in Montreal, in the province of Quebec, on Aug. 27. The terms of the contract referred to in the amended points of claim, so far as the same were in writing, were contained in three letters which passed between the parties dated Dec. 30, 1899, Jan. 1, 1900, and Jan. 2, 1900, and were

marked respectively S., T., and U. The claimants were in possession of the property in question, but at the time of the transfer of the title deeds and securities a paper writing was delivered by the claimants to the defendants, which stated that the deeds were signed without prejudice to any claims for misrepresentation.

The claimants sought to give evidence that the contract between the parties was not confined to the documents, S., T., U., but that among the terms of the contract (which they claimed was partly in writing and partly verbal) upon which they purchased the properties in question, or, in the alternative, that, among the matters verbally warranted to them by the defendants, and in consideration of which they agreed to and did enter into the contract of purchase, were the following: (a) That water power to the extent of 12,000 horse power could and would, within a reasonable time and at an expense not exceeding 12 dollars per horse power, be developed at Sturgeon Falls without the utilisation of any other falls upon the Sturgeon River; (b) that there was an inexhaustible supply of pulpwood upon the area comprised in the government concession, and more than the claimants, operating on the scale contemplated by the parties or any other possible extension of such scale, could exhaust within twenty-one years; (b 1) that the cost of cutting and delivering at the mill at Sturgeon Falls logs for pulp making was 1 dollar 60 cents to 2 dollars per cord and would never exceed 2 dollars per cord; (c) that the building and works which had been partially erected and which were intended for the purpose of a pulp and paper mill had been erected with reasonable care and of suitable materials and according to proper plans, and were in fact reasonably suited for the purposes of a paper and pulp mill; (d) that the buildings and works were so far carried towards completion that they could and would be completed, and paper would be running over the machines by Mar. 1, 1900; (e) that 20,000 cords of pulpwood would be at the mill on Mar. 1, 1900, to enable the claimants to proceed then with the operating of the mill; (f) that there was no contract or agreement which interfered with the rights of the claimants in respect of the property in question or restricted their use or enjoyment thereof.

Paragraph 9 of the Special Case stated that the claimants sought to give evidence before the arbitrator of the fact that the whole of the 12,000 horse power was necessary for the claimants' purposes, that in place of there being a constant supply day and night of 12,000 horse power, the power did not exceed 4,000 horse power, and that there were no means of increasing this, and, therefore, the property was practically useless and valueless for the purposes of the claimants. The claimants also sought to give evidence before the arbitrator (para. 10) that it was absolutely essential to the contract that there should be an ample supply of pulpwood for twenty-one years and that in fact there was not a supply for one year; (para. 11) that the buildings and works in part erected were utterly unfit for the purpose of a mill, the purposes intended, and known to both parties, and that the buildings would have to be entirely torn down and rebuilt; (para. 12) that the buildings which they claimed should have been finished by Mar. 1, 1900, would require a long time to complete, that the 20,000 cords of pulpwood, which they claimed should have been ready on Mar. 1, 1900, were not ready; that, by reason of the delay in the commencement of operations, very large loss had been occasioned to the claimants; (para. 13) that certain alleged contracts which they claimed were not made known to them until after the purchase were now attempted to be put forward by the defendants whereby (among other burdens) the right to use the water powers of the Sturgeon Falls and of the upper falls on the river for electric purposes would be curtailed, and thus a means of acquiring an increased power for the purposes of the mill, and for the purposes of profit, would be closed to the claimants, and they claimed that thereby the value of the property to the claimants would be seriously impaired. They also sought to give evidence that while at the time of taking possession of the property in question and delivering to the defendants the document stating that they had signed the deeds without prejudice to any claims for misrepresentation, they had become aware in part of the extent of the representations

A made by the defendants in regard to the buildings and works at Sturgeon Falls and the time when the same could be completed, they had no knowledge of the falsity of the several other representations above set out, particularly those in regard to the water power and the extent and cheapness of the wood supply, and continued down to and after the time of so taking possession and delivering that document to reply upon the several representations, and but for those representations and their continued reliance thereon they would not have entered into possession of the property.

B The questions for the opinion of the court were: (a) Whether evidence was admissible to add to or vary the contract as disclosed by the written documents S., T., U., and to support the claims of the claimants to give the evidence already mentioned; (b) whether the points of claim and defence and counterclaim alone constituted "the points in dispute in reference to the contract" referred to in the agreement between the parties of May 2, 1900, or were in the nature of pleadings or particulars which were capable of amendment by the arbitrator, and whether the arbitrator could amend the pleadings so as to order the rescission of the contract; (c) in the event of an answer of the court to question (a) being in the affirmative, and the answer to question (b) was that the points of claim and defence and counterclaim alone constituted the points in dispute referred to the arbitrator, whether D the documents permitted of the evidence which the claimants sought to give being given; and (d) whether the word "liabilities" in the letter marked S. was limited to the indebtedness of the company referred to in para. 3 (b) thereof, or included all the indebtedness of the company, or was parol evidence admissible to show the meaning attached to the word by the parties when entering into the contract.

The letter marked S., was as follows:

E "Daily Chronicle" Paper Mills, 12, Salisbury Square, Fleet Street, E.C., Dec. 30, 1899.—Ernest A. Bremner, Esq., Sturgeon Falls Pulp Co., Ltd., 78, Queen Victoria Street, E.C.—Dear Sir,—Sturgeon Falls Pulp Co., Ltd.—
F Referring to our various interviews and conversations re the above, we hereby offer you ninety thousand pounds (£90,000) for the entire rights, assets, and liabilities of the above company, including the liabilities attaching to existing
G contracts as at this date, and the Canadian government concession, dated Oct. 6, 1898, subject to the following conditions—viz.: (1) The approval of the titles to the property of the company by our solicitors. (2) That you guarantee an effective water power, when fully developed, of not less than 12,000 horse power. We agree to develop the same at our expense on the lines planned by your engineer (we paying said engineer's expenses) and under his direction and instructions, which shall be given in writing. If within twelve months from the completion of the full development of the water power, which shall be proceeded with forthwith with all due diligence under the instructions of your engineer as before mentioned, the power should at any time fall below 12,000 effective horse power a reduction to be made in the purchase price of five pounds (£5) for every effective horse power below 12,000. (3) (a) The price mentioned above is to be for the property of the company as it stood on June 1, 1899. All expenditure since that date upon the mills, machinery, etc., is to be paid over by us, plus 10 per cent. upon the ascertained sum. It is understood that it is very roughly estimated at £45,000, but we agree to take the actual figures in the company's books, which are to be verified by our accountants, £25,000 of this to be paid in each on conveyance of the property, and the balance in six months, when the actual figures are ascertained and verified. (b) We agree to take over the liabilities of the company as under: £10,000 repayable Nov. 30, 1900; £10,000 repayable in three years from May 1, 1899; £20,000 repayable at par in three years from May 1, 1899, or in seven years at 103½, at our option. Debt to be reduced meanwhile at the rate of £2,000 a year. All the above carries interest at the rate of 6 per cent. per annum. (c) The remaining £50,000 of the £90,000 to be paid in a form of instalments that may be mutually agreed, over a period not exceeding three years. All the above carries interest at the rate of 6 per

cent. per annum. It is understood that we take over the property free of any agreement for the sale of the product of the paper mills, it being an essential that we have the disposal of the paper beginning with the starting up of the mills. We have made this offer after very careful consideration, and we are not prepared to amend it, and shall require a reply accepting or declining not later than twelve o'clock noon on Tuesday next, Jan. 2, 1900.—Yours faithfully, pp. Edward Lloyd, Ltd.; Frank Lloyd, Managing Director."

The letter marked T. was as follows :

"Jan. 1, 1900.—Messrs. Edward Lloyd, Ltd., 12, Salisbury Square, E.C.—Dear Sirs, Sturgeon Falls Pulp Co., Ltd.—Your offer of Dec. 30, 1899, was submitted to a meeting of the above company held to-day, and it was agreed to accept the same with the following provisions—viz., The Sturgeon Falls Pulp Co., Ltd., whilst undertaking not to negotiate further with the Manufacturers' Paper Co. of New York for the sale of paper made at Sturgeon Falls, or of the property itself, deem it necessary to protect themselves in the following manner : If the Manufacturers' Paper Co. of New York should bring an action against the Sturgeon Falls Pulp Co., Ltd., calling upon them to implement an agreement which was proposed but not concluded for the sale of paper, the Sturgeon Falls Pulp Co., Ltd., undertake to defend such action by every reasonable means in their power, in the ordinary courts and also in the Court of Appeal, at their own expense and without cost to Edward Lloyd, Ltd. If, however, the Manufacturers' Paper Co. of New York should win such an action, Edward Lloyd, Ltd., would have to undertake the fulfilment of the proposed agreement, which provides for the sale of paper manufactured at Sturgeon Falls to the Manufacturers' Paper Co. of New York at the price of 164 dollars 25 cents per 100lb. free on cars at Sturgeon Falls. Should any of the paper be disposed of by Edward Lloyd, Ltd., previous to a decision in the above-mentioned action, the Sturgeon Falls Pulp Co., Ltd., agree to indemnify the said Edward Lloyd, Ltd., against loss in respect thereto. We may say we have been advised by our solicitors and are of strong opinion ourselves that the Manufacturers' Paper Co. of New York have no case against us, but it is deemed necessary to make this provision in our acceptance. In acknowledging this acceptance of our offer, please say if you agree to the provisions mentioned above.—Yours faithfully, pro the Sturgeon Falls Pulp Co., Ltd., Managing Director."

The letter marked U. was as follows :

"Daily Chronicle Paper Mills, London Office, 12, Salisbury Square, Fleet Street, London, E.C., Jan. 2, 1900.—The Sturgeon Falls Pulp Co., Ltd., 78, Queen Victoria Street, E.C.—Dear Sirs,—We are in receipt of your letter of 1st inst., accepting our offer of Dec. 30, 1899, and we agree to the provisions therein mentioned. Yours faithfully, Edward Lloyd, Ltd.; Harry Lloyd, director."

Asquith, K.C., Rawlinson, K.C., Manisty, K.C., and Herbert Neild for Edward Lloyd, Ltd.

Sir E. Clarke, K.C., Haldane, K.C., Frank Russell, and P. Clarke for the Sturgeon Falls Pulp Co., Ltd.

Cur. adv. vult.

June 28, 1901. **BRUCE, J.**, read the following judgment : We propose to answer categorically the questions submitted to us. On the first part of question (a) counsel for Edward Lloyd, Ltd., has not contended before us that evidence is admissible to add to or vary the contract as disclosed by the written documents S., T., U., and we are of opinion that evidence is not admissible to add to or vary the contract so disclosed by those documents. The question whether evidence is

A admissible to support the claims of the claimants as set up in the Case, or any of them, renders it necessary that we should consider the nature of these claims. In the first instance it will be convenient to consider the averment that the claimants sought to give evidence that among the matters verbally warranted to them by the defendants, and, in consideration of which they agreed to enter into the contract of purchase, were the following: (a) That water power to the extent of 12,000 horse power could and would within a reasonable time and at an expense not exceeding 12 dollars per horse power be developed at Sturgeon Falls without the utilisation of any other falls upon the Sturgeon river; (b) that there was an inexhaustible supply of pulp wood upon the area comprised in the government concession, and more than the claimants' operations on the scale contemplated by the parties could exhaust within twenty-one years. The questions raise the point whether the defendants

B (i) are entitled to give oral evidence of warranty forming part of the consideration of the contract of purchase and not contained in the letters forming the written contract of purchase; or (ii) are entitled to give oral evidence to extend the scope of a warranty contained in the letters. There may be a distinction between the two cases, but it will be convenient in the first instance to consider generally whether oral evidence is admissible to establish a warranty not contained in the written

C contract.

D It becomes important to consider what is a warranty. A warranty in a sale is not one of the essential elements of the contract, for a sale is none the less complete and perfect in the absence of a warranty. But it is a collateral undertaking, forming part of the contract by the agreement of the parties, expressed or implied: see BENJAMIN ON SALE, pt. 2, ch. 1. LORD ABINGER in *Chanter v. Hopkins* (1) says

E (4 M. & W. at p. 404):

"A warranty is an express or implied statement of something which the party undertakes shall be part of a contract, and, though part of the contract, yet collateral to the express object of it."

F The important point to be remembered is that a warranty in consideration of which the purchaser enters into a contract of sale is part of the contract, and, although it involves a stipulation collateral to the contract, yet it is not an independent or collateral contract. Of course it is possible to imagine a case in which for good consideration an independent contract of warranty should be entered into. As, if

G a man sold a horse for fifty guineas without a warranty, and at the time of sale or after, in consideration of ten guineas paid to him over and above the price, he warranted the horse to be sound, in that case the contract of warranty would be an independent and collateral contract. But in the ordinary case where a man is induced to enter into a contract by reason of a warranty, his entering into the contract is the consideration for the warranty and there is no other consideration for the warranty, and the warranty, therefore, forms part of the contract. *Wain v. Warblers*

H (12) is sufficient authority to establish that the consideration for an agreement is an essential part of the agreement, and where a contract is required to be in writing the consideration must be stated in the writing. The provisions of the Mercantile Law Amendment Act, 1856, s. 3, which establish an exception to this rule in one particular instance, do not affect the general principle.

I The application of the principle is well illustrated by *Kain v. Old* (3). The declaration alleged that, in consideration that the plaintiff would buy of the defendant's testator a ship at a price mentioned, the testator promised that the ship was copper bolted. It then alleged that the ship was not copper bolted, and the plaintiff claimed damages. It was proved at the trial that the defendant's testator delivered to the plaintiff an instrument describing the ship as copper bolted; but this instrument the court held could not be regarded as an instrument of contract. The bill of sale of the ship was held to be the only instrument of contract, and that instrument did not describe the ship as copper bolted. The court held that the description of copper bolted in the first-mentioned paper amounted to a representation only, and

could not be regarded as part of the contract. The plaintiff, therefore, failed in establishing the warranty. ABBOTT, C.J., in delivering the judgment of the court said (2 B. & C. at p. 634):

"If the contract be in the end reduced into writing, nothing which is not found in the writing can be considered as part of the contract. A matter antecedent to and dehors the writing may in some cases be received in evidence as showing the inducement to the contract, such as a representation of some particular quality or incident to the thing sold. But the buyer is not at liberty to show such a representation unless he can also show that the seller, by some fraud, prevented him from discovering a fault which he, the seller, knew to exist."

It is clear from the language used by the Chief Justice that the court regarded the representation that the ship was copper bolted as the inducement to the plaintiff to purchase the ship, yet, as the contract of purchase was in writing and contained no mention of the representation, it was held that in the absence of fraud no evidence could be given of the representation. It would seem to follow from the principle laid down in *Kain v. Old* (3) that where the only consideration for a warranty is the contract to which the warranty is collateral, and the contract is expressed in an instrument in writing which contains no mention of the warranty, that oral evidence of the warranty is not admissible.

But in more recent times cases have been decided which are difficult to reconcile with the older cases, of which *Kain v. Old* (3) is an example. In *Morgan v. Griffith* (4) the plaintiff agreed to hire of the defendant some grass land on the terms of a lease, which was to be signed at some future time; he entered upon the land and found it overrun with rabbits. When the lease was tendered to him, he refused to execute it or to continue to hold the land unless the defendant undertook to destroy the rabbits. The defendant refused to insert a term in the lease, but he gave the plaintiff a verbal promise that he would do so. The plaintiff then executed the lease, which contained a stipulation that he should not shoot, hunt, or sport on the land. The defendant failed to destroy the rabbits, and the plaintiff brought the action to recover compensation for damage done to the grass in consequence of the breach of promise by the defendant. The plaintiff sought to give in evidence the verbal promise. The defendant objected on the grounds that there was no consideration for the verbal promise other than the lease, and that, therefore, the verbal promise could not be treated as a collateral contract. But the court, although it did not suggest there was any other consideration for the verbal promise than the signature of the lease, held that the verbal promise was entirely collateral to the lease. I own I feel it exceedingly difficult to understand how the verbal promise could be treated as a contract, entirely independent of the lease, when the granting of the lease formed the consideration for the promise. It is not easy to see how the court distinguished between the case of a term collateral to the main object of the contract, which commonly exists where a warranty forms part of the contract of sale, and a very different case where an independent but subsidiary contract is entered into upon fresh considerations contemporaneously with the principal contract and having relation to it.

It is now, however, too late to question the authority of *Morgan v. Griffith* (4), which was decided so long ago as the year 1871. In 1873 a case almost precisely similar was decided in the same way by two most distinguished judges, JAMES and MELISH, L.JJ. — *Erskine v. Adane* (5)—and the same question has recently received full consideration in the Court of Appeal in *De Lassalle v. Guildford* (6). These authorities are of course binding upon this court, and I feel we can no longer act upon the principle laid down in *Kain v. Old* (3).

I think, therefore, we must decide that the verbal warranty alleged in (b) (relating to the supply of pulpwood) must be regarded as a term so far collateral to the contract set out in the letters S., T., U., that oral evidence is admissible to establish the

A warranty. This decision, I think, applies to (b), (c), (d), and (e) but I do not think it applies to (a) (relating to water power). The written contract (the letter marked S) in its second paragraph contains a clause relating to a guarantee of an effective water power when fully developed of not less than 12,000 horse power. On the authority of the cases I have mentioned, I think evidence, as I have already said, may be given to prove a verbal warranty respecting a matter on which the written contract is wholly silent. But the authority of the cases does not, I think, extend so far as to enlarge the scope of a warranty which is contained in the written contract, and, as the written contract contains a warranty respecting the water power, I think it must be taken that the written contract expresses the agreement of the parties on that subject, and that oral evidence is not admissible to prove the matters alleged in (a). I think the matter referred to in (f) stands upon the same footing as (a), and that the evidence proposed to be given under the heading (f) is not admissible, because it appears from letter "T." forming part of the written contract that provisions were made in the written contract respecting an agreement or alleged agreement which in a possible event might interfere with or restrict the use or enjoyment by the claimants of the property.

D As to the part of question (a) which refers to para. 9 of the Special Case, such evidence is, we think, admissible only so far as it is relevant to prove the breach of the guarantee contained in the written contract. In answer to so much of question (a) as refers to para. 10 of the Case, we think the evidence sought to be given by the claimants is admissible. In answer to so much of question (a) as refers to para. 11, if the claimants establish the warranty alleged under (c), we think they are entitled to give the evidence mentioned in para. 11 of the Case. In answer to so much of question (a) as refers to para. 12 of the Case, we think, if the claimants establish the warranty alleged in (d), that they may give evidence that the buildings and works, which were warranted at the date of the contract to be so far carried towards completion that they could be completed by Mar. 1, 1900, were not so far carried towards completion and could not have been completed by Mar. 1, 1900. Further, we think that, if the claimants established the warranty alleged in (e) they may give, to prove the breach of that warranty, evidence such as is mentioned in the later part of para. 12 in the Case.

G In answer to question (b), we are of opinion that all points in dispute between the parties in reference to the contract for sale and purchase of Sturgeon Falls are included in the submission to arbitration, and that the points of claim and the defence and counterclaim are in the nature of pleadings or particulars which are capable of amendment by the arbitrator. If any points in dispute arise between the parties in reference to the said contract which are not disclosed by these pleadings and particulars, we are of opinion that it is in the discretion of the arbitrator to allow amendments on such terms as he may think fit in order to allow the parties to raise such points, and that if the claimants claim rescission of the contract it will be open to the arbitrator to make any amendment he may think fit to enable the claimants to give evidence of facts which entitle them to rescind the contract. If such question is raised it will be competent to the arbitrator to decide whether the claimants are or are not entitled to a rescission of the contract. But, while thus answering the questions submitted to us, we do not wish to be understood as expressing an opinion that the facts disclosed to us lead to the conclusion that the claimants are entitled to a rescission of the contract. They seem to have entered into possession of the property, and it seems to us, in the state of circumstances when now arisen, difficult to suppose that they can now be entitled to have the contract rescinded. We have said so much only in order that our answer to the question may not be misunderstood. We have no desire to take upon ourselves the decision of a question which we think it is for the arbitrator to decide. In answer to question (d) we are of opinion that it is for the arbitrator to construe the letter of Dec. 30 and to determine the meaning of the word "liabilities" as used in the letter. We are of opinion that parol evidence is not admissible to show the meaning

attached to the word by the parties when entering into the contract. So far as we can judge, we see no ground for limiting the word "liabilities" in the first paragraph of the letter to the particular liabilities referred to in para. 3 (b) of the letter. But as we have said, it is for the arbitrator, and not for us, to determine this last point.

PHILLIMORE, J.—I entirely concur with the judgment of my learned brother, and for the reasons which he has given.

Order accordingly.

Solicitors: *Hopwood, Stroughill & Hopwood; Charles Russell & Co.*

[*Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.*]

DULANEY AND OTHERS v. MERRY & SON

QUEEN'S BENCH DIVISION (Channell, J.), January 25, February 9, 1901]

[Reported [1901] 1 K.B. 536; 70 L.J.K.B. 377; 84 L.T. 156; 49 W.R. 331;
17 T.L.R. 253]

Deed of Arrangement—Deed executed by foreign debtor abroad—Valid in foreign country—Property of debtor in England—Need for deed to be registered—“Debtor.”

Traders domiciled abroad, with a branch in England managed by a manager, executed in the country of their domicile a deed by which they assigned all their estate to trustees for the benefit of their creditors. The deed was good according to the law of the foreign country, and by that law the property became duly vested in the trustees. While goods, the property of the traders in England, were in the possession of the agent of the trustees, judgment creditors of the traders, who had obtained judgment in England, caused execution to be levied on the goods. On a claim to the goods by the trustees in interpleader proceedings,

Held: on the true construction of the Deeds of Arrangement Act, 1887, the provisions of that Act did not apply to a deed of arrangement valid in a foreign country executed by a foreign debtor abroad; therefore, the deed, to be valid, need not be registered in England under s. 5 of the Act, and the trustees had established a good title against the execution creditors.

Per CHANNELL, J.: “Debtor” in the Act meant “debtor subject to our jurisdiction” and “debtor subject to the Bankruptcy Acts.”

Notes. The Deeds of Arrangement Act, 1887, was repealed by the Deeds of Arrangement Act, 1914 (2 HALSBURY'S STATUTES (2nd Edn.) 321), which largely re-enacts the provisions of the Act of 1887. For ss. 2, 4, 5, 6 (2) and 13 of the Act of 1887, referred to in the judgment, *infra*, see ss. 32, 1, 2, 5 (2) and 10 of the Act of 1914. For minor amendments of the latter Act, see Administration of Justice Act, 1914, s. 22, and Finance Act, 1949, Sched. 11, Part 5.

As to registration of deeds of arrangement, see 2 HALSBURY'S LAWS (3rd Edn.) 612-617; and for cases see 5 DIGEST (Repl.) 1151 et seq.

Cases referred to:

- (1) *Ho. A. B. & Co.*, [1900] 1 Q.B. 541; 69 L.J.Q.B. 375; 82 L.T. 169; 16 T.L.R. 238; 7 Mans. 134, C.A.; affirmed sub nom. *Cooke v. Charles A. Vogeler Co.*, ante p. 660, [1901] A.C. 102; 70 L.J.K.B. 181; 84 L.T. 10; 17 T.L.R. 153; 8 Mans. 113, H.L.; 4 Digest (Repl.) 25, 205.
- (2) *Sill v. Warswick* (1791), 1 Hy. Bl. 665; 126 E.R. 379; 11 Digest (Repl.) 384, 454.
- (3) *Alcock v. Smith*, [1892] 1 Ch. 238; 61 L.J.Ch. 161; 66 L.T. 126; 8 T.L.R. 222; 36 Sol. Jo. 199, C.A.; 11 Digest (Repl.) 385, 462.
- (4) *Cammell v. Sewell* (1858), 3 H. & N. 617; 27 L.J.Ex. 447; 4 Jur.N.S. 978; affirmed (1860), 5 H. & N. 728; 29 L.J.Ex. 350; 2 L.T. 799; 6 Jur.N.S. 918; 8 W.R. 639; 157 E.R. 1371, Ex. Ch.; 11 Digest (Repl.) 524, 1372.
- (5) *Re Savers, Ex parte Blain* (1879), 12 Ch.D. 522; 41 L.T. 46; 28 W.R. 334, C.A.; 4 Digest (Repl.) 24, 203.

Interpleader Issue.

Danckwerts, K.C. (Carrington with him) for the trustees.

Muir Mackenzie, K.C. (Willes Chitty with him) for the judgment creditors.

Cur. adv. vult.

Feb. 9, 1901. **CHANNELL, J.**, read the following judgment.—This was an interpleader issue tried before me without a jury, and it raises a difficult question whether the plaintiffs, who are trustees under a deed of assignment for the benefit of creditors executed by foreign debtors in the country of their domicile, can establish in the courts of this country a good title as against execution creditors to goods in this country belonging at the date of their assignment to the debtors, without the deed of assignment being registered pursuant to the Deeds of Arrangement Act, 1887.

The facts are not in dispute. Christian Defries and Minnie Defries, his wife, carried on business as partners under the style of "the Charles A. Vogeler Co.," manufacturers and vendors of drugs and patent medicines. They were domiciled in the State of Maryland. They carried on business at Baltimore and also in London, Paris, Sydney, and elsewhere. Their business in London was managed for them by a manager. They resided at Baltimore and, so far as appears, have never been in England. By deed, dated Dec. 18, 1899, and executed at Baltimore, Christian and Minnie Defries assigned all their estate, real and personal and mixed and wheresoever situated, to Henry S. Dulaney (who also was domiciled in Maryland), for the benefit of their creditors. Dulaney afterwards petitioned the circuit court of Baltimore city, and obtained authority to "administer his trust under the authority of that court." Subsequently the other plaintiffs in the present issue were duly appointed co-trustees with Dulaney. They also are domiciled in Maryland.

It was proved before me by the evidence of experts that the deed was good according to the law of Maryland, and that the property became duly vested in Dulaney; that this was effected by the operation of the deed—that is, by the act of the parties, and not of the court; that the proceedings in court were analogous to the administration of an estate in our Courts of Chancery, and operated to give protection and indemnity to the trustee; that the deed could have been impeached within a limited time by bankruptcy proceedings in Maryland, but that the period had elapsed without any such proceedings having been taken, and that the deed was consequently now unimpeachable in Maryland; that under the deed, and also under the bankruptcy law now established in Maryland, local creditors would have no preference over foreign creditors; and that English creditors and other foreign creditors would rank *pari passu* with the American creditors in the administration of the estate under the deed. It further appeared that after the execution of the deed, proceedings were taken under the bankruptcy law of this country to make the "Charles A. Vogeler Co." bankrupt, on the ground, among others, that the

execution of the deed was an act of bankruptcy; that it had been held by the Court of Appeal, and ultimately by the House of Lords, that there was no jurisdiction to adjudicate them bankrupts as they were domiciled foreigners who had not brought themselves within the jurisdiction of our courts; and that they had not committed an act of bankruptcy available here by the execution of the deed abroad. The decision of the Court of Appeal is reported sub nom. *Re A. B. & Co.* (1), and the decision of the House of Lords has been reported sub nom. *Cooke v. Charles A. Vogeler Co.* (1), since the argument before me.

An interim receiver was appointed in those bankruptcy proceedings, but on Feb. 28, 1900, after the decision of the Court of Appeal, the receiver gave up possession of the goods of Vogeler & Co. in this country to one Buffham, the agent in this country of the plaintiffs, the trustees under the deed, acting under power of attorney for them. On Mar. 5, 1900, the defendants in this issue, who had obtained judgment against Vogeler & Co., caused execution to be levied on the goods so in the possession of Buffham, under a writ of execution which had been delivered to the sheriff on the same day. The usual interpleader proceedings were taken and I now have to decide whether the plaintiffs had a good title as against the defendants, the execution creditors. The deed of arrangement was never registered in this country under the Deeds of Arrangement Act, 1887, and it seems clear that this non-registration is the only difficulty which stands in the plaintiffs' way. But for this statute the deed is clearly sufficient to pass the property, according to the law of this country as well as according to the law of Maryland. Counsel for the defendants did, at the commencement of the case, suggest that the deed might be bad under the statute of Elizabeth, but he withdrew this point when it became clear, on the evidence of the experts, that the foreign law applicable to the deed gave no preference to native over foreign creditors.

Counsel for the plaintiffs relied on the maxim *mobilia sequuntur personam*, and quoted the judgment of Lord Loughborough in *Sill v. Warswick* (2) where he says (1 Hy. Bl. at p. 690):

"It is a clear proposition not only of the law of England but of every country in the world where law has the semblance of science, that personal property has no locality. The meaning of that is not that personal property has no visible locality, but that it is subject to that law which governs the person of its owners. With respect to the disposition of it, with respect to the transmission of it, either by succession or the act of the party, it follows the law of the person. The owner in any country may dispose of personal property. If he does, it is not the law of the country in which the property is, but the law of the country of which he was a subject which will regulate the succession."

But, although this is the general rule, it is perhaps somewhat too broadly stated in this decision; at all events the rule is subject to exceptions. I was referred by counsel for the defendants to a passage in STORY'S CONFLICT OF LAWS (s. 423a), which, after stating the law as to movables and that their disposition and the adjustment of priorities and privileges in reference to them follows the law of the domicile of their owner, proceeds:

"Exceptions may doubtless exist where the law of the country in which either movable or immovable property is situate, prescribes a different rule, which must then be obeyed."

Again, in s. 550, it is said:

"a nation within whose territory any personal property is actually situate has as entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate therein. It may regulate its transfer and subject it to process and execution, and provide for and control the uses and disposition of it to the same extent that it may exert its authority over immovable property."

The exceptions to the general rule are somewhat similarly stated in several modern text-books: see DICEY'S CONFLICT OF LAWS, p. 537; FOOTE'S PRIVATE INTERNATIONAL LAW, p. 226, but the authorities in point are few. I find, however, that KAY, L.J., in *Alcock v. Smith* (3) says ([1892] 1 Ch.D. at p. 267):

"As to personal chattels it is settled that the validity of a transfer depends not upon the law of the domicile of the owner, but upon the law of the country in which the transfer takes place. Our own law as to distress and market overt is illustrative of this. The goods of a foreigner distrained in a house tenanted by an Englishman in this country may be sold for the tenant's rent and the purchaser acquires a perfect title, whatever may be the law of the owner's domicile. So the goods of a foreigner, sold here in market overt by one who had no title to them, could not be recovered from the purchaser. In both cases the property would pass to him by our law."

Further, he quotes *Cammell v. Sewell* (4), a case in which a sale in Norway, good according to the law there, of the goods of an Englishman, was held good also by our courts.

It seems clear that a transfer of movables in this country, good by our law, would be held good, notwithstanding that it might not comply with formalities required by the law of the domicile of the owner, but there has not been quoted to me nor have I found any clear case of a transfer, good according to the law of the domicile of the owner and made there, but held bad for not conforming to the law of the country where the goods are situate. Of course registered stock, such as consols, can only be transferred according to the regulations under which the register is kept, but this, though possibly an illustration of the rule laid down by KAY, L.J., seems to depend on the special nature of the property. Some cases also were quoted by counsel for the defendants which appear to be illustrative merely of the rule that the lex fori must govern all questions of procedure and of the form of the remedy. The instance which most clearly shows how far the law of each country is applicable is that of a will. If the surviving partners of the Baltimore firm had died leaving a will, the validity of that will would depend on Maryland law. If one witness were sufficient by that law we should hold a will so witnessed good, although our law requires two witnesses. But, although we should recognise the title of the executor under the foreign will, we should require him to take out probate here and should not allow him to deal with goods in this country without taking probate. This is a distinct instance in which our law, while recognising the foreign disposition of movables, requires something further to be done here before it is acted on, but the case is probably to be accounted for by the probate being the only evidence of the title of the executor which our courts recognise and is part of the lex fori necessarily applicable.

On this part of the case, therefore, although no very distinct authority, other than the passage in STORY, can be found, I cannot doubt that counsel for the defendants is right in saying that it is within the competence of the legislature of this country to enact rules as to the passing of property situated in this country, and to say that the property in goods situated here, which has been dealt with by foreign owners in accordance with the law of their domicile, shall not pass by such dealing unless certain formalities, imposed by our law, are also complied with. Indeed, the plaintiffs do not dispute that, if our law does prohibit the transaction which he relies on in this case, effect must be given by our courts to the prohibition, though he contends, as I understand him, that our law is to be disregarded unless it goes the length of prohibiting the foreign transaction.

The question I have to decide, therefore, seems to reduce itself to one of construction of the Act of 1887. But in order to arrive at that construction we must proceed in the way very clearly defined by the LORD CHANCELLOR in the House of Lords in *Cooke v. Charles A. Vogeler Co.* (1). I may paraphrase the language and say: "If the law has intended, and has expressed its intention, that a deed executed abroad

by a foreigner shall be registered before it can pass property situate in this country, no court has any jurisdiction to disregard what the legislature has enacted. If, on the other hand, it is manifest that the language of the statute does not reach the case supposed, no court has jurisdiction to enlarge the ambit of English legislature beyond what the legislature has permitted."

It is necessary carefully to consider the Deeds of Arrangement Act, 1887. The object of the Act appears to be to secure to creditors information concerning private arrangements outside bankruptcy by making it necessary to register the deeds and to file an estimate of assets and liabilities. Creditors thus become in a position to exercise their option of coming in under the deed, or of treating it as an act of bankruptcy and having the estate administered in bankruptcy. Deeds acquire no validity by the fact of their registration, and deeds to which the Act applies would, if executed by a debtor subject to our bankruptcy law, be acts of bankruptcy. The Act, therefore, seems to be supplementary to the law of bankruptcy, and we should expect to find it made applicable to the same persons as the bankruptcy laws. The decision of the House of Lords shows that the word "debtor" in the Bankruptcy Acts is to be confined to debtors who are subject to the English bankruptcy laws, and I have come to the conclusion, though not without much doubt, that this Act must be limited in a similar way. If the Act applies to deeds executed by debtors not subject to our bankruptcy laws, its effect would be to enable the first creditors, who put in an execution, to get paid in full without the other creditors having any means of securing a rateable distribution of assets, for the deed would not be available as an act of bankruptcy as shown by *Cooke v. Charles A. Vogeler Co.* (1), and the suffering a levy by execution and sale would not be an act of bankruptcy as shown by *Re Sawers, Ex parte Blain* (5).

This result would be anomalous, and, I think, unjust, but nevertheless it may be the true construction of the statute, and some further examination of the enacting words is necessary. The first matter commented on before me was s. 2—"This Act shall not extend to Scotland." A similar clause in the Bankruptcy Act was also commented on in the case in the House of Lords, and I cannot say that it has no bearing on the point, but I myself attach very little weight to it. I think this section merely means that it is not intended by the Act to alter the law of Scotland. We have but one legislature to enact the laws for England and for Scotland, but the laws of the two countries are very different, and even when it is desired to make a law to take effect in England and in Scotland it is often impracticable, by reason of this existing difference in the laws of the two countries, to make the alterations in the law of both by the same Act of Parliament. Moreover, the law of Scotland might, so far as I know, in 1887 have already included provision for the registration of deeds, or something which would obviate the mischief intended to be remedied in England by the Act of 1887.

Passing on, s. 4 of the Act defines the deeds to which the Act is to apply, as including deeds (afterwards again specified) made by or in respect of the affairs of a debtor for the benefit of his creditors generally, otherwise than in pursuance of the law for the time being in force relating to bankruptcy. The reference here to the laws of bankruptcy is, of course, accounted for by the fact that the Bankruptcy Act then in force, as well as a prior Act and also a subsequent one, has provided for deeds being executed in certain cases, and registration of such deeds was, of course, unnecessary, but the reference seems to assume the debtor to be one subject to the bankruptcy law. If debtor is read in this section in the same way as the House of Lords read it in *Cooke v. Charles A. Vogeler Co.* (1) the present deed would not be within the Act.

Section 5 enacts that a deed to which the Act applies shall be void unless registered in a limited time. It could not have been intended that such a deed as the present should be void altogether. It must operate on the goods in Baltimore, and the legislature could never have intended to enact to the contrary. It is necessary, therefore, to read the section with some limitations, and counsel for the defendants

asks me to read it "void as to goods in this country." The next words in s. 5 show that it is contemplated that a deed to which the Act applies may be executed out of England or Ireland, but those words are required to meet the case of an absconding debtor, subject to our bankruptcy laws, who goes abroad and then executes a deed for the benefit of his creditors. The period for registration is undoubtedly so short as to be very inconvenient if it is to apply to a deed such as the present, which goes a little to show that such a deed was not contemplated, but the difficulty might perhaps be met in practice by s. 9.

Then s. 6 (2), provides that the original deed is to be produced, and that it is to be stamped with an ad valorem stamp on the value of the property passing by it. The production of the original of a foreign deed would almost always be inconvenient and sometimes impossible. Counsel for the plaintiffs pointed out that by the law of many foreign countries an original of a deed is in a notary's book, and is kept by him, and that the grantees get nothing but notarial copies. One would think that, if foreign deeds were to be included, the production of the original would be dispensed with by the Act. Further, if the Act were intended to apply to foreign deeds, the legislature would have made the ad valorem stamp on the value, not of the whole property passing, but of that within the jurisdiction. Then s. 13 seems to assume that every debtor executing a deed to which the Act applies must have his place of business or reside either in the London bankruptcy district, or in Ireland, or else in some "county court district"—i.e., either in Ireland, England, or Wales—for by the expression "county courts" English county courts, which have bankruptcy jurisdiction, are clearly meant, and not foreign courts.

Thus a critical examination of the words of the Act of Parliament seems to show that the legislature certainly had not in their contemplation a deed by foreign debtors operating on property abroad as well as property here. The fact that the legislature overlooked this particular case is, however, hardly enough to justify a court in saying that it is not included. If the operative words of the Act in their ordinary meaning clearly included the case, and there was no legislative principle by which those words could be qualified, the case must be held within the Act, notwithstanding there was reason to think that it had been in fact overlooked by the legislature. Here the operative words of the Act read shortly are "a deed made by a debtor for the benefit of his creditors shall be registered, and shall be void if not registered." Is there any legitimate way of reading these words so as not to include the deed of a foreigner? Besides the small matters in the Act on which I have commented, I think there is. Some limitation is required. The Act cannot mean that such a deed is to be void as regards the property situate abroad; as pointed out in the House of Lords all legislation is primarily territorial, and not intended to control persons not subject to the jurisdiction. It is, at least, as legitimate to read "debtor" as meaning "debtor subject to our jurisdiction" as it is to limit the word "void" and say it means "void as regards property within our jurisdiction." And when we find that in an Act in *pari materia* the word "debtor" does bear that meaning, I think it is more legitimate to put here the same limitation than a different one. I bear in mind the observation of counsel for the defendants that the House of Lords proceeded very much on the fact that bankruptcy affects the personal status, and that English legislation could not affect the status of foreigners, and, although these domiciled foreigners never submitted themselves personally to the jurisdiction of an English court, they did subject some of their goods to our English law by leaving them here, as the illustration of *KAY, L.J.*, as to the law of distress clearly shows.

It would, therefore, be within the competence of the English legislature to say that these foreigners should only transfer those goods by registered deed. But this Act is not an Act regulating the transfer of property. It includes deeds of composition and of inspectorship where no property passes, and if, therefore, there is to be a limitation in the generality of the operative words in it, that limitation would be rather on the deeds that come within it than on the property. As the Act

includes only some deeds, a limitation which takes a class of deeds—those executed abroad by foreigners—out of the Act altogether does less violence to the language of the Act than a limitation which makes some deeds, to which the Act does apply, void in part, when the Act says they are to be void altogether. On the whole it seems to me that, acting on the same authority as the House of Lords did, I am justified in putting on this Act the same limitations as they put on the Bankruptcy Act, and saying that "debtor" means "debtor subject to the Bankruptcy Acts." This interpretation has the advantage of preventing the unseemly scramble for the English goods of the foreign debtor which would take place if this deed were held to be within the supplementary branch of the law of bankruptcy as to deeds for the benefit of creditors, and yet not within the general law of bankruptcy, so that the makers of the deed would be adjudged bankrupt.

In the view I take there is no English law which requires this deed to be registered. Consequently, there is no *lex rei site* to interfere with the operation of the maxim *mobilia sequuntur personam*. I, therefore, hold that the plaintiffs have established a good title against the execution creditors and I find the issue for the plaintiffs with costs.

Judgment for plaintiffs.

Solicitors: *J. Arscott Bartrum; Gibbs, White & Strong.*

[Reported by J. A. STRAHAN, ESQ., Barrister-at-Law.]

ANGEL v. MERCHANTS MARINE INSURANCE CO.

[COURT OF APPEAL (Vaughan Williams, Stirling and Mathew, L.JJ.), March 19, 20, 24, April 7, 1903]

[Reported [1903] 1 K.B. 811; 72 L.J.K.B. 498; 88 L.T. 717; 51 W.R. 530; 19 T.L.R. 395; 9 Asp.M.L.C. 406; 8 Com. Cas. 179]

Insurance—Marine insurance—Constructive total loss of vessel—Damage giving rise to claim—Estimated cost of repairs—Value of wreck not to be taken into account.

By a policy of marine insurance the repaired value of the vessel in ascertaining whether the vessel was a constructive total loss was to be taken as £23,000. The ship ran ashore, but was temporarily repaired and brought back to England. The cost of repairs, if the ship had been reinstated, would have been £22,500, i.e., less than the repaired value.

Held: in deciding whether or not there had been a constructive total loss, the value of the damaged vessel as she lay on the rocks ought not to be added to the cost of reinstating her, and, therefore, the shipowners were not entitled to claim as for a constructive total loss.

Dictum of LORD ABINGER in *Young v. Turing* (1) (1841), 2 Man. & G. at p. 601: *not applied.*

Moss v. Smith (2) (1850), 9 C.B. 94 and *Sailing Ship Blairmore Co. v. Macredie* (3), [1898] A.C. 593, applied.

Notes. Though the present decision was overruled by the House of Lords in *Macbeth & Co., Ltd. v. Maritime Insurance Co., Ltd.* ([1908] A.C. 144) the latter decision, which concerned a loss occurring before the passing of the Marine Insurance Act, 1906, dealt with the common law rule and not with the interpretation of s. 60 (2) (ii) of the Act of 1906. The present decision has since been affirmed, so far as

A compares the Act. by *Hall v. Hayman* (1912) 2 K.B. 51. See "Notes" to s. 60 (2) (IV) in 13 HALSBURY'S STATUTES (2nd Edn.) 43, and 22 HALSBURY'S LAWS (3rd Edn.) 152 (b).

Overruled: *Macbeth & Co., Ltd. v. Maritime Insurance Co., Ltd.*, [1908] A.C. 144. Referred to: *Hall v. Hayman*, [1912] 2 K.B. 5; *Curas v. London and Scottish Assurance Corp., Ltd.*, [1935] All E.R. Rep. 246.

B As to constructive total loss of ship, see 22 HALSBURY'S LAWS (3rd Edn.) 151 et seq.; and for cases see 29 DIGEST 268 et seq.

Cases referred to:

1. *Young v. Taring* (1841), 2 Man. & G. 593; 2 Scott. N.R. 752; 133 E.R. 883; 29 Digest 271, 2196.
- C** 2. *Moss v. Smith* (1850), 9 C.B. 94; 19 L.J.C.P. 225; 14 L.T.O.S. 376; 14 Jur. 1003; 137 E.R. 827; 29 Digest 259, 2096.
3. *Sailing Ship Blairmore Co. v. Macredie*, [1898] A.C. 593; 67 L.J.P.C. 96; 79 L.T. 217; 14 T.L.R. 513; 8 Asp.M.L.C. 429; 3 Com. Cas. 241; 24 R. 893, H.L.; 29 Digest 266, 2145.
4. *Irving v. Manning* (1847), 1 H.L.Cas. 287; 6 C.B. 391; 6 L.T. 108; 10 L.T. 877; 9 E.R. 766, H.L.; 29 Digest 270, 2176.
- D** 5. *Rankin v. Potter* (1873), L.R. 6 H.L. 83; 42 L.J.C.P. 169; 29 L.T. 142; 22 W.R. 1; 2 Asp.M.L.C. 65, H.L.; 29 Digest 278, 2259.
6. *Beaver Line Associated Steamers, Ltd. v. London and Provincial Marine and General Insurance Co., Ltd.* (1899), 5 Com. Cas. 269; 29 Digest 270, 2184.
7. *Wild Rose Steamship Co. v. Japa* (1903), 19 T.L.R. 289; 29 Digest 270, 2185.
- E** 8. *Aitchison v. Lahore* (1879), 4 App. Cas. 755; 49 L.J.Q.B. 123; 41 L.T. 323; 28 W.R. 1; 4 Asp.M.L.C. 168, H.L.; 29 Digest 236, 1899.

Also referred to in argument:

Benson v. Chapman (1849), 2 H.L.Cas. 696; 8 C.B. 950; 13 Jur. 969; 9 E.R. 1256, H.L.; 29 Digest 259, 2094.

F *Fleming v. Smith* (1848), 1 H.L.Cas. 513; 9 E.R. 859, H.L.; 29 Digest 285, 2322.

Somes v. Sugrue (1830), 4 C. & P. 276, N.P.; 29 Digest 262, 2113.

Grainger v. Martin (1863), 4 B. & S. 9; 2 New Rep. 191; 122 E.R. 363; sub nom. *Martin v. Granger*, 8 L.T. 796; 11 W.R. 758; 1 Mar.L.C. 365, Ex. Ch.; 29 Digest 272, 2198.

Stewart v. Greenock Marine Insurance Co. (1844), 6 Dunl. (Ct. of Sess.) 359; 29 Digest 122, 744i.

Scottish Marine Insurance Co. v. Turner (1853), 4 H.L.Cas. 312, n.; 21 L.T.O.S. 10; 17 Jur. 631; 1 W.R. 537; 1 Macq. 334; 10 E.R. 483, H.L.; 29 Digest 209, 1678.

Kaltenbach v. Mackenzie (1878), 3 C.P.D. 467; 48 L.J.Q.B. 9; 39 L.T. 215; 26 W.R. 844; 4 Asp.M.L.C. 39, C.A.; 29 Digest 280, 2273.

H **Appeal** from a decision of BIGHAM, J., in an action brought by a shipowner against underwriters, claiming for a constructive total loss of the insured vessel.

Carver, K.C., and *Loehnis (Lewis Noad with them)* for the plaintiff.

J. A. Hamilton, K.C., and *Maurice Hill* for the defendants.

Cur. adv. vult.

I April 7, 1903. **VAUGHAN WILLIAMS, L.J.**, read the following judgment.—
This is an appeal from the judgment of BIGHAM, J., in favour of the defendants in an action claiming as for a constructive total loss on a policy on ship. The ship was wrecked on the coast of Sicily, being driven on the rocks. There was from the first the hope that the ship might be got off, but the plaintiff (the shipowner) gave a notice of abandonment to the underwriters, which they did not accept. The ship was floated and brought to Malta by the operations of the salvage association, acting for the benefit of all concerned, on the terms that they were to receive nothing unless the ship was salvaged. The cost of these operations was

afterwards assessed at £3,500. The ship was to a certain extent repaired at Malta with a view to her proceeding under steam to Cardiff for permanent repairs. The underwriters agreed with the master for the navigation by the ship's crew of the ship when repaired from Malta to Cardiff for a sum of £1,400. The repairs, somehow or other, although certified by surveyors to be sufficient, broke down almost immediately after leaving Malta; the fact being that it was only possible to get repairs of a very temporary nature done at Malta. The ship was nearly lost, but succeeded in getting into Tunis. She was again temporarily repaired there, but was not allowed to proceed to England under her own steam, and was towed to Cardiff. Estimates were obtained at Barry for the repair of the ship, but she was not actually repaired before the trial before BIGHAM, J.

BIGHAM, J., arrived at the conclusion that £22,559, less some £200 which the shipowner admitted he could not support, was the proper amount to fix as the cost of repairs. The repaired value of the ship the learned judge took as £23,000, which by the terms of the policy was to be taken as the repaired value in ascertaining whether the vessel was a constructive total loss. BIGHAM, J., in estimating the cost of repairs, did not add anything for the expenses incurred by reason of the accident which compelled the ship to put into Tunis. This accident he attributed to the perils of the sea, and thought that the temporarily repaired ship could have been insured for the voyage to England for a premium of £150; and it was for this reason that he included nothing in the expenses of repairs for expenses incurred by reason of the accident, and only included the insurance premium. BIGHAM, J., deducted from the plaintiff's estimate of repairs certain items to which objection was taken by Mr. Griggs, the expert witness called on behalf of the defendants. As to several of these items, I am not sure that I should not have arrived at a different conclusion in fact.

I do not, however, think that we ought to review the decision of the learned judge, arrived at after a five days' trial, on matters which in a sense are all questions of fact: for I treat estimates based on facts as matters of fact. A different finding on some of these objections by the underwriters would have been sufficient to make the expenses exceed the repaired value. I accept, however, as I have already said, the findings of the learned judge; and I only mention the dispute on these points to show how little the figures relied on as constituting the items of the cost of repairs or the total arrived at thereby can be relied on as factors in a mere arithmetical conclusion; especially in a case in which the learned judge thought, to use his own expression, that it was a very close thing, and so very near a constructive total loss that the underwriters might very well have paid it. The shipowner gives his notice of abandonment immediately after the marine accident. Precise estimates are, of course, impossible; and it seems to me that unless the insured shipowner is to take upon himself risks which ought not to be borne by him (such as the risk whether the ship will be got afloat at all, or, having been got afloat, will arrive at a port for temporary repairs, and ultimately at home for permanent repairs) a large margin ought to be added to the figures of cost of repairs to cover risks of this sort—risks which a prudent uninsured owner would certainly take into consideration in determining whether he should repair or sell.

There is, however, another consideration which it is suggested the prudent uninsured owner would certainly in fact have regarded in determining whether he should repair—I mean the damaged value of the ship; that is, the price which could be got for her as she lay unrepaired, which was, it was said, about £7,000. But, unfortunately, this part of the case was not very thoroughly gone into. The plaintiff in the earlier part of the trial seems to have been content to rely upon the estimates of cost of repairs exceeding the £23,000. Then, when it seemed likely that the deductions made by the judge would reduce the repairs below the £23,000, the claim to add the value of the damaged vessel was put forward and discussed, the judge, however, saying that there was no real evidence of the value. It seems unsatisfactory to have to discuss an important question of marine

insurance law in a case in which the facts, perhaps, do not raise the question at all. I do not think that it could be or was denied that the value of the damaged ship must be included in the calculation, if the ship had, in fact, been sold where she was and as she was, and the question, after sale, had been whether the circumstances justified abandonment. But it is said that this item of calculation must be disregarded if there is no such sale.

In my judgment, the "prudent uninsured owner" test was already accepted as the proper test at least down to 1873. The recognition of the test in *Irving v. Manafog* (4), in the House of Lords, and in *Rankin v. Potter* (5), also in the House of Lords, puts the matter, to my mind, beyond argument. Nor do I think that it is possible to say that *Moss v. Smith* (2), which was cited in *Rankin v. Potter* (5), had then been recognised as substituting for the "prudent uninsured owner" test an arithmetical test turning on the difference between estimated totals. The "prudent uninsured owner" test was, I think, adopted for the very purpose of covering considerations which cannot be embodied in the figures of an arithmetical calculation. I wish to observe that in *Moss v. Smith* (2), there was no approximation of the cost of repairs and repaired value, and that the alleged misdirection was a misdirection with regard to the freight (which was separately insured), inasmuch as the Chief Justice, it was said, omitted to tell the jury that, in determining whether or not there was a total loss of freight, they were to throw out of consideration the value of the ship and to consider only whether a prudent owner, acting with a view to earning freight, would have executed the necessary repairs either wholly or in part. The court held that there was no misdirection, and it is with reference to this that MAULE, J., made the observations which are relied upon as either substituting the "arithmetical" for the "prudent owner" test, or for limiting the measure in applying the prudent owner test to a contrast of the figures of cost of repairs and repaired value.

There can be no doubt, to my mind, but that BRAMWELL and MARTIN, BB., in delivering their opinions in *Rankin v. Potter* (5) both recognised the value of the damaged ship as an item which was to be taken into consideration in the application of the "prudent uninsured owner" test; and, more than that, recognised the value of the damaged ship as an item going to make up the total of the figures to be contrasted with repaired value. This view has been applied by PHILLIMORE, J., in *Beaver Line Associated Steamers, Ltd. v. London and Provincial Marine and General Insurance Co., Ltd.* (6), and by WALTON, J., in *Wild Rose Steamship Co. v. Jupe* (7). It is to be observed that in *Rankin v. Potter* (5) the item of value of the damaged ship was essential to the conclusion that there was a constructive total loss. You cannot get the required result without it. It is further to be noted that in *Rankin v. Potter* (5) the ship was not, in fact, sold.

It seems to me that, perhaps, the authorities could be reconciled if one took the rule to be that the shipowner could only take into consideration the value of the damaged ship if the cost of repairs approximated the repaired value. If the damage to the ship by the perils of the sea is so extensive that it is clear that the cost of repairs will approximate the repaired value, it would not be reasonably practicable to repair her if a substantial sum could be obtained for her as she is and where she is, seeing that the expense of repairs would be such that, under the circumstances, no man of common sense would incur the outlay. Such a ship, as a matter of business, is, in my opinion, totally lost. Take, however, the case where the damage is slight, and the cost of repairs is small relative to the value of the ship. The shipowner, as a matter of business, would not take into consideration the necessarily high value of the slightly damaged ship unless, instead of desiring to minimise the loss incurred by the perils of the sea, he regarded the marine accident as affording a market enabling him to sell his ship at a profit.

In my judgment, a case in which the cost of repairs and the value of the ship are nearly approximate as they do in the present case would be just a case in

which the "prudent owner" test, applied as I have suggested, would do justice, which the mere comparison of figures would fail to do. But there is no case which has recognised this modification in the application of the "prudent owner" test, and one hesitates to introduce such a modification in the rules of law governing so widely extended a business as that of marine insurance under British law, although the application of the "prudent owner" test, as understood by BRAMWELL and MARTIN, BB., in their opinions in *Rankin v. Potter* (5), and also by LORD ABINGER in *Young v. Turing* (1), might lead to the results pointed out in a note by the editors of the last edition (7th Edn.) of ARNOULD ON MARINE INSURANCE—Mr. de Hart and Mr. Ralph Simcox—following a suggestion by Mr. McARTHUR in his work on MARINE INSURANCE. The particular suggestion in the last edition (7th Edn.) of ARNOULD'S MARINE INSURANCE is that neither on principle nor on authority can the value of the damaged vessel be taken into consideration. The editors' note to s. 1124 runs thus :

"Suppose a vessel comes into port requiring repairs costing £1,000, her damaged value being £10,000, and her repaired value being £10,500. This, according to the argument derived from *Young v. Turing* (1) [and, I would add, from the opinions of BRAMWELL and MARTIN, BB., in *Rankin v. Potter* (5)] would be a case of constructive total loss. But it is submitted that it is absurd to say a vessel is a total loss, whether constructively or otherwise, which is only damaged to the extent of 10 per cent. or less."

The contention seems to be that the old test of a "prudent uninsured owner" was adopted at a time when there was no telegraph and the means of communication were difficult, and at a time when there was no salvage association ready to step in to salve the ship and take charge of her until she could reach a port where permanent repairs could be effectively executed, and where, therefore, the cost of the repairs could be measured either by the actual execution of the work or by reliable estimates obtained on invitations to tender. It is said that at the time of the adoption of the "prudent owner" test, the master, through difficulty of communication and inability to secure with any certainty means of repair, was in practice apt to consider seriously the question whether he should sell the materials of the ship, or the ship as she lay, rather than make the attempt to repair. But it is said that nowadays such a case rarely arises, and that when it does the old test can be applied; but that now the conveniences of modern times, telegraphic communication, the salvage associations, and Lloyd's agents everywhere, throw on the master but rarely the old alternative, repair or sell; and that in modern times the shipowner ought to guide his conduct as an insured owner desirous to have regard to the interests of all concerned, and that the damaged ship ought, whenever it is possible, to be taken to the port where permanent repairs can be effected, and the arithmetical test applied with something like precision. Such a rule seems to me too favourable to the underwriter. I think that this contention is open to the criticism that the shipowner at the moment of election, when he has to exercise the option of giving notice of abandonment, has really no precise data upon which to act, and that there must always be a quantity of items, especially the cost of the temporary repairs and the getting of the ship to the ports of temporary and permanent repair, as there were in the present case, which do not admit of precision. I doubt whether under the absolute arithmetical test the underwriter really takes upon himself the whole of the risks of the perils of the sea. I think it was a doubt of this sort which made lawyers of the United States of America adopt the 50 per cent. rule.

The final result in this appeal, I think, must be that the judgment of BIGHAM, J., must be affirmed; first, because I doubt whether in any case we ought to reverse the decision of BIGHAM, J., on this question of marine insurance law, having regard to the state of the evidence as to the value of the damaged ship, the manner in which the point was taken at the end of the trial, and the mode in which it was

A disposed of by the learned judge, and I am not prepared to do so. Secondly, even though my opinion were stronger than it is, I should not like to differ from my brethren on a point which does not properly arise on the evidence. I, therefore, do not differ from the judgment of my brethren that the judgment of BIGHAM, J., must be affirmed.

B STIRLING, L.J.—I agree that in this case we ought to accept the conclusion of fact of BIGHAM, J. It is, therefore, to be taken that the value of the ship, when repaired, exceeded the expense of repairs by a sum of about £700 or £750. The learned judge arrived at a smaller figure, but I understand it to have been conceded in argument that some consequential corrections which would have been the result of his determination would have brought it to the figure I have mentioned. It is then contended that the loss ought nevertheless to be treated as a constructive total loss, because the value of the ship as she lay on the rocks exceeded that sum, so that a prudent uninsured shipowner would have sold her rather than repaired her. BIGHAM, J., rejected that contention, saying that there had not been adduced any evidence as to that value on which he could act. The evidence stood thus: no one was called on behalf of the plaintiff to show what the value of the ship was at the time. Naturally none of the plaintiff's witnesses was cross-examined on the subject, nor has there been any evidence of these matters adduced by the defendants. In truth the plaintiff seems to have launched his case in the expectation that he would be able to satisfy the judge that the cost of repairs would exceed the value of the ship when repaired, and it was only when he failed in satisfying the learned judge on that point that he fell back on this question of the value of the ship, and he now seeks to establish the amount from expressions which occur in the correspondence and in the light of subsequent events.

E I think there is much to be said in favour of the view taken by BIGHAM, J. I think mere estimates of value not made at the time ought, in a case of this kind, to be closely scrutinised by the court, and I hesitate to rely on inference with respect to a matter in which direct evidence can be given. I am not, therefore, persuaded that it would be right to overrule the decision of BIGHAM, J., and this would be sufficient to dispose of the case, so far as I am concerned. But a question of law has been argued, and unfortunately on it different views are entertained by my brethren, and it may be right, therefore, that I should express the opinion that I have formed. *Young v. Taring* (1) was decided in 1841 in the Exchequer Chamber, and LORD ABINGER in giving the judgment of the court said (2 Man. & G. at p. 601):

"The Chief Justice has laid down the usual and recognised rule, that the jury ought to consider, whether, under all the circumstances attending the ship, a prudent owner, if uninsured, would have repaired the vessel."

H Then he says (*ibid.*): "Now, to the value of the repairs must be added her value as she lay in the dock." It is upon that observation that the argument in this case is founded. It is to be observed it is a mere dictum: it was not necessary for the decision of the case, and, so far as appears from the report, did not form the subject of argument before the court. In 1847 *Irving v. Manning* (4) was decided in the House of Lords, and PARTESON, J., who delivered the opinion of the learned judges who advised the House, says (1 H.L.Cas. at p. 304):

I "... the course has been in all cases in modern times to consider the loss as total where a prudent owner, uninsured, would not have repaired."

And again at a later point (1 H.L.Cas. at p. 306) he says:

"... the established mode of putting the question, when it is alleged that there has been, what is perhaps improperly called, a constructive total loss of a ship, is to consider the policy altogether out of the question, and to inquire what a prudent uninsured owner would have done in the state in which the vessel

... placed by the perils insured against. If he would not have repaired the vessel, it is deemed to be lost."

In 1850 *Moss v. Smith* (2) was decided, in which the question was very much considered, and judgments were given which are constantly referred to in subsequent cases. MAULE, J., says (9 C.B. at p. 108):

"If a ship sustains such extensive damage that it would not be reasonably practicable to repair her—seeing that the expense of repairs would be such that no man of common sense would incur the outlay—the ship is said to be totally lost. It is in that way alone that the question as to what a prudent owner would do arises. However damaged the ship may be, if it be practicable to repair her, so as to enable her to complete the adventure, she is not totally lost. The ordinary measure of prudence which the courts have adopted is this—if the ship, when repaired, will not be worth the sum which it would be necessary to expend upon her, the repairs are, practically speaking, impossible, and it is a case of total loss."

WILDE, C.J., says this (9 C.B. at p. 108):

"The underwriter undertakes to indemnify the owner against a loss of freight by perils of the sea. The law has fixed the meaning of this warranty against sea-damage in such distinct terms, that, for many years, every contract of insurance has been made with reference to the known and recognised principle, that a ship is prevented from performing her voyage, and consequently from earning freight, when she has sustained damage which can only be repaired at an expense which no prudent owner uninsured would incur; and that is when the outlay will exceed that which he will get by it—viz., when the ship, after the repairs are executed, will not be worth the sum which has been expended upon her."

It seems to me that in that case the court defined, as MAULE, J., points out, the standard—the measure of prudence—which the courts have adopted with reference to such a case. In 1854 there was published the third edition of PHILLIPS ON INSURANCE, and in vol. 2 at s. 1534 the learned author states the law thus:

"In English jurisprudence the right to make an abandonment of the ship is governed by the rule just stated—namely, that the right to abandon on account of the damage and expense merely accrues where, and only where, the ship when recovered or repaired will not be worth the expense necessarily to be incurred for the purpose of recovering or repairing it."

He adds:

"This rule has reference to a case in which the amount merely determines the character of the loss. Other circumstances may come into consideration in determining the loss to be partial or total."

I do not propose to go in any detail through the subsequent cases, but it appears to me that, notwithstanding the observations of BRAMWELL and MARTIN, BB., in advising the House of Lords in *Rankin v. Potter* (5), to which my Lord has referred, the weight of authority is in favour of the view which is based on the decision in *Moss v. Smith* (2) and which is expressed in the language which I have just cited from PHILLIPS ON INSURANCE. I should like, however, to refer particularly to *Aitchison v. Lohre* (8), where the question of whether or not there was a constructive total loss was discussed by the House of Lords. LORD BLACKBURN, in dealing with the point, says (4 App. Cas. at p. 761):

"I think it convenient to pause here and inquire what would have been the loss to an uninsured owner from the perils of the seas under such circumstances."

A He then says (1141): "If such an uninsured owner chose to sell the hull as it lay, his position would be this," and he goes through a calculation by which he arrives at a loss, amounting to £2,521, and then he says:

B "And if the hull had been so damaged that to repair it would have cost more than the ship would, when repaired, have been worth, the prudent ship-owner would have taken this course."

C He adds: "But in fact he not only could, but did repair it." Then he goes into a second calculation in which he ascertains the loss, having reference to the repairs and expenditure necessary for the purpose of repairing, and the value of the ship when repaired, and he arrives at an amount of loss which is smaller than that which he ascertained would have been suffered if a sale had been made.

D As I understand the figures, the result would have been the same whether the value of the vessel as the ship lay is taken into consideration or not, and therefore, it appears to me not to be a decision which guides us in the present case. But the way in which the learned Lord lays down the law in a subsequent passage appears to me to agree with that which was contended for by the respondents to this appeal. He says (4 App. Cas. at p. 762):

E "The owner of an insured ship which is so damaged that, though it is capable of repair, the expense of repairing it will exceed its value, may treat the ship as totally lost, and recover a total loss, the underwriters who pay that total loss being entitled to all that is saved. The assured is not, even then, bound to do so. But if the ship can be practically repaired within the meaning of that phrase as explained by MAULE, J., in *Moss v. Smith* (2), the assured has not the option to treat it as a total loss; and on the figures stated in the special case the respondent here had not that option."

F It appears to me that the learned Lord there adopts the mode of stating the case which is laid down in the judgments of *Moss v. Smith* (2), and the law as laid down in the same manner, as it seems to me, by LORD WATSON in a subsequent case in the House of Lords in *Sailing Ship Blairmore Co. v. Macredie* (3). For these reasons I have arrived at the conclusion which I have stated. I only wish to add this, that I do not say that evidence of value in such cases as these can be entirely excluded, and therefore, I do not differ from PHILLIMORE, J., and WALTON, J., in what they did in the cases before them, because their decisions were only on the admissibility of evidence. It may be that evidence of the value of the ship at a wreck might be material in ascertaining the question of fact whether or not there was a total loss. I agree, therefore, with the judgment that has been given.

G
H
I MATHEW, L.J., read the following judgment:- The plaintiff sought to establish his right to abandon to the underwriters by evidence that the costs of the repairs of the ship would exceed the repaired value. BIGHAM, J., decided that the plaintiff had failed, and that there was no constructive total loss. It has not been easy to follow the steps of the learned judge through a mass of evidence and argument submitted to him in the course of a trial that lasted over five days. The vessel was insured by a time policy for £23,000, and by the terms of the policy the insured value of the ship was to be taken as the repaired value in ascertaining whether the vessel was a constructive total loss. The vessel, while covered by the policy, was run ashore on the coast of Sicily, and upon news of the disaster the assured gave a notice of abandonment which the underwriters declined to accept. With the consent of all concerned salvage operations were undertaken by the salvage association, and the ship was floated and brought to Malta at a cost of £3,500. In her damaged condition she was worth about £7,000. Under the superintendence of surveyors, who represented the plaintiff and the underwriters, temporary repairs to enable the vessel to be brought home were done at a cost of about £550. The learned judge has found that the repairs were properly done. The underwriters had provided a sum of £1,475 to cover the expenses of the

voyage home. This sum, added to the value of the damaged ship, could be recovered from Malta to a home port for £150. The vessel sailed from Malta, but in a few hours, as it would seem from some peril of the sea, her steering gear gave way, and she was obliged to put into Tunis. Further repairs were found to be necessary, which were done at a cost of £218. A tug was sent out from England to bring the vessel home at a cost of £750. She was brought safely to Barry, and a tender was obtained to cover all necessary repairs. These sums of £218 and £750 would be covered by the insurance from Malta to a home port, and were held by the learned judge not to be charges which the owner would have had to meet.

At the trial accounts were put in which had been prepared to show the plaintiff's estimate of the costs of reinstating the ship. The total amounted to the very large sum of £26,222. These figures were reduced by the learned judge to £22,559. In the discussion before us the items allowed on the one hand and struck out on the other were objected to, and we were asked to review the decision of BIGHAM, J., as to the cost of repairs. But I see no reason to differ from the conclusion that £22,559 was a proper estimate of the outlay necessary to reinstate the ship. But it was contended for the plaintiff that, upon the assumption that the entire cost of repairs did not exceed the sum of £22,559, the plaintiff was nevertheless entitled to treat the loss as total. It was argued that the question to be determined was whether or not a prudent uninsured owner would abandon the adventure and sell the wreck as she lay on the rocks. In arriving at a conclusion on this subject, the owner, it was said, would take into account the value of the damaged vessel, and would certainly sell rather than repair.

I am unable to agree with this reasoning. The solution of the question whether there is a constructive total loss may sometimes be helped by considering what a prudent owner would do, where, for instance, a stranded vessel is immediately sold on the ground that salvage operations were difficult and the result uncertain. But it seems to me in such a case as the present, where the actual costs of repairs have been ascertained and are not a matter of estimate, the matter cannot be dealt with on that footing. The question is not what an owner would consider the course most advantageous to himself. What has to be determined is to what extent the ship has been damaged by the perils insured against, and thus to settle whether the loss is partial or total. It is total if the prosecution of the voyage has become commercially impracticable. In recent times, with the readier means of communication open to underwriters, the condition of a stranded ship is rarely left to mere speculation. When notice of abandonment has been given the skilled agents of the underwriters are enabled to visit the vessel, and they can generally form a sound judgment as to whether the ship can be saved. Where there is a fair prospect of reinstatement, salvage operations are undertaken on behalf of the insurers without requiring the owner to incur any expense.

In the present case the usual course was followed. The salvage operations succeeded, and the underwriters satisfied the learned judge that the loss was partial and not total. They arrived at this result by showing that the cost of rendering the ship as serviceable as she was when insured was less than the repaired value. The argument that the real question was what an imaginary owner would do when his vessel was still on the rocks seems to me not to be open to the plaintiff. Any such general principle would seriously prejudice underwriters, and might impose upon them losses which were not due to the perils insured against. The test applicable here is that sanctioned in the many decisions referred to by counsel for the underwriters from *Moss v. Smith* (2) to *Sailing Ship Blairmore Co. v. Macredie* (3). The rule seems to me to have been properly applied by BIGHAM, J. But it was further urged for the plaintiff that, in determining the question of the right to abandon, the value of the damaged ship should be added to the cost of repairs. With this addition the valuation fixed by the policy would be largely exceeded. The application of this supposed mode of calculation would seem to involve unreasonable results, for, in adjusting the amount the assured could recover under his

A policy, what is saved from the perils insured against is treated as having been lost. The authority relied upon by the plaintiff's counsel was a dictum of LORD ABINGER in his judgment in *Young v. Turing* (1) (2 Man. & G. at p. 601). It was admitted that the point had not been dealt with in that case, either at nisi prius or in the Court of Common Pleas, and the observation of the Chief Baron was not necessary for the decision of the court. Further, that with the exception of the recent judgments at nisi prius referred to in the argument, the authority of *Young v. Turing* (1) upon this point had not been judicially approved. It is noticeable that at the trial no evidence was offered to show that average adjusters acted upon any such rule. The subject is discussed unfavourably to the plaintiff's contention in PHILLIPS ON INSURANCE, vol. 2, s. 1534; CARVER'S CARRIAGE OF GOODS BY SEA (3rd Edn.), s. 303; and ARNOULD ON MARINE INSURANCE (7th Edn.), vol. 2, s. 1124. I am of opinion that the plaintiff's contention fails, and that in determining whether the ship can be repaired the assured is not entitled to add the damaged value of the ship to the cost of repairs.

Appeal dismissed.

Solicitors: *Downing, Bolam & Co.*, for *Downing & Handcock*, Cardiff; *Waltons, Johnson Bubbs & Whetton*.

[Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.]

BALMORAL STEAMSHIP CO., LTD. v. MARTEN

[HOUSE OF LORDS (Lord Macnaghten, Lord Shand, Lord Brampton, Lord Robertson and Lord Lindley), June 19, 20, August 5, 1902]

[Reported [1902] A.C. 511; 71 L.J.K.B. 819; 87 L.T. 247; 51 W.R. 175; 18 T.L.R. 802; 9 Asp.M.L.C. 321; 7 Com. Cas. 292]

Insurance—Marine insurance—General average contribution—Salvage award—Valued policy—Agreed value less than contributory value—Liability of insurer. Custom—Usage—Trade—Undesirability of disturbing long established commercial practice.

Where a ship is insured for an agreed value by a valued policy of insurance, and a general average liability for a general average contribution is incurred, or a salvage award is made against the owners based upon a contributory value larger than the value in the policy, underwriters are only liable for the proportion of the loss which the value in the policy bears to the contributory value and not for the whole loss, this being the effect of a long established trade usage which it is undesirable to disturb.

Notes. The effect of this decision was expressed in s. 73 (1) of the Marine Insurance Act, 1906 (13 HALSBURY'S STATUTES (2nd Edn.) 14), but the case is reported in view of the observations of the learned Lords on the salutariness of the rule upheld by the decision and the statute, and, further, it is a leading illustration of the undesirability of disturbing, especially in commercial matters, any custom or practice which has been long established in this country.

Considered: *Boag v. Standard Marine Insurance Co.*, [1937] 1 All E.R. 714; *Elcock v. Thomson*, [1949] 2 All E.R. 381. Referred to: *Goole and Hull Steam Towing Co. v. Ocean Marine Insurance*, [1927] All E.R. Rep. 621.

As to liability of insurers for general average and salvage charges, see 22 HALSBURY'S LAWS (3rd Edn.) 141, and for cases see 29 DIGEST 231 et seq. As to customs and usages, see 11 HALSBURY'S LAWS (3rd Edn.) 158, and for cases 17 DIGEST (Repl.) 3.

Cases referred to:

- 1) *Living v. Manning* 1847, 1 H.L.Cas. 287; 6 C.B. 291; 6 L.T. 108; 10 L.T. 877; 9 E.R. 766, H.L.; 29 Digest 270, 2176.
- 2) *The Main*, [1894] P. 320; 63 L.J.P. 69; 70 L.T. 247; 10 T.L.R. 242; 7 Asp.M.L.C. 424; 6 R. 775; 29 Digest 252, 2039.
- 3) *Pitman v. Universal Marine Insurance Co.* (1882), 9 Q.B.D. 192; 51 L.J.Q.B. 561; 46 L.T. 863; 30 W.R. 906; 4 Asp.M.L.C. 544, C.A.; 29 Digest 249, 2013.

Also referred to in argument:

- Dickenson v. Jardine* (1868), L.R. 3 C.P. 639; 37 L.J.C.P. 321; 18 L.T. 717; 16 W.R. 1169; 2 Mar.L.C. 126; 29 Digest 232, 1874.
- North of England Iron Steamship Insurance Association v. Armstrong* (1870), L.R. 5 Q.B. 244; 39 L.J.Q.B. 81; 21 L.T. 822; 18 W.R. 520; 3 Mar.L.C. 330; 29 Digest 122, 748.
- The Knight of St. Michael*, 1898 P. 30; 67 L.J.P. 19; 78 L.T. 90; 46 W.R. 396; 14 T.L.R. 191; 8 Asp.M.L.C. 360; 3 Com. Cas. 62; 29 Digest 215, 1718.
- Dillon v. Whiteorth, Dillon v. Sea Insurance Co.* (1880), 49 L.J.Q.B. 408; 43 L.T. 365; 4 Asp.M.L.C. 327, C.A.; 29 Digest 239, 1924.
- Mairehead v. Forth and North Sea Steamboat Mutual Insurance Association*, [1894] A.C. 72; 10 T.L.R. 82; 6 R. 59, H.L.; 29 Digest 438, 3395.
- The Mary Thomas*, [1894] P. 108; 71 L.T. 104; 7 Asp.M.L.C. 495; sub nom. *The Mary Thomas, Mary Thomas Steamship Co., Ltd. v. Globe Marine Insurance Co., Ltd.*, 63 L. J.P. 49; 10 T.L.R. 154; 6 R. 792, C.A.; 29 Digest 235, 1888.

Appeal from a decision of the Court of Appeal (SIR A. L. SMITH, M.R., VAUGHAN WILLIAMS and STIRLING, L.J.J.) affirming a decision of BIGHAM, J., in the Commercial Court. The judgment of the Court of Appeal is reported at [1901] 2 K. B. 896 and that of BIGHAM, J., at [1900] 2 Q. B. 748.

The action was brought by the appellants on a policy of marine insurance on the steamship *Balmoral*, subscribed to by the respondent and other underwriters, to recover a portion of general average and salvage charges incurred in respect of the *Balmoral* and her cargo. The policy sued upon was a time policy, dated Dec. 20, 1898, for a period of twelve months from noon of Dec. 5, 1898, and was against the usual risks. It provided:

"The said ship, etc., goods and merchandise, etc., for so much as concerns the assured by agreement between the assured and assurers in this policy are and shall be valued at say on: Hull, tackle, apparel, furniture, etc., valued at £20,000; machinery, boilers, etc., and everything connected therewith, valued at £13,000,—total, £33,000."

On June 22 and 23, 1899, during the currency of the policy, salvage services were rendered to the *Balmoral* and her cargo (her machinery having broken down) by the steam trawler *Amroth Castle*, and general average expenses were incurred for the hire of tugs to tow the ship and cargo to London. In a salvage action in the Admiralty Court by the owners of the *Amroth Castle* the value of the *Balmoral* was proved by her owners in the affidavit of values at £40,000, and an award of £500 and costs was made on the basis of that value. The same value was also adopted by the average adjusters as the value of the ship for the purpose of assessing its contribution to the general average expenses. The average adjusters, in apportioning the general average expenses and salvage charges between the interests at risk,

A made the ship valued at £40,000 pay £58 6s. 8d. general average and £472 2s. for salvage charges. They then dealt with these amounts in respect of the insurances on ship as follows:

B "The ship pays, if contributory value £40,000, £58 6s. 8d. general average; if insured value £33,000, will pay £48 2s. 6d.; the ship pays salvage charges, £472 2s.—£520 1s. 6d."

C The adjusters thus charged to the insurers on ship in respect of general average thirty-three fortieths of the sum paid by the ship, and in respect of salvage charges the entire sum paid by the ship. The appellants having claimed to recover from the respondent on the basis that the underwriters were liable to pay the whole of the general average payable by the ship—viz., £58 6s. 8d.—and not the thirty-three fortieths of such amount shown in the average statement, and also the whole of the salvage charges payable by the ship—viz., £472 2s.—the respondent contended that the underwriters' liability to compensate the appellants in respect of general average and salvage charges was limited to thirty-three fortieths of the sums of £58 6s. 8d. and £472 2s. respectively, that being the proportion which £33,000, the agreed value of the *Balmoral* in the policy, bore to £40,000, the value on which the salvage award was made, and the ship's contribution to general average assessed. D The courts below decided in favour of the respondent underwriter and the ship-owners appealed.

J. A. Hamilton, K.C., and Leck for the shipowners.

Pickford, K.C., and Scrutton, K.C., for the underwriter.

E Their Lordships took time for consideration.
Aug. 5, 1902. The following opinions were read.

LORD MACNAGHTEN. The question in this case is of little consequence as regards the money value of the claim. It is important in its bearing on a rule of F practice which has prevailed with underwriters and average staters in this country for a long period. Ship, cargo, and freight have had to contribute to general average and salvage charges. For the purpose of contribution the values of the ship, cargo, and freight at risk were ascertained. There is no question as to the value of the cargo or of the freight. The value of the ship was taken to be £40,000, being the amount at which it was valued in the salvage proceedings. G Contribution from the ship in respect of general average and salvage charges works out at £530 8s. 8d. This amount is claimed from the underwriters. The underwriters say: "That may be the proper amount of contribution as between ship, cargo, and freight, but as between us and you the policy on the ship was a valued policy. It was stipulated that 'for so much as concerns the assured by agreement between the assured and assurers' the ship, with its machinery and H everything connected therewith, was valued at £33,000. As the value in the policy is so much less than the contributory value, we are only bound to pay a proportionate amount, or thirty-three fortieths of the ship's contribution." To this the shipowners answer: "You are opening the policy. The ship was fairly valued at £33,000. That value as between you and us must hold good for all purposes. You have nothing to do with the value put upon the ship at a different time and for a I different purpose. It is impossible to determine with any degree of accuracy the value of a thing which is not an article of commerce. The agreed value in the policy is, or was at the time of the agreement, just as truly the 'real value' as the value arrived at somehow or other in the salvage proceedings. The ship was fully insured, and you must make good the loss just as you would have had to reimburse the cost of repairs made necessary by sea damage."

Many authorities were cited, and all available text-books were referred to. But, speaking for myself I must say that I think that little help is to be obtained from text-books or reported cases. No case was cited which has more than a very

remote and indirect bearing upon the question. Mr. PHILLIPS, who upholds the English practice as against the New York practice, for which the appellants contend, puts the case very fairly in his work *ON INSURANCE* when he says (s. 1410):

"There is nothing in the policy that favours one of these modes of construction in preference to the other, each being consistent with the language of the instrument."

His conclusion is that the question must depend upon the application of "the general principles of insurance." But I do not think that we get rid of the difficulty by referring it to the general principles of insurance. It seems to me that there is as much to be said on the one side as on the other. And although I think, if the matter were *res integra*, that I should prefer the English rule, my preference would be based on the consideration that the law of marine insurance in this country, although anomalous in many respects, is eminently practical. Just as the agreed value of the ship is disregarded when the question is whether a prudent uninsured owner would repair or abandon, so where there has been a value put upon the ship by a competent authority, or adopted by a competent authority, or treated as binding in a business transaction, it seems to me that that value, whether it has or has not the better right to the title of "the real value," cannot be left out of consideration. And I think it a salutary rule and not unreasonable that the underwriters' liability under the policy should be adjusted with regard to it. However that may be, I do not think that counsel for the shipowners succeeded in proving that the English rule is contrary to principle.

That being so, there is, in my opinion, an end of the case, and discussion on the comparative merits of the English rule and the New York rule becomes academical. The rule that prevails with English average staters is a rule that has been long established. It is well known, and it must have helped to form the basis of a vast number of contracts which are still running, and some of which may run for twelve months to come. In that state of things it seems to me that if the English rule is to be altered, it must be altered by Parliament and not by a decision of this House. It would be open to Parliament, if it should see fit, to enact a new rule, to fix a date for its coming into operation, and so avoid any semblance of injustice to those who have contracted on the footing of the old rule. STIRLING, L.J., in his judgment in the Court of Appeal, expresses an opinion that, theoretically, the sum recoverable would be that which would be payable if the agreed value in the policy had been employed in the average adjustment. I venture to think so too. The mode of calculation adopted by the average staters seems rather too favourable to the underwriters. Suppose the value of the ship in the policy, and also for the purpose of contribution, to be £16,000, the value of the cargo and freight to be £12,000, and the total amount required to be £840, the ship would then pay four-sevenths, or £480. Then suppose the ship, for the purpose of contribution, was valued at £18,000, the value of cargo and freight remaining the same the ship would pay three-fifths, or £504, that is £24 more than if the value for the purpose of contribution had been the same as the value in the policy. But if you reduce the ship's contribution in the proportion of eighteen to sixteen, the underwriters have only to pay eight-ninths of £504, or £448, that is £32 less than would have been payable if the contributory value had been the same as the value in the policy.

But there again the rule is well understood, and, though I do not think it quite accurate, I do not think that it ought to be disturbed. Though the rule only speaks of general average, it has always been treated as applying to salvage expenses also. I do not think that any distinction ought now to be made between these two heads of expenditure. The first part of the rule, which says that the insurers are not to pay more than the ship's contribution, although the contributory value be less than the value in the policy, seems to me to be unobjectionable, as the contract of insurance is a contract of indemnity. In the result, therefore, I move your Lordships that the appeal be dismissed with costs.

- A** **LORD SHAND.**—I am also of opinion that the appeal should be dismissed, and the judgments of BIGHAM, J., and of the Court of Appeal affirmed with costs. I confess that I think the case a very clear one, and the ground of my judgment may be stated very shortly. The policy of insurance provides that the ship, for so much as concerns the assured, by agreement between the assured and assurers in this policy, is and shall be valued at, say, £33,000. In all questions of indemnity, there-
- B** fore, the parties to the policy, insurers and insured, have agreed that, though the ship may be worth as much more valuable, her value is to be taken at £33,000 only. There is no exception. The agreement is to apply in all cases of indemnity which may arise. So if the question were one of principle merely, and the rule of custom and practice, which has been so much referred to, had never existed, the House
- C** must give effect to this stipulation or agreement between the owner of the ship and the underwriter or insurer, who asks that the terms of his special contract shall receive effect. An owner may insure so as to cover his whole risk, or he may insure only to cover part of his risk, and prefer to be his own insurer in part, or, to put it in other words, to leave his ship in part uninsured. This he does if he insures his ship below her true value. Thus, having a ship worth £40,000, he
- D** may insure her for £20,000 only, with a clause such as that above quoted, declaring that he has agreed that between him and the underwriter the ship shall be taken to be of that value only. What is the effect of this? Not only that the owner becomes his own insurer for one-half of the value of the ship, but he gets a present benefit. He pays only one-half of the premium which he must have paid had he insured his ship at her true value, and, on the other hand, the underwriter
- E** undertakes only the risk corresponding to the reduced premium on one-half of the real value of the ship.

- In questions of salvage and general average, which at once give rise to claims of indemnity under an insurance policy, the value of the ship is necessarily a material element, for the value of the ship will, with the circumstances in which the salvage services have been given, enter deeply into the question of the remuneration to be given. Of course that value in a question with salvors must be the
- F** real value at the time when the salvage services are rendered. Accordingly, in this case the ship was taken at her full value, and the owner had to pay a larger sum than if the value had been £33,000 only. It seems to me that when he claims full relief by way of indemnity, the underwriter in his defence is simply asking that effect shall be given to his stipulation in the policy that in all questions of indemnity the ship shall be valued at £33,000 only. It follows that he is liable to pay only the
- G** proportion which the value in the policy bears to the actual value on which the statement has been made up. I, therefore, agree with BIGHAM, J., in holding that the rule or custom founded on is in accordance with sound principle; but even if that were open to question, the rule has been so long recognised and acted on that I am further of opinion with your Lordships that effect should now be
- H** given to it, and that it should continue to receive effect unless altered by legislation.

- LORD BRAMPTON.**—The steamship *Balmoral*, by a marine policy dated Dec. 20, 1898, and underwritten by the respondent, was insured for twelve calendar months against all ordinary perils of the seas. By the policy it was agreed that, for so much as concerned the assurers and the assured, she should be valued at
- I** £33,000. In June, 1899, while on a voyage from Philadelphia to London, when near the Isle of Wight, the *Balmoral* met with so strong a gale, and so heavy and irregular a sea, that her tail shaft was fractured, and it became necessary to accept the voluntary assistance of the steam trawler *Amroth Castle* to tow her, as she did, during two days, when two tugs, which had been engaged and hired for that purpose, took her in charge in the Downs and towed her to the Millwall Dock, London. The cost of these two tugs was £100, and formed the item of general average in dispute, and the owners of the *Amroth Castle* were awarded by the Admiralty Court as salvage the sum of £500. In the course and for the purposes

of the salvage action it was proved that the contributory value of the *Balmoral* was £40,000, so that, having regard to the agreed policy value, she was under-insured to the amount of £7,000. In adjusting these two items as between the owners of the ship, cargo, and freight, the adjuster, taking the contributory value of the ship to be £40,000, assessed the amount to be contributed by the owners for general average at £58 6s. 8d., and for salvage £472 2s., making a total of £530 8s. 8d. payable by the *Balmoral*.

The question has now arisen between the shipowners and the underwriters, the shipowners claiming that the whole of those amounts is payable by the underwriters, as insurers of a fully-insured ship, the underwriters contending that their liability is limited to such proportion of those sums as the agreed value of the ship bears to the contributory value proved in the Admiralty Court. This would reduce their liability to thirty-three fortieths of the plaintiffs' claim, which they have always been prepared and are willing to pay. Before BIGHAM, J., it was proved by a highly experienced average adjuster, that for many years a custom had existed which certainly in and since 1874 had been adopted as a rule at Lloyd's, that when a ship is insured for less than the contributory value, the underwriter pays on the insured value. It was proved also that such custom applied to salvage as well as general average, and that salvage had until recently been always adjusted as part of a general average. The owners of the ship contended that the rule was inconsistent with the terms of the policy, for that the *Balmoral* was a fully-insured ship, being valued as a whole at £33,000, and being so insured they were entitled to a full indemnity against the claims. BIGHAM, J., overruled that contention, and refused to disregard the rule, on the basis of which, as he said, policies for many millions had been made, and acting upon it he gave judgment for the underwriters. In that judgment I entirely agree.

I can well understand that in one sense, but in one sense only, the *Balmoral* may be said to have been fully insured as a ship—that is to say, every part of her structure forming a complete ship was in fact covered by the policy, but not to her full value, for it was expressly agreed in the policy that for all purposes of it her value should be limited to £33,000, being only thirty-three fortieths of her contributory or real value, in respect of which the salvage was awarded. In adjusting the liability of the underwriters, therefore, the amount of salvage payable by them was properly arrived at having regard to the proportion which the agreed value of the ship bore to the contributory value as proved in the Salvage Court. This was in exact accordance with the custom and rule proved. Based, as the amount of a salvage award invariably is, upon the true contributory value of the ship and the property saved, I cannot conceive anything more unreasonable or unjust than that an owner should seek to recover from an underwriter salvage based upon a value far in excess of the insured value, and so get the benefit of an insurance without paying a premium largely in excess of the smaller value which as between themselves they have agreed for all purposes of the policy to treat as the true value and to be bound by.

Another consideration presents itself to me. It cannot be denied that, the ship being for all purposes of the insurance insured for £33,000 only, the property of the owners saved by the salvors was worth £7,000 more than the insured amount. What sound or just reason can possibly be urged in support of the claim of the owners to be so indemnified by the underwriters who have received from the owners no consideration for such indemnity? I can see none. Let me suppose that the owners, having insured with the defendants in £33,000 on the ship valued at that sum, had effected another insurance with other underwriters, valuing the ship at £7,000 to make up its full value. Would anybody question that the salvage payable on the full value of the ship would be rightly claimed and payable by contributions from both sets of underwriters in the proportions which the sum insured by each bore to the whole value of the property saved—viz., £40,000? If the assured, whether with a view of saving the premiums or for any other reason,

A preferred to have the £7,000 uninsured, they became their own insurers to that amount, and I see no reason in law or good sense why they should not bear the burden which they now seek, as I think, improperly, to fix upon the underwriters. I have considered carefully the very able arguments of the learned counsel for the appellants and the cases cited in support of them, but they have not substantially affected the views which I have expressed and entertain. The rule and custom of Lloyd's, upon which BIGHAM, J., acted, is, in my opinion, sound, sensible, and legal, and I am, therefore, content to rest my judgment upon it, and agree that this appeal should be dismissed with costs.

LORD ROBERTSON concurred.

C LORD LINDLEY. This case turns on the effect of expressing, in an ordinary marine policy, an agreed value at which the ship insured by it is to be taken as between the assured and the underwriter. The effect has to be considered with reference to two losses sustained by the assured—viz., (i) his share of a general average loss; and (ii) his share of a loss sustained by reason of salvage services for which payment had to be made. The assured's share of these two losses is £530.

D The ship was valued in the policy at £33,000. In ascertaining the amount payable by the assured for general average and for salvage the ship was valued at £40,000. The underwriters thereupon contend that they are liable to pay thirty-three fortieths of the above-mentioned £530. The assured, on the other hand, say that they are entitled to be paid the whole of this sum, as it does not exceed the limit of £33,000.

E The underwriters contend that their view is correct in principle, and is in conformity with a long-established custom or practice at Lloyd's invariably followed in this country. The assured do not deny that the last statement is true, but they contend that the custom or practice is contrary to principle, and ought not to be judicially recognised. BIGHAM, J., who tried the case, and the Court of Appeal have both decided in favour of the underwriters, and your Lordships are asked to reverse their decision.

F Let us consider the principles applicable to the case independently of any custom or practice at Lloyd's or amongst underwriters. The sum of £33,000 mentioned in the policy is a sum agreed upon between the assured and the underwriter. No one else is in any way bound to value the ship at that sum. If, as here, a general average loss has been sustained and has to be borne by ship,

G freight, and cargo, according to their respective values, it is plain that the real value of the ship must be ascertained in order to apportion the loss between them, and that the conventional value of £33,000 must be disregarded. So as regards salvage; the salvors are in no way affected by the fact that the ship has been valued at a particular sum in her policy of assurance. The real value of the ship saved must be ascertained, because the amount awarded for salvage

H depends (*inter alia*) to a great extent on the benefit which accrues to the owner of the ship, and this benefit can only be measured in money by the value of the property saved. But, whatever the real value of the ship, when the amount payable by the underwriter to the assured has to be ascertained, her value must be treated as £33,000; and if the owner makes any claim on him based on the ship being worth more, the underwriter is entitled to say that the claim is not in accordance with the bargain between them.

I I confess that I see no answer to this argument. It seems to me to follow from the decision of your Lordships in *Irring v. Manning* (1), where the true effect of a valuation clause in a policy was carefully considered and finally settled. For the sake of avoiding all disputes in settling what the underwriter has to pay, the value of the ship is to be taken at an agreed sum. In order to prevent fraud by over-insuring this principle may require qualification, but where, as here, the ship is under-insured, no qualification is necessary. The notion prevalent at one time, and supported by the high authority of Mr. BENECKE, that, although the valuation

in a policy is conclusive in the case of a total loss, yet in the case of a partial loss the valuation may be opened, has long been exploded: see 3 KENT'S COM. 274; PARSON'S MARINE INSURANCE, vol. 1, p. 272; ARNOULD ON MARINE INSURANCE (16th Edn.), pp. 299, 939. There are numerous decisions showing this to be the case in valued policies on goods and freight (the most recent being *The Main* (2)); and I am unable to discover any reason for applying to ships a doctrine repudiated as unsound when applied to goods or freight. At the same time, I have not discovered any direct decision on this point. The principle that the valuation in a policy on ships is to be regarded in cases of partial loss was assumed to be correct in *Pitman v. Universal Marine Insurance Co.* (3), and was not questioned on appeal.

The owners, however, contend that the underwriters have no concern with the mode in which the amounts payable for losses insured against are arrived at. The owners say that they are fully insured up to a certain limit, and that if that limit is not exceeded all losses insured against must be fully paid. This appears to me to ignore the difference between valued policies, as understood in this country, and open policies, and to be erroneous according to English law. The introduction of the word "fully" occasions the fallacy in the plaintiff's reasoning. It is not true to say that the plaintiffs are fully insured. If the word "fully" is introduced, it must be qualified, so as to show its true meaning—i.e., fully for a ship of the value mentioned in the policy. If, in this case, the ship had been totally lost the owners would have found themselves uninsured to the extent of the ship's real value over £33,000. To say that the whole value, as fixed in the policy, is insured, and then to treat the assured as fully insured, appears to me misleading. The contract is not fully to insure the shipowner up to a certain limit, but to insure him on the footing that his ship is to be taken to be of the value of £33,000 for the purpose of ascertaining what is payable under the policy. The foregoing observations are as applicable to losses owing to salvage as to ordinary general average losses. There is more difficulty in dealing with salvage losses, as the sum awarded for salvage services is arrived at by considering the risks and dangers encountered by the salvors as well as the value of what is saved; but this value is always a very material matter for consideration, and, other things being the same, it may, for all practical purposes, be fairly regarded as regulating the amount awarded when the sum payable under a valued policy has to be ascertained.

So the matter stands on principle. Let us now consider the custom or practice or rule on which the underwriters also rely. The rule does not mention salvage; but it was proved at the trial that the rule is always applied to losses occasioned by salvage as well as to ordinary general average losses, and I have endeavoured to show that this is correct in principle. The rule, as framed, treats over-insurances and under-insurances differently. It first deals with contributory value, the underwriter pays what is assured on the contributory value." If this rule is applied to a valued policy, it infringes the principle of taking the agreed value for better and for worse in ascertaining what the underwriter has to pay. This deviation from that principle may perhaps be justifiable in cases of over-insurance, on the ground that it avoids all danger of fraud and endless disputes between over-insured owners and underwriters. But this part of the rule is inapplicable to the present case, and it is unnecessary to say more about it. The second part of the rule applies to under-insurances and to the present case; and there being no danger of fraud, the rule says: "But when insured for less than the contributory value the underwriter pays on the insured value." The rest of the rule is consequential on this. The rule is, in my opinion, not wrong, but right, in principle, and is calculated to save infinite trouble. The actual method of working out the rule adopted by underwriters may not be arithmetically accurate, but it is simple and convenient; there is nothing unfair in it, it has long been adopted, and there is no justification for disturbing it. It is true that in New York the practice appears to be in favour of the appellants, but in this respect I believe New York stands alone; and although uniformity in these

A *business is greatly to be desired, your Lordships cannot, in my opinion, judicially do otherwise than dismiss this appeal. So far as the actual words of the policy go, they appear to me consistent with both rival contentions; but the English rule is more consistent than the other with the interpretation which has for years been put on valued policies in this country. The appeal should be dismissed with costs.*

B

Appeal dismissed.

Solicitors : *Lowless & Co.; Waltons, Johnson, Bubbs & Whetton.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

C

D

CHAMBERS v. GOLDTHORPE RESELL AND OTHERS v. NYE

[COURT OF APPEAL (Sir A. L. Smith, M.R., HENN COLLINS and ROMER, L.J.J.).
February 27, 1901]

E *Reported* [1901] 1 K.B. 624; 70 L.J.K.B. 482; 84 L.T. 444; 49 W.R. 401;
17 T.L.R. 304; 45 Sol. Jo. 325]

*Building Contract—Architect—Certificate—Authority for payment to contractor—
Ascertainment of amount—Position of architect—Quasi-arbitrator.*

F

Clauses in building contracts provided that a certificate of the architect in each case "showing the final balance due or payable to the contractor(s) is to be conclusive evidence of the works having been duly completed, and that the contractor(s) is (are) entitled to receive payment of the final balance . . ."

G

Held: by SIR A. L. SMITH, M.R., and HENN COLLINS, L.J.; ROMER, L.J., dissentiente: when acting under these clauses the architect was not the agent of the building owner so that his sole duty was to look after the owner's interests as against those of the contractor; he owed a duty to them both; his task was not merely ministerial or clerical or one of arithmetic, it involved technical skill and knowledge; and, therefore, his position was that of a quasi-arbitrator between the owner and the contractor who had undertaken to exercise judicial functions impartially between the parties in determining the matters specified in the clauses; accordingly, no action would lie against him for negligence in the performance of those duties.

H

Arbitration—Submission—Settlement of matters specified in contract—No dispute actually in existence.

Per SIR A. L. SMITH, M.R., and HENN COLLINS, L.J.: There can be a submission to arbitration to settle specified matters although no dispute has actually arisen with regard to them, if it is probable that a dispute will arise unless the arbitration takes place.

I

Notes. *Considered and Explained: Kennedy v. Barrow-in-Furness Corpn.* (1909), Hudson, Bldg. Contracts, 7th Edn., p. 520. Followed: *Boydton v. Richardson* (1924), 69 Sol. Jo. 107. Considered: *Wisbech R.D.C. v. Ward*, [1927] All E.R. Rep. 496. Followed: *O'Brien v. Perry and Daw* (1940), 85 Sol. Jo. 142. Considered: *Freeman v. Allen*, [1943] 1 All E.R. 493; *R. B. Barden, Ltd. v. Swansea Corpn.*, [1957] 3 All E.R. 243. Referred to: *Brightman v. Tate*, (1919) 1 K.B. 463.

As to submissions to arbitration, liabilities of arbitrators, and the duties of architects under building contracts, see 2 HALSBURY'S LAWS (3rd Edn.) 3 et seq., and 33, and *ibid.*, vol. 3, p. 525 et seq. For cases see 2 DIGEST (Repl.) 421 et seq., and 550 et seq., and 7 DIGEST (Repl.) 455 et seq.

Cases referred to :

- (1) *Clemence v. Clarke* (1879), Hudson's B.C., 8th Edn., 227; 7 Digest (Repl.) 369, 125.
- (2) *Lloyd Bros. v. Milward* (1895), Hudson's B.C., 8th Edn., 224, C.A.; 7 Digest (Repl.) 370, 127.
- (3) *Stevenson v. Watson* (1879), 4 C.P.D. 148; 48 L.J.Q.B. 318; 40 L.T. 485; 43 J.P. 399; 27 W.R. 682; 7 Digest (Repl.) 462, 484.
- (4) *Tharsis Sulphur and Copper Co. v. Loftus* (1872), L.R. 8 C.P. 1; 42 L.J.C.P. 6; 27 L.T. 549; 21 W.R. 109; 1 Asp.M.L.C. 455; 2 Digest (Repl.) 551, 856.
- (5) *Pappa v. Rose* (1871), L.R. 7 C.P. 32; 41 L.J.C.P. 11; 25 L.T. 466; 20 W.R. 62; affirmed (1872), L.R. 7 C.P. 525; 41 L.J.C.P. 187; 27 L.T. 348; 20 W.R. 787, Ex. Ch.; 2 Digest (Repl.) 550, 855.
- (6) *Rogers v. Jamis* (1891), 56 J.P. 277; 8 T.L.R. 67; Hudson's B.C., 8th Edn., 80, C.A.; 7 Digest (Repl.) 367, 120.
- (7) *Wadsworth v. Smith* (1871), L.R. 6 Q.B. 332; 40 L.J.Q.B. 118; 19 W.R. 797; 2 Digest (Repl.) 432, 81.
- (8) *Jenkins v. Betham* (1855), 15 C.B. 168; 24 L.J.C.P. 94; 24 L.T.O.S. 272; 1 Jur.N.S. 237; 3 W.R. 283; 3 C.L.R. 373; 139 E.R. 384; 2 Digest (Repl.) 551, 859.

Also referred to in argument :

- Re Carus-Wilson and Green* (1886), 18 Q.B.D. 7; 56 L.J.Q.B. 530; sub nom. *Re Wilson and Green, Re Casterton Estates*, 55 L.T. 864; 35 W.R. 43; 3 T.L.R. 22, C.A.; 2 Digest (Repl.) 421, 3.
- Scott v. Liverpool Corpn.* (1858), 3 De G. & J. 334; 28 L.J.Ch. 230; 32 L.T.O.S. 265; 5 Jur.N.S. 105; 7 W.R. 153; 44 E.R. 1297; 2 Digest (Repl.) 474, 336.
- McIntosh v. Great Western Rail. Co.* (1850), 2 Mac. & G. 74; 2 H. & Tw. 250; 19 L.J.Ch. 374; 15 L.T.O.S. 321; 14 Jur. 819; 42 E.R. 29, L.C.; 7 Digest (Repl.) 372, 138.

CHAMBERS v. GOLDTHORPE.

Appeal by the defendant from a decision of the Queen's Bench Division (CHANNELL and BUCKNILL, JJ.), reversing a decision of the judge of the Holmfirth County Court.

The plaintiff was an architect, and sued the defendant, the building owner by whom he had been employed, for his fees, which by agreement were to be calculated at a percentage on the total cost of certain houses erected by the defendant. The defendant counterclaimed for negligence, alleging that the plaintiff, whom he had employed as his architect for reward, had negligently and incorrectly measured up the work done by the contractor who had built the houses, and given wrong certificates whereby the plaintiff had suffered loss. The defendant had employed the plaintiff as an architect to prepare plans and specifications of certain houses which he wished to build, and to superintend the execution of the works. The defendant entered into a written contract with a contractor for the erection of the houses in accordance with the plans and specifications for a certain named sum. Clause 8 of the contract provided that any authority given by the architect for any alteration in or to the works was not to vitiate the contract, but all additions, omissions, or variations made in carrying out the works, for which a price had not been previously agreed upon, were to be measured and valued and certified for by the architect, and added to or deducted from the amount of the

A contract as the case might be, according to the schedule of prices annexed, or, where the same might not apply, at fair measure and value. Clause 10 provided that the architect was to have full power to require the removal from the premises of all materials which, in his opinion, were not in accordance with the specifications, and to require other proper materials to be substituted. Clause 11 provided that should any of the works be, in the opinion of the architect, executed with improper materials or defective workmanship, the contractor should, when required by the architect during the progress of the work, forthwith re-execute the same and substitute proper materials and workmanship, and in case of default of the contractor in so doing within a reasonable time, the architect was to have power to employ other persons to re-execute the work, and the cost thereof was to be borne by the contractor. By cl. 20 :

C "A certificate of the architect, or an award of the referee hereinafter referred to, as the case may be, showing the final balance due or payable to the contractor is to be conclusive evidence of the works having been duly completed, and that the contractor is entitled to receive payment of the final balance. . . ."

D By cl. 22 :

"Provided always that in case any question, dispute, or difference shall arise between the proprietor, or the architect on his behalf, and the contractor as to what additions, if any, ought in fairness to be made to the amount of the contract by reason of the works being delayed through no fault of the contractor, or by reason or on account of any directions or requisitions of the architect, involving increased cost to the contractor beyond the cost properly attending the carrying out of the contract according to the true intent and meaning of the signed drawings and specifications, or as to the works having been duly completed, or as to the construction of these presents, or as to any other matter or thing arising under or out of this contract (except as to matters left during the progress of the works to the sole decision or requisition of the architect under cll. 10 and 11) or in case the contractor shall be dissatisfied with any certificate of the architect under cl. 8, or under the proviso in cl. 16, or in case he shall withhold or not give any certificate to which the contractor may be entitled, then such question, dispute, or difference, or such certificate, or the value or matter which should be certified, as the case may be, is to be from time to time referred to the arbitration and final decision of an architect, being a fellow of the Royal Institute of British Architects, to be appointed on the request of either party by the president for the time being of such institute, and the award of such referee is to be equivalent to a certificate of the architect, and the contractor is to be paid accordingly. Such award or certificate may be made a rule of Her Majesty's High Court of Justice or any court of record in England. The cost of the arbitration and award shall be in the discretion of the arbitrator."

I Upon the completion of the houses the plaintiff gave a final certificate, and in this action he claimed his fees calculated at a percentage on the cost of the works. The defendant counterclaimed for negligence, alleging that the plaintiff had negligently and incorrectly measured up the work done, and so had given a certificate for a larger amount than it ought to have been. At the trial of the action in the Hedderfirth County Court, the county court judge gave judgment for the plaintiff on his claim and for the defendant on his counterclaim for damages to be assessed. On appeal, the Queen's Bench Division (CHANNELL and BUCKNILL, JJ.), gave judgment for the plaintiff on the counterclaim, on the ground that, when acting under cl. 20 of the contract, the architect held a judicial position between the building owner and the contractor, and was, therefore, not liable for negligence. The defendant appealed.

RESTELL AND OTHERS v. NYE.

Appeal by the plaintiffs from a decision of MATHEW, J., at the trial of the action without a jury.

The plaintiffs were the executors of a building owner who had employed the defendant, an architect, to prepare plans and specifications for the building of certain houses, and to superintend the execution of the works for a commission on the cost of the works. The action was brought to recover damages for the negligence of the defendant in the performance of his duties as architect in improperly certifying for, as extras, works included in the contract. The contract between the building owner and the contractor was substantially the same as that in the preceding case, but it contained the following clauses :

"Clause 20. Where the value of the works executed, and not included in any former certificate, shall from time to time amount to the sum of £200, the contractors are to be entitled to receive payment at the rate of £75 per cent. upon such value upon obtaining the architect's certificate, a further £15 per cent. upon such value within one calendar month from the completion of the works, and of which completion the contractors shall then have obtained the certificate of the architect, and the remaining £10 per cent. at the expiration of a further period of three calendar months from such last-mentioned certificate provided always that no final or other certificate is to cover or relieve the contractors from their liability under the provisions of cl. 14 hereof, whether or not the same be nullified by the architect at the time of or subsequently to granting any such certificate. Clause 21. A certificate of the architect, or an award of the referee hereinafter referred to, as the case may be, showing the final balance due or payable to the contractors, is to be conclusive evidence of the works having been duly completed, and that the contractors are entitled to receive payment of the final balance. . . . Clause 22. Provided always, that in case of any question, dispute, or difference arising between the employer, or the architect on his behalf, and the contractors attending the carrying out of the contract according to the true intent and meaning of the signed plans and specifications, or as to the works having been duly completed, or as to the construction of these presents, or the said specifications, or as to any other matter or thing arising under or out of this contract, or the execution of the works hereby contracted for (except as to matters hereinbefore left during the progress of the works to the sole decision or requisition of the architect), then such question, dispute, or difference is to be from time to time referred to the arbitration and final decision of — and the said referee's charges and costs of and incidental to the reference shall be paid by such parties as the referee shall direct, and the said reference shall be considered a reference to arbitration within the meaning of the Arbitration Act, 1889, or any statutory modification thereof, and no proceedings whatsoever shall be taken by the contractors against the employer until the contractors shall have obtained, and save upon, the award of the said referee, whose appointment shall be irrevocable."

At the trial of the action MATHEW, J., held that the defendant, in giving his certificates under this contract, was in the position of an arbitrator, and that, therefore, no action would lie against him for negligence in this matter. He, accordingly, gave judgment for the defendant, and the plaintiffs appealed.

Lowenthal for the defendant in *CHAMBERS v. GOLDTHORPE*.
Scott-Fox, K.C., and *R. W. Harper* for the plaintiff.

Bray, K.C., and *Morton* for the plaintiffs in *RESTELL v. NYE*.
L. Horton-Smith and *W. P. G. Boxall* for the defendant.

A SIR A. L. SMITH, M.R.—These are two actions in each of which a question has been raised as to the liability of an architect for negligence.

The first case is one in which an architect brought an action against the building owner who had employed him, claiming fees for the work which he had done, the fees being calculated at a percentage on the amount payable by the owner to the builder who erected the houses. The owner counterclaimed against the plaintiff, alleging that the plaintiff had been guilty of negligence in certifying so large an amount as he did as being payable by the defendant to the builder. The question thus raised is whether, in allowing and certifying the amount payable by the defendant to the builder, the plaintiff was in the position of an arbitrator between the owner and the builder, or whether he was acting only as agent for the owner. If, in making out the certificate, the plaintiff was acting merely as agent for the owner, he would be liable in case he should have acted negligently. But, if he were acting as an arbitrator between the two parties, he would not be liable for negligence at the suit of the owner. There is no suggestion in this case that the plaintiff acted fraudulently or in collusion with the builder, so that the only question is as to his liability for acting negligently.

D There can be no doubt that in what the plaintiff did under several of the clauses of the building contract he was acting solely as agent for the owner. He was employed by the owner to look after the builder, and to see that the builder made use of proper materials. In those matters the plaintiff was acting as agent for the owner—his position was adverse to the builder. In those instances where his duty was simply to protect the interests of the owner he was acting as agent for the owner, and would be liable to the owner if he acted negligently. But the question in the present case has arisen out of what the plaintiff did when acting under cl. 20 of the building agreement. By that clause the owner and the builder agreed to be bound by the final certificate to be given by the plaintiff. Was the plaintiff, in giving that certificate, acting as agent for the owner, or was it his duty to act impartially as an arbitrator between the owner and the builder? I feel unable to hold that under cl. 20 the sole duty of the plaintiff was to look after the interests of the owner as against those of the builder. Under that clause he owed a duty to the builder as well as to the owner. In agreeing to act under that clause, he undertook a duty towards both of them, which was to hold the scales fairly and to decide impartially between them the amount which the builder was entitled to be paid by the owner. Reference was made to the effect of cl. 22 in the agreement, and the judgment of GROVE, J., in *Clemence v. Clarke* (1) was cited; but I do not see why, in case of a dispute arising under the contract, either party should not be entitled to go to arbitration under that clause. Under the contract in the second case now before the court, it seems clear that either party, in the case of a dispute, would be entitled to have it referred to arbitration. But the point does not seem to me material to the real question which we have now to decide. *Lloyd Bros. v. Milward* (2) and *Clemence v. Clarke* (1), seem to lead to the conclusion that, unless there is a dispute and a reference to arbitration under cl. 22 before the architect has given his certificate, under cl. 20 the certificate given by him is final between the owner and the builder.

I What is the duty of the plaintiff in giving his certificate? The ascertainment of the amount to be paid by the owner to the builder is not a mere matter of arithmetic. The architect's duties are not merely ministerial or clerical, to use the words of LORD COLERIDGE, C.J., in *Sterenson v. Watson* (3). The matter requires the use of professional knowledge, skill, and judgment. In such circumstances *Sterenson v. Watson* (3) appears to show that the position of the architect is that of an administrator between the owner and the builder. It was argued that there could be no arbitration because no dispute had arisen between the owner and the builder. In my opinion, there can be an arbitration to settle matters although no dispute has actually arisen with regard to them, if it is probable that a dispute will arise unless the arbitration takes place.

I will refer to *Tharsis Sulphur and Copper Co. v. Loftus* (4), in which there was no more a dispute than there has been in the present case. There damage had occurred to a ship which required an average adjustment. There was no actual dispute as to the proportions in which the loss had to be borne by the various parties, but it was necessary that the question should be settled between them, and an average adjuster was asked to settle it. So in the present case when the builder had carried out his contract it became necessary that the question should be settled how much the owner ought to pay the builder. The claim in *Tharsis Sulphur and Copper Co. v. Loftus* (4) was made against the average adjuster for negligence. It was held that he was not liable on the general principle that a person so employed is in the position of an arbitrator, and cannot be sued in respect of the manner in which he has exercised his functions, unless he be guilty of fraud or collusion. BOVILL, C.J., said (L.R. 8 C.P. at pp. 6, 7) :

"No authority has been cited to show that a person called upon to act as an arbitrator, or to settle disputes, or adjust accounts between parties, is liable to an action for negligence."

KEATING, J., said (*ibid.* at pp. 7, 8) :

"Now, without deciding what is the proper definition of an arbitrator, it appears to me clear that the defendant is in the position of an arbitrator for the present purpose, inasmuch as he was a person by whose decision two parties having a grievance agreed to be bound. It appears to me that the safe rule, when parties agree to be bound by the decision of a third party on any matter, is that they take him in such a case for better or worse; and if he discharges his duty faithfully and honestly, they must be satisfied."

BRETT, J., said (*ibid.* at pp. 8, 9) :

"Then it is said that the defendant is liable because he was not an arbitrator, but only a person who had undertaken to adjust accounts between two parties. Now the case of *Pappa v. Rose* (5) decides that a person who undertakes to give a decision between two parties as to any matter, though he may not be an arbitrator in the strict sense of the word, as not being bound to exercise all the judicial functions for the purpose of deciding the matter in dispute that an arbitrator in the strict sense of the term would have to exercise, nevertheless is not liable to an action for want of skill. It appears to me that the reasoning employed in that case is equally applicable to an action for want of care, and that if an arbitrator in the strict sense of the word is not liable for want of care, it follows that a person who has undertaken to decide a dispute between two parties is also not liable."

In my judgment, the present case is covered by those words. When acting under cl. 20 of this building contract, the plaintiff was in the position of one who had undertaken to exercise judicial functions with regard to the questions that had arisen between the owner and the builder, and, therefore, he is not liable to an action for negligence in respect of the way in which he exercised those functions.

I will add a few words as to *Rogers v. James* (6), in which an architect was held liable in an action for negligence by his employer. That case is distinguishable from the one we have now to decide, though to some extent it supports the view I am now taking. The negligence there alleged was not properly supervising the work done under a building contract, which was the thing he was employed by the building owner to do. He was employed to do that supervision simply as agent for the owner, and his position was adverse to the builder. There was no arbitration in the matter at all. The case was simply one of a negligent breach of the duty owed by an agent to his principal. The question there decided has nothing to do with the present point.

A For these reasons I think that the counterclaim raised by the defendant in the first of the two cases now under appeal is not maintainable, and that this appeal should be dismissed. The second case we have to decide is one in which a building owner has sued an architect for negligence of the same kind as that alleged in the first case. There may be some slight differences in the facts of the two cases, but they do not affect the principles to be applied in deciding them. The

B real point in issue in the two cases is the same, whether the architect in giving his final certificate of the amount due from the building owner to the builder was in the position of an arbitrator or of an agent to the building owner. For the reasons I have already stated I think that in the second case the action will not lie, and the appeal in this case must also be dismissed.

C **HENN COLLINS, L.J.**—I am of the same opinion. The question in these two appeals is the same. The question is whether an architect who has undertaken the duties which were undertaken by the architects in the two cases now before us is in the position of what has been sometimes called a quasi-arbitrator. If he is, then it appears to me that upon the authorities no action is maintainable against him for negligence in the exercise of his functions. The question whether or not

D he is in that position depends upon whether, as was said by CHANNELL, J., in the court below, he was placed in a position in which he was bound to exercise his judgment impartially as between the two parties to the building contract. It was argued that he was not in that position; that he was simply an agent of the building owner, and, therefore, owed no duty whatever to the builder. The

E question is, whether that view, or the view that he was bound to exercise his judgment impartially between the parties, is the correct one.

In my opinion, his position was that of a quasi-arbitrator. The construction of cl. 22 of the contract has been the subject of a decision of this court in *Lloyd Bros. v. Milward* (2), by which we are bound. It was there held that where a dispute had arisen—that is to say, where a dispute had actually been formulated

F between the parties—before the architect had given his certificate, the jurisdiction of the architect was ousted, and that of the arbitrator let in, but that, if no such formulated dispute had arisen before the architect had given his certificate, the jurisdiction of the referee was not let in, and the certificate of the architect was final and as binding as the award of a referee, as conclusive evidence that the works had been completed, and that the builder was entitled to the balance for

G which the certificate was given.

What is the position of an architect whose duty it is to give a certificate which is to be final and binding both on his employer and the other party to the building contract? Is he free from any obligation towards one of the parties, or is his position such that he is under the duty of exercising his judgment impartially between the two parties? It appears to me that he is in the last-mentioned

H position. The case seems to me to come exactly within the decision of *Stevenson v. Watson* (3), which was decided in 1879. I have always looked on that case as the leading authority on the subject. It came after a series of cases in which the position of a lay person who has to decide a dispute between two parties had been discussed. LORD COLERIDGE, C.J., reviewed the preceding authorities, and laid down the law on a sound logical principle. He said that where a matter is

I left by two parties to the judgment of a third who is to determine their rights, and the task is not merely one of arithmetic, but involving technical skill and knowledge, that person is in the position of a quasi-arbitrator, and no action will lie against him for negligence in the performance of those duties.

In that case the question arose on demurrer, and the material clause of the contract, which was set out in the statement of claim, was as follows :

“The contractor and the directors will be bound to leave all questions or matters of dispute which may arise during the progress of the works or in

the settlement of the account to the architect, whose decisions shall be final and binding upon all parties. The contractor will be paid on the certificate of the architect."

That is substantially the same as what is contained in cl. 20 in the contract in the present case. There was no formulated dispute in that case any more than there is here, but the certificate of the architect was to be final and binding. The builder sent in to the defendant accounts which showed a balance, after giving credit for certain sums, of £1,616 6s. 7d., and it was alleged that the defendant, without calling on the plaintiff for any explanation, and without communicating to him on the subject, proceeded to ascertain what, in his judgment, was payable, and gave a certificate to the effect that a balance of £251 14s. 4d. was due. There was, therefore, no formulated dispute any more than there is in the case now before us. LORD COLERIDGE, in delivering judgment, said he thought that, though no doubt the result was one of figures, yet, before it could be arrived at, there must be an exercise of professional knowledge, skill, and judgment. He then continued.

"Moreover, it seems to me that it is so provided for by the contract, and that the true view of the contract is that presented by Mr. Wills—viz., that before the plaintiff can recover sums of money from the building owner there must be the certificate of the architect to ascertain what sums are due from the building owner to the plaintiff. Now, if I have rightly described the position of the defendant with respect to the plaintiff, it follows from the decided cases that this action does not lie. Where, indeed, the building owner and the architect collude together, and in collusion the architect fraudulently abstains from doing his duty towards the builder, there is authority for saying that he can maintain an action against the building owner. . . . I think this case is within the authority of the cases cited which decide that where the exercise of judgment or opinion on the part of a third person is necessary between two persons, such as a buyer and seller, and, in the opinion of the seller, that judgment has been exercised wrongly, or improperly, or ignorantly, or negligently, an action will not lie against the person put in that position, when such judgment has been wrongly, or improperly, or ignorantly, or negligently exercised."

It was contended that there can be no quasi-arbitration unless a dispute is in existence, but I think that there is a fallacy in that argument. There is a difference between a dispute formulated between the parties, so as to be within cl. 22 of the contract as interpreted by the Court of Appeal in *Lloyd Bros. v. Milward* (2), and that sort of possible difference which underlies an agreement between two parties, that what one is to pay and the other is to be paid in respect of a certain matter shall be ascertained by a third person. In such an agreement there is involved an underlying assertion of possible difference as to the rights to be so ascertained by the third person, and if he, having notice of the agreement, accepts the responsibility of deciding between the two parties he must, in my opinion, have duties towards both of them. It is not necessary that there should be a formulated dispute in order to put such a person in the position of a quasi-arbitrator.

Is, then, the architect in the two appeals now before us in that position? As the acts of the parties have not brought cl. 22 into operation, it seems to me that the architect is in the position of a quasi-arbitrator—that is to say, his duty is to ascertain impartially the rights and liabilities between the building owner and the builder by the exercise of his skill and judgment. The matter seems to me to come well within the principles laid down in *Pappa v. Rose* (5), *Tharsis Sulphur and Copper Co. v. Loftus* (4), and *Stevenson v. Watson* (3). Those cases seem to me not only to lay down the principle to be applied in the present matter, but to be clear authorities as to the terms of the contract now before us. As I have said, it was held in *Lloyd Bros. v. Milward* (2), where there was a formulated dispute

A within cl. 22, that the jurisdiction of the architect was ousted. And in *Clemence v. Christie* (1), where there was no such formulated dispute, it was held that the certificate of the architect was final, and it was spoken of by GROVE, J., as an award. Taking these two cases together, it seems to me to be clearly established that, as the architect's functions were not ousted by anything done under cl. 22, he was a person clothed with the duty of exercising his judgment impartially in deciding between two persons. I agree with the reasoning of my Lord and with that of CHANNELL, J., in the court below.

B As to *Wadsworth v. Smith* (7), the question there was whether a building contract, in which it was provided that the architect's certificate was to be final between the parties as to certain matters, was a submission to arbitration within the Common Law Procedure Act, 1854, so as to admit of being made a rule of court, and it was to this point that the observations in the case were addressed. **C** If such a contract were a submission, the architect would be, in the full sense of the term, an arbitrator. This is, presumably, the reason why, in the subsequent cases the courts have been careful to refer to persons similarly situated as "quasi-arbitrators"—that is, persons not acting under a formal submission, but, nevertheless, for certain purposes regarded as being in the same position as arbitrators. **D** I see no material distinction between the facts in the two appeals now before us.

E In the second case now before us it is to be observed that the judge was MATHEW, J., who tried *Rogers v. James* (6) in 1891, where it was held that an action for negligence lay by the building owner against the architect. No one disputes that for many purposes the architect is the agent of the building owner, and so would be liable for negligence, but it is not inconsistent with his employment that he should for some purposes assume the rôle of quasi-arbitrator, and when acting in that position no action for negligence will lie against him. In *Rogers v. James* (6) the architect was not acting in the capacity of quasi-arbitrator, but as agent for his employer.

F **ROMER, L.J.**—I regret to say that I differ from the Master of the Rolls and my brother HENN COLLINS. Suppose a person undertakes for reward to estimate for another the work which is to be done for his principal by someone else, in such a case it seems to me that as regards his principal he does not take the position of an arbitrator with respect to the estimate which he is to make, merely because he knows that his principal and the third person have agreed that his estimate **G** is to be taken as conclusive and as determining the price to be paid by his principal for the work to be done by the third person. In such a case, in my opinion, in giving his estimate he would still be acting for his principal; and so long as he acted without fraud he would be under no liability to the third person, but if he were guilty of negligence causing damage, he would be liable to an action at the suit of his principal.

H I cannot think that view is wrong, and yet the architect in the present case must maintain a contrary view to enable him to succeed in this appeal. By the terms of his employment by the building owner the architect undertook to measure up from time to time the work done by the builder, and to certify the amount of money to be paid for it, and, on the work being completed, to certify the balance due to the builder. He was to be paid by his principal for doing this work, and **I** it is for this work that he is now suing. If he was guilty of negligence, causing damage, in doing the work which he was paid to do, he would *prima facie* be liable to his principal. In order to escape from that liability, the onus lies on him to show that by the terms of the contract between his principal and the contractor, he was freed from that liability. No doubt he might do so, if he could show that by those terms he was undoubtedly placed in the position of an arbitrator with regard to his certificate, and that his principal's complaint against him in regard to the certificate was for something done by him in his capacity of arbitrator. But he would not, in my opinion, succeed in showing this merely by reason of the fact

that his principal and the contractor had by the contract between them agreed that, if no prior dispute arose in reference thereto, his certificates should be treated as conclusive between them. A

I turn to the contract in this case. I find there that not only is there nothing going beyond what I have just mentioned or indicating that, in measuring up the work and certifying, he was regarded as an arbitrator, but the provisions of the contract appear to me to negative the idea that under the contract he was in any way to be regarded as in the position of an arbitrator. I need not go through the whole of those provisions, but I may point out that there is an arbitration clause, cl. 22, which does provide for the settlement of disputes by an arbitrator who is not the architect, and in that clause the architect is recognised as being the agent of the building owner, and as acting in opposition to the interests of the builder. Clause 8 is also not without significance, for if there were any matters in respect of which one would expect to find the architect placed in the position of an arbitrator, it would be in reference to the matters dealt with by that clause. But yet we find that, though the architect's principal would be bound under cl. 20 by the architect's certificate in reference to those matters, yet under cl. 22 the contractor may challenge the certificate and go to arbitration upon it. Clauses 10 and 11 may also be referred to, because they are clauses under which the decision of the architect is final, and there is no right of going to arbitration under cl. 22. They enable the architect to decide during the progress of the works whether proper materials are being used by the contractor, and his decision on these matters is final. B

Is it possible that because under these clauses the architect is given power to decide between the owner and the contractor whether or not proper materials have been supplied, if by his negligence he allowed the contractor to supply improper materials, and the building owner were thereby damaged, the building owner would have no remedy against him because the architect could say that in that matter he was in the position of an arbitrator? I think that would be a most lamentable conclusion, and one which in my opinion we are not bound to arrive at, and yet, if the architect's arguments here be correct, the building owner would be without any remedy. If the contract be looked at as a whole, it appears to me that, far from enabling the architect to discharge the onus which I have said rests on him, the contract is strongly against the contention which is urged on his behalf. To hold the contrary to what I think is correct would put a construction on the contract which is not necessary or right, and which would work injustice between a building owner and an architect guilty of negligence. C

I think that the state of the authorities is not altogether satisfactory, but it seems to me that there is nothing which prevents me from arriving at the conclusion which I have come to. Not only are there no authorities against me, but I think that the cases are in my favour. The general principles were considered in *Wadsworth v. Smith* (7) by COCKBURN, C.J., BLACKBURN, J., MELLOR, J., and HANSEN, J. They had to consider whether a certain clause in a building contract constituted the architect an arbitrator in certain matters. The clause was a somewhat ambiguous one, but the court dealt with the matter as one of general principle and came to the conclusion that it did not make the architect an arbitrator. The judgments are, therefore, very important. COCKBURN, C.J., said (L.R. 6 Q.B. at pp. 336, 337): D

"Here the clause in question gives the defendant power to put an end to the agreement if there is unreasonable delay or unsatisfactory conduct on the part of the plaintiff, such delay or unsatisfactory conduct to be ascertained and decided in writing by Messrs. Scargill and Clarke, the defendant's architects for the time being, against whose decision there shall be no appeal. I am by no means disposed to say that this amounts to a submission to arbitration, although it is certainly wider than and different from many of the ordinary clauses as to the certificate of architects which have occurred in cases under E

- A building contracts, and which have been determined to be binding on the builder, and not to be clauses of arbitration. The present clause is certainly more like a submission to arbitration; it is on the confines of the two classes; but, on the whole, it seems to me to savour more of a mere architect's certificate than of a judicial proceeding."
- B He was dealing there with a question of principle and considering in relation to it the ordinary clause in a building contract by which the certificate of an architect is made binding on the parties, and he points out that under such a clause the architect is not an arbitrator. BLACKBURN, J., said (*ibid.* at p. 337):

- C "Where by an agreement the right of one of the parties to have or do a particular thing is made to depend on the determination of a third person, that is not a submission to arbitration, nor is the determination an award; but where there is an agreement that any dispute about a particular thing shall be inquired of and determined by a person named, that may amount to a submission to arbitration, and the determination, though in the form of a certificate, be an award."

- D He was there dealing with the case before him on the question of principle, which, I think, ought to govern the present case. MELLOR, J., concurred. HANNEN, J., said (*ibid.*):

- E "I think this is not an agreement or submission to arbitration; the clause in question seems to me no more than an extension of the ordinary clause in building contracts, that the certificate of the architect shall be conclusive as to work done and the mode of doing it."

Those four learned judges decided the case before them as a question of principle, and according to the principle which, in my opinion, should be applied to the present case.

- F *Jenkins v. Betham* (8) also seems to me to be in support of the view which I take. There an action was brought against some persons whom the plaintiff had appointed as valuers for him to value dilapidations as between himself and another person. It was agreed that, if the valuers disagreed, an umpire should be appointed, but if the valuers agreed and no umpire was appointed, the valuation of the valuers was to be final and conclusive between the parties. If the argument put forward by the architects in the two cases now before the court were correct, it ought to have been held that in that case no action would have lain against the valuers because they would have been in the position of arbitrators; but it was held that the action did lie because the valuers had undertaken to exercise due skill as valuers in the matter in which they were employed. That case, therefore, is an authority in support of the view of the law which I take. The reasoning of the judges in
- H *Rogers v. James* (6) and *Lloyd Bros. v. Milward* (2) also seems to me to support my view.

- I I will now come to the cases which are said to conflict with my view of the law. In *Tharsis Sulphur and Copper Co. v. Loftus* (4) the question was whether or not the defendant had occupied the position of arbitrator in reference to his performance of the duties of an average adjuster. I think that the headnote to that case is correct. It says that general average losses having been incurred in the prosecution of a voyage, it became necessary to settle and adjust the proportion of the loss which the ship and cargo had respectively to bear, "and in order to do so the plaintiffs, the owners of the cargo, and the shipowner agreed to refer the matter to the defendant, an average adjuster, and to be bound by his decision." In my view that was a case in which a dispute existed, the parties to it agreed to refer it to the defendant for settlement, and the defendant was, therefore, clearly in the position of an arbitrator. The defendant was not employed by one party to the dispute more than by the other. If ever there was a case in which a person was in the position of

an arbitrator, I should have thought it was that case. The judgment clearly proceeded on the footing that a dispute had arisen. In the course of the argument by Mr. Myburgh on behalf of the plaintiffs, BOYLL, C.J., said: "The nature of the agreement set out assumes that the amount was in question between the parties." Taking that view, the case appears to me to have been rightly decided and to afford no authority against the view of the law which I take.

In *Pappa v. Rose* (5) a broker was held to have been in the position of an arbitrator. The question which he had to determine was whether certain raisins were of a "fair average quality" within the meaning of a certain contract. The court came to the conclusion that, under the circumstances, the broker was an arbitrator and that the action against him would not lie. The reasons for the judgment are shown in the observations of the judges. At the trial of the action BOYLL, C.J., ruled that an action would not lie against the defendant, inasmuch as he acted as a judge or arbitrator in deciding on the quality of the raisins, provided he acted bona fide. That is, a question had arisen as to the quality of certain raisins, and the defendant had been put in the position of a person who was to settle the dispute between the two parties, and was, therefore, an arbitrator. He was not employed by either one or other of the parties; he was not to receive any pay as the agent of one of the parties. In the Court of Common Pleas, KEATING, J., said (L.R. 7 C.P. at p. 38):

"I think this was not a matter to be done by the defendant in his ordinary capacity as a broker. It is true that he was a broker, and that he made the contract. But he was only to decide upon the quality of the raisins in the event of a dispute arising between the parties."

BRETT, J., said (*ibid.* at p. 39) that the ruling was

"not that the defendant was in the strict sense of the term an arbitrator, but that he was a person filling a position which brought him within an exception well known to the law of England—viz., that a person who is appointed and is acting as an arbitrator to determine a matter in difference between two or more persons does not enter into an implied promise to bring to the performance of the duty intrusted to him a due and reasonable amount of skill and knowledge."

He held that the defendant was a person who was appointed exclusively to determine a disputed fact. That case does not seem to me to be any authority against the view of the law which I hold.

The only case cited which causes me any difficulty is *Stevenson v. Watson* (3). I cannot help thinking that the judges in that case were influenced by the very special nature of the clause in the contract. The case arose on demurrer, and the clause is set out in the statement of claim. It is as follows:

"The contractor and the directors will be bound to leave all questions or matters of dispute which may arise during the progress of the works or in the settlement of the account to the architect, whose decisions shall be final and binding upon all parties."

I am not surprised that upon that clause the court held that the architect was constituted an arbitrator. If the judges did not decide upon the words of that clause, but intended to lay down any general principle—which I do not think they did—differing from that laid down in the previous cases, all I can say is that I prefer the decision in *Wadsworth v. Smith* (7) to that in *Stevenson v. Watson* (3). But I do not think it necessary to say that there is any difference in principle between those two cases. I think that the decision in the latter case was based upon the special terms of the clause I have referred to, and it may be observed that it was not necessary in that case to decide the point now in dispute. The contractor was suing in that case and it was necessary for him to put his claim on the ground that the defendant was an arbitrator. He could not put it in any other way, for the

A Defendant certainly was not the agent of the contractor. Therefore the court had not to decide whether the defendant was an arbitrator or not. The defendant was not the plaintiff's agent, and was, therefore, under no special duty to him, but was only bound to act honestly.

Looking, therefore, at all the cases, the balance of authority seems to me to be strongly in favour of the view which I venture to express. That view I think is more in consonance with natural justice. In cases of this kind, in which an employer pays an architect for supervising building works, it would be lamentable if, when he suffered damage by the negligence of the architect, he should have no remedy against the person he has employed and paid. I, therefore, think that in the first of these two cases the appeal should be allowed. The view which I have expressed as to the first case applies also to the second.

C *Appeals dismissed.*

Solicitors: *Van Sandau & Co.*, for Mills & Co., Huddersfield; *James & Mellor*, for Learoyd & Co., Huddersfield; *White & Leonard*; *Ingoldby & Adkin*, for Nye & Clewer, Brighton.

[*Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.*]

D

LINAKER v. PILCHER AND OTHERS

E

[KING'S BENCH DIVISION (Mathew, J.), February 9, 11, 1901]

[Reported 70 L.J.K.B. 396; 84 L.T. 421; 49 W.R. 413;
17 T.L.R. 256; 45 Sol. Jo. 276]

F *Trade Union—Action against union—Tort—Libel in newspaper owned by union—Liability of trustees—Right to be indemnified out of union funds—Trade Union Act, 1871 (34 & 35 Vict., c. 31), ss. 8, 9.*

Trade Union—Legality of acts—Conduct of newspaper—Improvement of condition and protection of interests of members.

G A registered trade union carried on a newspaper, not for profit or as a trading adventure, but for the purpose of improving the condition and protecting the interests of the members of the union in accordance with the rules and objects of the union. Under s. 8 of the Trade Union Act, 1871, the property of the union was vested in trustees. In an action brought by the plaintiff against the trustees as representing the union for damages for a libel published in the newspaper,

H **Held:** the action was one "touching or concerning the property" of the union within s. 9, and, therefore, the trustees had properly been sued in the action and were entitled to be indemnified out of the funds of the union in respect of the damages awarded against them by the jury in favour of the plaintiff.

I **Held, further:** on the facts the conduct of the newspaper was a legitimate activity of the union under one of its rules which provided: "The objects of the society shall be to improve the condition and protect the interests of its members."

Notes. Not followed: *Osborne v. Amalgamated Society of Railway Servants*, 1909 1 Ch. 163. Considered: *Longdon-Griffiths v. Smith*, [1950] 2 All E.R. 662. Referred to: *Stech v. South Wales Miners' Federation* (1907), 96 L.T. 260; *Rickards v. Bartram* (1908), 25 T.L.R. 181.

As to the liability in tort of a trade union and proceedings against unions, see 38 *Harvey's Laws* (3rd Edn.) 367, 368, 378 et seq. For cases see 43 *Digest* 112

et seq., 125-128. For Trade Union Act, 1871, see 25 HALSBURY'S STATUTES (2nd Edn.) 1244.

Cases referred to :

- (1) *Taff Vale Rail. Co. v. Amalgamated Society of Railway Servants*, [1901] 1 K.B. 170; 70 L.J.K.B. 219; 83 L.T. 474; 64 J.P. 788; 49 W.R. 101; 17 T.L.R. 68, C.A.; reversed [1901] A.C. 426; 70 L.J.K.B. 905; 85 L.T. 147; 65 J.P. 596; 50 W.R. 44; 17 T.L.R. 698; 45 Sol. Jo. 690, H.L.; 43 Digest 127, 1295.
- (2) *Flood v. Jackson*, [1895] 2 Q.B. 21; 64 L.J.Q.B. 665; 73 L.T. 161; 59 J.P. 388; 43 W.R. 453; 11 T.L.R. 335; 39 Sol. Jo. 396; 14 R. 397, C.A.; reversed sub nom. *Allen v. Flood*, [1898] A.C. 1; 67 L.J.Q.B. 119; 77 L.T. 717; 62 J.P. 595; 46 W.R. 258; 14 T.L.R. 125; 42 Sol. Jo. 149, H.L.; 43 Digest 125, 1275.
- (3) *Temperton v. Russell*, [1893] 1 Q.B. 435; 62 L.J.Q.B. 300; 68 L.T. 425; 57 J.P. 518; 41 W.R. 321; 9 T.L.R. 304; 37 Sol. Jo. 303; 4 R. 302, C.A.; 43 Digest 126, 1287.

Also referred to in argument :

- British Mutual Bank Co., Ltd. v. Charnwood Forest Rail. Co.* (1887), 18 Q.B.D. 714; 56 L.J.Q.B. 449; 57 L.T. 833; 52 J.P. 150; 35 W.R. 590; sub nom. *Mutual Banking Co. v. Charnwood Forest Rail. Co.*, 3 T.L.R. 498, C.A.; 1 Digest (Repl.) 686, 2449.
- Ruck v. Williams* (1858), 3 H. & N. 308; 27 L.J.Ex. 357; 31 L.T.O.S. 167; 22 J.P. 420; 6 W.R. 622; 157 E.R. 488; 41 Digest 24, 184.
- Southampton and Itchin Bridge Co. v. Southampton Local Board* (1858), 8 E. & B. 801; 28 L.J.Q.B. 41; 4 Jur.N.S. 1298; 120 E.R. 298; sub nom. *Itchin Bridge Co. v. Local Board of Health of Southampton*, 30 L.T.O.S. 256; 6 W.R. 223; 13 Digest (Repl.) 318, 1267.
- Duke of Bedford v. Ellis*, [1901] A.C. 1; 70 L.J.Ch. 102; 83 L.T. 686; 17 T.L.R. 139, H.L.; 16 Digest (Repl.) 545, 3859.

Further Consideration by MATHEW, J., of an action for libel tried with a jury.

The plaintiff was a district superintendent in the employment of the London and North-Western Railway Co. at Manchester. The defendants, John Pilcher, Philip Hewlett, and George Alcock, were the trustees of the Amalgamated Society of Railway Servants of England, Ireland, Scotland, and Wales, which was registered under the Trade Union Acts, 1871 and 1876, its registered office being situate at 72, Acton Street, Gray's Inn Road, London. The society, and the defendants as trustees thereof, were the proprietors and publishers of a weekly newspaper called the "Railway Review," which had an extensive circulation. The action was brought in respect of a libel which the plaintiff alleged the defendants had, on May 11, 1900, and on May 25, 1900, printed or caused to be printed and published in the "Railway Review," charging the plaintiff with drunkenness. The defendants, the three trustees, in their defence, pleaded, among other defences, justification, and further that

"these defendants will object that as a matter of law they cannot in this action be sued in their capacity of trustees in any way so as to bind the Amalgamated Society of Railway Servants of England, Ireland, Scotland, and Wales, or the property thereof."

The action was tried by a special jury who found a verdict for the plaintiff for £1,000 damages, and the question was reserved for further consideration as to the point raised by the defence whether the funds of the society could be made liable to indemnify the defendant trustees.

Sir Edward Clarke, K.C., Walton, K.C., and L. Sanderson for the plaintiff.
Rufus Isaacs, K.C., and Horridge, K.C., for the defendant trustees.

Cur. adv. vult.

A Feb. 11, 1901. **MATHEW, J.**, read the following judgment.—This was an action for libel in which the plaintiff recovered a verdict for damages against the defendants. The defendants were trustees of a trade union, the Amalgamated Society of Railway Servants, and the sole question at the trial, all others being reserved, was whether or not there had been a libel, for which it was assumed, for the purposes of the case, that the defendants, as proprietors of the newspaper, were responsible. In the defence a point was made which was reserved for further consideration, and it was thus stated :

C “These defendants [the trustees] will object that, as a matter of law, they cannot in this matter be sued in their capacity of trustees, in any way, so as to bind the Amalgamated Society of Railway Servants of England, Ireland, Scotland, and Wales, or the property thereof.”

D It appeared that the newspaper in question, the “Railway Review,” had been started about the year 1894 by this society, and an endeavour was made in the first instance to register the paper under the Newspaper Libel and Registration Act, 1881, as the property of the society. The Board of Trade, however, objected to the inconvenience of that course, seeing that a very large number of persons would belong to the society and be members of it, and it was ultimately arranged that the newspaper should be registered in the names of the trustees of the society. That course was adopted, and the three defendants whose names appear on the record were accordingly registered as proprietors. Subsequently it appeared to be convenient that one of the three names should appear on the register, and that course was followed. At the time when the action was brought, the same three persons were trustees of the society. Under s. 8 of the Trade Union Act, 1871, it appears that the property of the society was vested in trustees, and under s. 16 that the trustees of the society were bound to publish annual reports showing the position of the affairs of the society, and from time to time in these annual returns the newspaper in question had been treated as an asset of the society, and there was a profit and loss account showing that the newspaper had been conducted on pretty nearly even terms, the expenditure being slightly in excess of the receipts from the newspaper.

G That being the position of things, the trustees being the owners of this property under the rules for the management of the society and under the sections in this Act to amend the law relating to trade unions in the year 1871, and particularly under s. 8 of the Act, it was said that the trustees were in the ordinary position of those who had a liability cast upon them within the limits of their trust by reason of their position as trustees. Therefore, for the plaintiff it was contended that the ordinary rule applied that trustees were entitled to be indemnified for what was done by them in the discharge of their duty as trustees, and for any responsibility and liability cast upon them on behalf of those for whom they were acting. H That was the position which the plaintiff took up. It was said that the funds are ample to meet this liability; that the trustees are not in a position to meet the liability; but that, in accordance with the ordinary rule, those who placed the trustees where they were as proprietors of this paper, and, therefore, rendered them liable in this action for damages, were bound to indemnify the trustees, and that, accordingly, the assets of the society are liable.

I In answer to that position taken by the plaintiff, it was contended for the defendants that this was an action of tort, and that the persons who were made responsible in the action for that tort were alone liable; that there was no right of recourse to the cestui que trust, namely, the society; that there was no authority for transferring the liability in that way, or treating such a case as within the ordinary rule as between trustee and cestui que trust; and that they (the defendants) were, therefore, alone bound to pay the damages, and had no right to claim any indemnity from the society. It was admitted that the defendants were not personally liable for what was done in the sense that they authorised

it in any way. They had no more to do with it than the proprietor of a newspaper whose editor, without his knowledge and without his sanction, inserts something in the newspaper that is defamatory, and gives rise to a cause of action. There can be no question as to that. There was no evidence that the three men who were trustees of the society had anything whatever to do with the conduct of the paper. It was, therefore, contended for the plaintiff that there was no reason why they should not be indemnified, and that their liability arose from the fact that the society had placed them in the position of legal proprietors of the newspaper, and made them responsible for an action like this. It was asked, for what reason was it said that the society was not to be responsible as any ordinary cestui que trust would be?

No answer was given to that question upon any principle of law, but it was said that if the Trade Union Act, 1871, be carefully examined there will appear to be clear indication that a trade union was never intended to be made responsible in respect of a cause of action against their trustees, however clearly that cause of action may have arisen within the limits of the trust, and by reason of the position in which the trustees have been placed by their principals. In support of that argument attention was called to s. 9 of the Trade Union Act, 1871. That statute in s. 8 contained the provision for vesting the property of the union in the trustees. That is followed by s. 9, and my attention was called to that section as containing a very important provision, as it was suggested, for the protection of trade unions. Certainly, if the contention was well founded, it was a very important point in the interest of trade unions, because it would follow that for any breach of contract, or for any tort committed by them, for which their trustees were liable, a union would be free of any liability and enjoy complete immunity. I was, therefore, not surprised that this contention was urged at considerable length by those who represented the trade union society in this case. The first part of s. 9 provides thus :

“The trustees of any trade union registered under this Act, or any other officer of such trade union, who may be authorised so to do by the rules thereof, are hereby empowered to bring or defend, or cause to be brought or defended, any action, suit, prosecution, or complaint, in any court of law or equity, touching or concerning the property, right, or claim to property of the trade union.”

It was said that it is noticeable from that provision that what the trustees are empowered to do is to bring or to defend an action in respect of any right or claim to, or liability to the property of the trade union, to recover goods or land the property of the trade union, or to defend any proceeding against property belonging to the trade union, but that specific property it was alone intended to protect, and, as there is no means of suing in respect of any other property—and this was not a case of specific property—this action and all analogous actions should, therefore, be actions the liability for which would rest where it fell—namely, upon the trustees, and could not be transferred to their principals, the trade union, if the trade union may be so described.

I am of opinion that that would be an extremely narrow construction of the section. There seems to me to be no reason why there should be this disability imposed upon the trustees in respect of anything but specific property, and it is difficult to conjecture why any such meaning should be attributed to the legislature, and I am satisfied there was no such intention. In support of the argument reference was made to certain obiter dicta, as they appeared to be, in the course of the argument in the Court of Appeal in *Taff Vale Rail. Co. v. Amalgamated Society of Railway Serrants* (1). The suggestion appears to have been made there, in the course of the argument, by one of the learned lords justices that property might mean specific property, but attention was called to another passage in the argument where a totally different opinion was expressed by the same lord justice.

A I do hope that the process will not be adopted by the Bar of referring to what is said in the course of the argument by a judge as conveying his opinion. Such observations during the argument are only intended to convey to counsel as a general rule what is passing through the judge's mind, leaving counsel to argue against the view the judge is putting forward, with the result that the judge is frequently convinced that the view he had indicated is not the correct one. That appears to be what happened in *Taff Vale Rail. Co. v. Amalgamated Society of Railway Servants* (1).

B In my opinion, "property" in s. 9 of the Act of 1871 means property generally, and I think that an action to add to the assets of the society—for instance, an action brought for breach of contract entered into on behalf of the society—would be an action "touching or concerning the property of the trade union."

C So an action that threatened the assets of the society by a claim for damages, as in this case, would be an action that touched and concerned the property of the society. It follows, therefore, that, in my judgment, the construction sought to be put upon that section is not the correct one, and that there is no objection to this action by reason of the language of that section.

D The last point that was made was curious, having regard to the character of this association, namely, that to start a newspaper was ultra vires. There was no lengthy examination of the cases as to the meaning of ultra vires in connection with companies, but no doubt there might be an analogy. It was said that this society is a trade union, but that it is not entitled to trade because it is a trade union, and that what this trade union has been doing has been to start and carry on a newspaper for profit and, therefore, is a trading body, and so what has been done is ultra vires. But when we look at the rules and objects of the society as disclosed by the rules, it appears to me that there can be no question that this was within the power and object of the society. The second clause of r. 1 of those rules runs thus: "The objects of the society shall be to improve the condition and protect the interests of its members"; and it goes on to mention a number of specific objects which are not material to this case. Further, s. 23 of the Trade Union Act, 1871, which contains the definition of "trade union," was said to cut down somewhat the rights and powers of the society, but I am satisfied that it has no such operation, and the only question here is one of fact. [This definition was repealed by the Trade Union Act Amendment Act, 1876, s. 16; see now Trade Union Act, 1913, s. 2 (1).] Was this newspaper started for the purpose of profit and as a trading adventure, or was it started to improve the condition and protect the interests of the members of the society? It is only necessary to look at the paper to see how thoroughly it was devoted to this latter purpose. It was pointed out that the paper was a penny paper and further that there were advertisements inserted in it; but that did not destroy its character. Its character was clear. It was entirely in the interests of the members of the trade union and to protect their interests. My attention was called to the particular paper in which this defamatory libel appeared, and that, no doubt, was a fair specimen of the other papers published by the society. It was clear that it had no trading purpose in view, and that in fact it was carried on at a loss. Therefore, its main object was that which was indicated by the rules in question. A number of cases have been cited in the course of argument which appear to me to be entirely irrelevant to the question before me. *Taff Vale Rail. Co. v. Amalgamated Society of Railway Servants* (1) was referred to, but that case only shows that you cannot treat a trade union as an incorporated body and sue it in its own name. The decision does not go beyond that, and it throws no light whatever upon this question as to the proper mode of procedure to be adopted in this case. *Flood v. Jackson* (2) and *Temperley v. Russell* (3), and the other cases cited do not relate in the least to the question now before me.

I My judgment, therefore, is for the plaintiff with reference to this point of law raised in the defence, and I hold that the defendants are, in their position as

trustees, entitled to be indemnified out of the funds of the society. There will, therefore, be judgment for the plaintiff for the £1,000 recovered and costs, and the judgment will be against the trustees, with a declaration that the trustees are entitled to be indemnified out of the funds of the society.

Judgment for plaintiff.

Solicitors: *R. S. Taylor, Son & Humbert; C. J. Smith & Hudson.*

[*Reported by W. W. ORR, Esq., Barrister-at-Law.*]

Re METCALF. METCALF v. BLENCOWE

[CHANCERY DIVISION (Farwell, J.), May 4, 1903]

[*Reported* [1903] 2 Ch. 424; 72 L.J.Ch. 786; 88 L.T. 727; 51 W.R. 650]

Administration of Estates—Hotchpot—Annuities—Immediate and reversionary annuities—Power to raise deficiency out of capital.

By his will the testator gave his wife an annuity of £400 for life charged on the income of his residuary estate to be paid in preference to all other annuities and interests and subject thereto he gave to his son an annuity of £150 for life and to his daughter an annuity of £450 for life with remainder to her children for their lives in stated proportions. In the event of the income proving insufficient the trustees were empowered to raise the annuities or any deficiency by mortgaging the real estate. After the death of the testator on Apr. 16, 1881, all the annuities were paid in full until Oct. 16, 1886, but those of the son and daughter were paid partly by money raised by mortgage. Thereafter the income from the estate, then realised and represented by a fund in court, proved insufficient to pay the wife's prior annuity. The son died on Aug. 20, 1891, and the daughter died on Sept. 21, 1900. The wife's annuity continued to be paid in full, partly out of capital, until Oct. 16, 1902. On her death on Jan. 29, 1903, the residue proved insufficient to pay the arrears of the annuities. On a petition for the distribution of the fund in court the question arose whether the sums received by the immediate annuitants until Oct. 16, 1886, ought to be brought into hotchpot.

Held: (i) the income payments of the annuitants in possession having been earned and expended before the interest of the reversioners arose were received in respect of a period to which the reversioners had no claim, and, therefore, those income payments were not required to be brought into hotchpot: (ii) the testator having empowered his trustees to resort to capital in discharge of the annuities of those in possession, thereby preferring the annuitants in possession to those in reversion, showed an intention inconsistent with hotchpot, and, therefore, capital sums received by the annuitants in possession were not required to be brought into hotchpot.

Notes. Referred to: *Re West, Denton v. West*, [1921] 1 Ch. 533; *Re Bradberry, National Provincial Bank, Ltd. v. Bradberry, Re Fry, Tasker v. Gulliford*, [1942] 2 All E.R. 629.

As to abatement of legacies and annuities, see 16 HALSBURY'S LAWS (3rd Edn.) 330-334; and for cases see 39 DIGEST 158-164.

Cases referred to:

(1) *Potts v. Smith* (1869), L.R. 8 Eq. 683; 39 L.J.Ch. 131; 21 L.T. 54; 17 W.R. 1083; 23 Digest (Repl.) 429, 4991.

(2) *Todd v. Bielby* (1859), 27 Beav. 353; 54 E.R. 138; 23 Digest (Repl.) 428, 4990.

A Also referred to in argument :

Wroughton v. Colquhoun (1847), 1 De G. & Sm. 357; 11 Jur. 940; 63 E.R. 1103; 39 Digest 162, 540.

Carr v. Ingleby (1831), 1 De G. & Sm. 362; 63 E.R. 1105; 23 Digest (Repl.) 426, 4975.

B *Long v. Hughes* (1831), 1 De G. & Sm. 364; 7 L.J.O.S.Ch. 105; 63 E.R. 1106; 23 Digest (Repl.) 427, 4983.

Heath v. Nugent (1860), 29 Beav. 226; 54 E.R. 613; 39 Digest 161, 528.

Re Wilkins, Wilkins v. Rotherham (1884), 27 Ch.D. 703; 54 L.J.Ch. 188; 33 W.R. 42; 39 Digest 161, 527.

Re Hargreaves, Dicks v. Hare (1890), 44 Ch.D. 236; 59 L.J.Ch. 375; 62 L.T. 819; 6 T.L.R. 264, C.A.; 39 Digest 156, 492.

C *Re Rees, Rees v. George* (1881), 17 Ch.D. 701; 50 L.J.Ch. 328; 44 L.T. 241; 29 W.R. 301; 35 Digest 198, 255.

Innes v. Mitchell (1846), 1 Ph. 710; subsequent proceedings (1847), 2 Ph. 346; 16 L.J.Ch. 415; 41 E.R. 976, L.C.; 23 Digest (Repl.) 428, 4985.

D **Petition** by the personal representatives of the widow and son of the testator for payment out of a fund in court of a sum for the arrears of the widow's annuity and for distribution of the fund between the personal representatives of the son and the testator's daughter and her children.

The fund in court related to the proceeds of sale of realty in which the widow had a life interest and on which the annuities were not charged except subject to her prior interest. On the distribution of the fund the question arose whether the annuitants in possession ought to bring into hotchpot the sums received by them, or whether the distribution ought to be in accordance with the declaration in *Polls v. Smith* (1) as distinguished from the subsequent directions which purported to follow *Todd v. Bibbly* (2). By his will, made in 1880, the testator gave his wife a life interest in his house and grounds and he also gave her an annuity of £400 for life charged on his residuary real and personal estate to be paid by half-yearly instalments out of the income in preference to all other annuities and interests given by his will, and, if the income should be insufficient, he directed that the deficiency should be made good out of the capital of his residuary estate in preference to all other charges. He gave annuities of £150 to his son Henry for life and of £450 to his daughter Hannah for life with remainder to her children for their lives, in the proportions therein mentioned. The annuities of the son and daughter were immediate interests in possession, taking effect at the death of the testator. His trustees were empowered to raise all the annuities or any deficiency out of the rents and profits of his real estate, except the house and grounds in which his wife had a life interest, and if such rents and profits should be insufficient by mortgage or charging the real estate. Subject to the annuities, he gave his wife the income of his residuary estate for life and devised his real estate to his son for life with remainders over. The testator died on Apr. 16, 1881, and until Oct. 16, 1886, the annuities to his son and daughter were paid in full, partly out of income and partly by money raised by mortgage of the real estate and directed by order of the court dated Aug. 9, 1883. The income from the realised estate, represented by a fund in court, was then insufficient to pay even the wife's prior annuity. The son died on Aug. 20, 1891, and the daughter on Sept. 21, 1900. The wife's annuity was paid in full, partly out of income and partly out of capital, until Oct. 16, 1902, and on her death on Jan. 29, 1903, the residue was insufficient to pay the arrears of the annuities.

Butcher, K.C., and *H. B. Vaizey* for the petitioners.

Upjohn, K.C., and *T. Watson* for an annuitant who took his annuity at the death of the testator.

P. F. Wheeler for the annuitants entitled in reversion.

Dickinson for the trustees.

FARWELL, J. (after stating the facts, continued):—In my opinion, the decision of the Vice-Chancellor is expressed in the declaration in *Potts v. Smith* (1). I cannot account for the subsequent additions and directions for bringing into hotchpot which appear in the order there, because it seems to be inconsistent with the words of the Vice-Chancellor that it made no difference in principle where the annuities have been given in expectancy on the death of another person. The view of Lord RUMLEY in *Todd v. Beilby* (2), which was followed by the Vice-Chancellor, is that you take the value of the annuity according to the events which have happened when the deficiency is ascertained at some period after the death of the testator; you reckon the value according to the events that have happened, and you only value what is necessary to be valued—namely, the interest in futuro of such of the annuitants as may still be living. To bring into hotchpot all that is received by the annuitants in the past would be certainly a novel application of the principle, and there is nothing in the cases which appear to warrant it.

If the testator's estate proved to be insolvent at the time of his death so that there would be no distribution at all, the court cuts the knot by treating everyone as having an interest which is immediately assessable in value and valuing a reversionary interest as much as those in possession, because it is going to distribute the estate, and in order to arrive at such distribution it must in some way or other arrive at the value of both reversionary interests and those in possession. When you have immediate distribution, you must have at once immediate assessment of values or else you cannot distribute. But that is the rule of the court, and to some extent it defeats the object of the testator, who did not intend a person to whom he has given on the death of A. £100 a year to receive £500 down on his own death before the death of A. The court has to do the best it can under circumstances which the testator did not contemplate. But where the estate is only ascertained to be of insufficient value after some period after the death and the distribution has gone on for some period, there is nothing in the cases which have been cited as to bringing the amounts which have been paid into hotchpot. In the case before me, and in most of the cases, it appears to me that it would be unjust to do so. The bringing into hotchpot is only a rule of the court for the purpose of equally dividing the subject-matter of a gift among the objects to whom that gift is made. If that subject-matter is in fact given to A. for life and after his death to B., the income which accrues to A. during his own life is something with which B. has nothing whatever to do. Here the annuitants in possession take certain income payments in respect of which the reversioners could have no claim at all, because that income was earned and was expended before their interest arose; and not only so, but the tenant for life took the residue of that income during the lifetime of the annuitants until it was stopped. So far, therefore, as regards these annuitants in possession paid out of income in the past, it appears that on no principle of equity would it be right to make them bring that into hotchpot.

Then it is said that this particular sum represents corpus, and that the annuitants in possession under the order of the court of 1883 have had sums paid to them which were raised out of corpus under the power to mortgage. That raises a question of construction as to the power under the will and the effect of the order of 1883. The will, after giving the annuities in the way I have said, gives power to raise

"so much thereof as the income of my residuary personal estate shall not be sufficient to pay out of the rents and profits of the said hereditaments and premises, or, in case the said rents and profits shall be insufficient, by mortgage or charging the said hereditaments and premises or any part thereof."

Then there are gifts over. The testator here contemplated the possibility that the corpus would be paid to the annuitants to discharge their annuities. That appears to be inconsistent with any direction for bringing sums received into hotchpot, because he does necessarily by this provision show an intention to prefer the annuitants who are in possession to those who are in reversion, because those in

A possession under this, although the interest be insufficient, yet paid, by mortgaging the corpus, the full amount of their annuities, so far as the mortgage value of the property is concerned, down to their own deaths. If you once arrive at that, the contention that there is any ground for an equity for bringing into hotchpot disappears, because it depends on the intention to divide the subject-matter of the gifts among certain persons equally. The result is that on the construction of this particular will, I hold that this direction for raising the annuities by mortgage out of corpus negatives any idea of bringing into hotchpot the sums which have been paid to the annuitants in possession. The minutes, therefore, as drawn are correct.

Solicitors : *Ernest Bevir; Ikin & Crowther; Stileman & Neale.*

[*Reported by A. W. CHASTER, Esq., Barrister-at-Law.*]

LANGLEY v. BOMBAY TEA CO.

[QUEEN'S BENCH DIVISION (Grantham and Channell, JJ.), June 13, 1900]

[*Reported* [1900] 2 Q.B. 460; 69 L.J.Q.B. 752; 83 L.T. 175; 49 W.R. 27; 16 T.L.R. 441; 19 Cox, C.C. 551]

Merchandise Marks—False trade description—Description to be inferred from conduct—Merchandise Marks Act, 1887 (50 & 51 Vict., c. 28), s. 2.

The appellant went to the respondents' shop and asked for two half-pounds of tea. One of the respondents' salesmen took two packets of tea from the counter and handed them to the appellant who paid for them. On each packet was stamped the words: "The weight of this package including the wrapper is half-a-pound." The packets each contained less than half-a-pound of tea. On a charge against the respondents of selling goods to which a false trade description or statement as to the weight thereof was applied,

Held: the Merchandise Marks Act, 1887, s. 2, only applied to a written or printed or some other physical mark, and did not apply to a description to be inferred from conduct, and, therefore, the respondents had not committed any offence against s. 2 (2) of the Act of 1887.

Notes. Section 2 (2) of the Merchandise Marks Act, 1887, has been replaced by another sub-section to be found in the Merchandise Marks Act, 1953, s. 4 (33 HALSBURY'S STATUTES (2nd Edn.) 920).

As to false trade descriptions, see 10 HALSBURY'S LAWS (3rd Edn.) 685 et seq.; and for cases see 43 DIGEST 239 et seq. For the Merchandise Marks Act, 1887, see 25 HALSBURY'S STATUTES (2nd Edn.) 1114.

Case referred to:

(1) *Coppen v. Moore* (No. 1), [1898] 2 Q.B. 300; 67 L.J.Q.B. 689; 78 L.T. 520; 62 J.P. 453; 46 W.R. 620; 14 T.L.R. 323; 42 Sol. Jo. 397; 19 Cox, C.C. 45, D.C.; 43 Digest 241, 853.

Also referred to in argument:

Budd v. Luckin, [1891] 1 Q.B. 408; 60 L.J.M.C. 95; 64 L.T. 292; 55 J.P. 550; 39 W.R. 350; 7 T.L.R. 242; 17 Cox, C.C. 248, D.C.; 43 Digest 244, 876.

Case Stated by the justices of the city and county of Newcastle-on-Tyne.

At a court of summary jurisdiction sitting at Newcastle-on-Tyne, the appellant preferred an information against the respondents charging that on Dec. 2, 1899,

they unlawfully sold at their shop in Clayton Street, Newcastle-on-Tyne, certain goods, to wit, two half-pounds of tea, to which a false trade description, namely, a false trade description or statement as to the weight of the goods, was applied, contrary to s. 2 (2) of the Merchandise Marks Act, 1887. The following facts were proved or admitted. On Dec. 2, 1899, the appellant, at the respondents' shop in Clayton Street, Newcastle-on-Tyne, asked for two half-pounds of tea. Packets of tea were lying on the counter. One of the respondents' salesmen took two packets, wrapped them in paper, and handed them to the appellant, who paid 2s. 6d. for them. Nothing was said by the salesman, who simply handed over the parcel to the appellant. The appellant took the parcel to an inspector of weights and measures. The parcel was then opened, and it was found that each packet was stamped with the words: "The weight of this package including the wrapper is half-a-pound." Placed under the string securing each packet was a ticket resembling a railway ticket, on which was printed:

"The Bombay Tea Co., Ltd., 50, Bull Street, Birmingham. $\frac{1}{2}$ lb. cheque for tea, coffee, or cocoa."

On presentation of these cheques at the respondents' shop in Newcastle-on-Tyne, the appellant would be entitled to receive for each cheque some article as a present or by way of discount on his purchase. The inspector weighed the packets and their contents. One packet was found to contain $144\frac{1}{2}$ grains and the other 132 grains less than half-a-pound. In each case, the weight, including the paper wrapper, was more than half-a-pound by 24 grains in the one case, and by 35 in the other.

It was contended on behalf of the appellant that the mere handing over of the packets to the appellant who had asked for two half-pounds of tea was a tacit admission by the respondents' salesman that each packet contained half-a-pound of tea, and that, as the packets contained less, a false trade description had been applied to the goods within the meaning of the Act. The justices being of opinion that the "trade description" contemplated by the statute was something written, printed, or stamped, and not a verbal description, still less an inference from conduct, and having regard to the fact that on each packet was actually stamped a notice that the weight including the paper was half-a-pound, dismissed the information. The appellant now appealed.

The Merchandise Marks Act, 1887, provides:

"2 (2) Every person who sells, or exposes for, or has in his possession for sale . . . any goods or things to which any . . . false trade description is applied . . . shall . . . be guilty of an offence against this Act.

"3 (1) For the purpose of this Act . . . the expression 'trade description' means any description, statement, or other indication direct or indirect (a) as to . . . weight of any goods. . . .

"5 (1) A person shall be deemed to apply a . . . trade description to goods who . . . (d) uses a . . . trade description in any manner calculated to lead to the belief that the goods in connection with which it is used are designated or described by that . . . trade description."

Robson, Q.C. (H. Jacobs with him) for the appellant.

Joseph Walton, Q.C., (with him Sir Edward Clarke, Q.C., T. Willes Chitty, and Clarke-Williams), for the respondents.

GRANTHAM, J.—In my opinion, the decision of the justices is clearly right. There is in fact nothing to be said in favour of the appellant's case. No doubt the Merchandise Marks Act, 1887, is an advance on the former Act of 1862. It is more extensive in its application. The earlier Act related only to descriptions "put" on goods, but the later Act has been made to relate to descriptions "applied" to goods. It seems to me, however, that the later Act only contemplates

A the physical application of descriptions to goods by writing, printing or other marks or character, and not to mere verbal descriptions, and, as the justices say, still less to descriptions merely inferred from conduct. If this be the correct view of the meaning of the enactment, then the trade description applied to these goods was true and not false. The wrapper had printed upon it an intimation that the half-pound included the weight of the wrapper. There was also a ticket attached

B to the parcel in which it was referred to as a half-pound of tea, but that was merely a cheque to entitle the purchaser to some small article in addition to the quantity of tea bought. In my opinion, no false trade description was applied to the tea. The description which was in fact applied to it was true—namely, the statement that each packet weighed with the wrapper half-a-pound.

C **CHANNELL, J.**—I am of the same opinion. I agree with the opinion expressed by **WRIGHT, J.**, in *Coppen v. Moore* (1), to the effect that the provisions of s. 2 of the Merchandise Marks Act, 1887, only apply to a written or printed or some other physical mark, and do not apply to a merely verbal description. I admit that this opinion was not necessary to the decision of the case before him, and, therefore, can only be regarded as a dictum. But, on the other hand, it was made with

D deliberation, and after he had heard the argument and had reconsidered an opinion to the contrary which he had expressed earlier. I, therefore, think that we should follow it, but I must also add that I myself agree with it. If the Act does not apply to a verbal description, neither can it apply to a description to be inferred from conduct. If this opinion is correct, it disposes of the Case (which was no doubt an arguable one), and we must decide in favour of the respondents.

E *Appeal dismissed.*

Solicitors: *Rowe & Maw; Vizard & Oldham, for Saunders, Bradbury & Saunders, Birmingham.*

[*Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.*]

F

G

TORKINGTON v. MAGEE

KING'S BENCH DIVISION (Lord Alverstone, C.J., Darling and Channell, JJ.), June 19, 25, 1902]

[*Reported* 1902] 2 K.B. 427; 71 L.J.K.B. 712; 87 L.T. 304; 18 T.L.R. 703]

H

Chose in Action—Assignment—Contract—Executory contract of purchase—Agreement for sale of reversionary interest in shares—Assignment before any breach of contract—Assignee entitled to maintain action for damages for breach occurring after assignment—Supreme Court of Judicature Act, 1873 (36 & 37 Vict., c. 66), s. 25 (6).

I

An executory contract of purchase, e.g., a contract to purchase a reversionary interest in shares where the purchase money has not been paid, of which there has been no breach, is assignable as a "legal chose in action" under s. 25 (6) of the Supreme Court of Judicature Act, 1873 (now s. 136 (1) of the Law of Property Act, 1925) so that the assignee can maintain an action for damages for a breach of the contract occurring after the date of the assignment.

Notes. Section 25 (6) of the Supreme Court of Judicature Act, 1873, has been repealed and replaced by s. 136 (1) of the Law of Property Act, 1925.

The present decision was reversed by the Court of Appeal ([1903] 1 K.B. 644) on the facts that as neither the assignor nor the plaintiff were willing to perform the contract there was no breach by the defendants entitling the plaintiff to recover damages, but the Court of Appeal did not decide the point of law on the meaning of s. 25 (6) of the Act of 1873, which was the subject of the present decision.

Considered: *County Hotel and Wine Co. v. London and North Western Rail. Co.*, [1918] 2 K.B. 251. Applied: *G. and T. Earle, Ltd. v. Hemsworth R.D.C.*, [1928] All E.R. Rep. 602. Referred to: *Tollhurst v. Associated Portland Cement Manufacturers (1900)*, [1902] 2 K.B. 660; *Glegg v. Bromley*, [1911-13] All E.R. Rep. 1138; *Re Pain, Gustavson v. Haviland*, [1919] 1 Ch. 38; *Ellis v. Torrington*, [1918-19] All E.R. Rep. 1132; *Nizam of Hyderabad v. Jung*, [1957] 1 All E.R. 257.

As to assignments of choses in action under the Law of Property Act, 1925, see 4 HALSBURY'S LAWS (3rd Edn.) 484 et seq.; for cases see 8 DIGEST (Repl.) 547 et seq. For s. 136 (1) of the Law of Property Act, 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 715.

Cases referred to:

- (1) *King v. Victoria Insurance Co., Ltd.*, [1896] A.C. 250; 65 L.J.P.C. 38; 74 L.T. 206; 44 W.R. 592; 12 T.L.R. 285, P.C.; 8 Digest (Repl.) 558, 109.
- (2) *Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608; 70 L.J.Ch. 814; 82 L.T. 347; 16 T.L.R. 299; 8 Digest (Repl.) 556, 99.
- (3) *May v. Lane* (1894), 61 L.J.Q.B. 236; 71 L.T. 869; 43 W.R. 193; 39 Sol. Jo. 132; 14 R. 149, C.A.; 8 Digest (Repl.) 556, 97.
- (4) *Brice v. Bannister* (1878), 3 Q.B.D. 569; 47 L.J.Q.B. 722; 38 L.T. 739; 26 W.R. 670, C.A.; 8 Digest (Repl.) 553, 78.
- (5) *Durham Brothers v. Robertson*, [1893] 1 Q.B. 765; 67 L.J.Q.B. 484; 78 L.T. 438, C.A.; 8 Digest (Repl.) 570, 216.
- (6) *Jones v. Humphries*, [1902] 1 K.B. 10; 71 L.J.K.B. 23; 85 L.T. 488; 50 W.R. 191; 18 T.L.R. 54; 46 Sol. Jo. 70, D.C.; 8 Digest (Repl.) 555, 90.
- (7) *Western Wagon and Property Co. v. West*, [1892] 1 Ch. 271; 61 L.J.Ch. 244; 66 L.T. 402; 40 W.R. 182; 8 T.L.R. 112; 36 Sol. Jo. 91; 8 Digest (Repl.) 556, 96.
- (8) *Marchant v. Morton, Down & Co.*, [1901] 2 K.B. 829; 70 L.J.K.B. 820; 85 L.T. 169; 17 T.L.R. 640; 8 Digest (Repl.) 549, 50.

Also referred to in argument:

- Colonial Bank v. Whinnery* (1886), 11 App. Cas. 426; 56 L.J.Ch. 43; 55 L.T. 362; 34 W.R. 705; 2 T.L.R. 747; 3 Morr. 207, H.L.; 8 Digest (Repl.) 543, 1.
- Earle's Shipbuilding and Engineering Co. v. Atlantic Transport Co.* (1899), 43 Sol. Jo. 691; 8 Digest (Repl.) 558, 106.

Appeal by the plaintiff from the decision of the Common Serjeant for the City of London in an action, tried without a jury, brought by the plaintiff, Torkington, against the defendant, Magee, for damages for breach of a contract for the sale of a reversion made by the defendant with one Rayner on Mar. 5, 1901, of the benefit of which contract the plaintiff became assignee from Rayner. The plaintiff claimed to sue as such assignee by virtue of the Supreme Court of Judicature Act, 1873.

The facts were as follows: The defendant was entitled to a reversionary interest and by agreement in writing, dated Mar. 5, 1901, made between him and Rayner, agreed to sell to Rayner the absolute reversion to one third share of a sum of £18,000, being a first charge on the several moneys, stocks, funds, and securities mentioned in the schedule to the agreement, at the price of £1,875, of which £25 was to be paid immediately as a deposit in part payment of the purchase money and the remainder on May 5, 1901, on which day the sale was to be completed and the reversion conveyed to Rayner. The contract was not completed on May 5, but the delay was waived by the defendant and negotiations as to the manner in which the contract should be completed went on for a much longer time, on the

A stating that the contract was still in force. On June 10, 1901, Rayner, by deed, absolutely assigned all his interest in the contract with the defendant and the benefit thereof to the plaintiff. On June 14 the plaintiff gave notice in writing of the assignment to the defendant. At the date of the assignment of the contract the purchase money had not been paid by Rayner to the defendant, except the deposit of £25, and there had been no breach of the contract by the defendant; but subsequent to the assignment there was a breach of the contract by the defendant and a failure by him to complete the contract.

B The plaintiff as assignee of the contract brought the present action in the Mayor's Court to recover damages from the defendant for breach of the contract. The defendant, among other defences, pleaded that the assignment was ineffectual in law, and was insufficient to entitle the plaintiff to sue in his own name. The Common C Serjeant found that the defendant refused and neglected to carry out the contract; that there was, or would have been if Rayner had been enforcing the contract, a breach of the contract by the defendant; that the plaintiff, Torkington, was willing to carry out the contract, and that, if the right under the contract were a "legal chose in action" within the meaning of s. 25, sub-s. (6) of the Supreme Court of D Judicature Act, 1873, there was an assignment of it to the plaintiff under the subsection, by the assignment of June 10, which entitled the plaintiff to bring an action on it. The judge was of opinion, however, that the right under the contract was not a "legal chose in action" which could be assigned, and therefore the plaintiff could not maintain the action, and on that ground gave judgment for the defendant, assessing the damages at £100, if it should be held that the plaintiff was entitled to maintain the action. The plaintiff appealed.

E By the Supreme Court of Judicature Act, 1873, s. 25 (6) :

"Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: Provided always, that G if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or anyone claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees."

H *Stewart Smith, K.C., (Sidney Clarke with him) for the plaintiff.*

M. M. Macnaghten for the defendant.

Cur. adv. vult.

I June 25, 1902. **CHANNELL, J.**, read the following judgment of the court.—In order to arrive at the meaning of the expression "other legal chose in action" in sub-s. (6) of s. 25 of the Supreme Court of Judicature Act, 1873, I think it necessary to consider what is the object of the Act, and of the particular section of the Act in which the words are to be found.

The Act provided for the amalgamation of the then existing superior courts of law and equity, with the view to the administration in the new court of one system of law in place of the two systems previously known as law and equity, and the general scope of the Act was to enable a suitor to obtain by one proceeding in one

court the same ultimate result as he could previously have obtained either by having selected the right court, as to which there frequently was a difficulty, or after having been to two courts in succession, which in some cases he had to do under the old system. Section 25 provided what was to be the rule in future in cases where previously the two systems differed. This is seen not only by looking at the particular matters provided for by the first ten sub-sections, but by the words of sub-s. 11:

"Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail."

This seems to me to show that sub-s. 6 is one of the matters particularly mentioned in which the rules of equity and common law had conflicted or varied in reference to the same matter, and this gives the clue to the meaning of any doubtful expression. Chose in action is a known legal expression used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession. It is an expression large enough to include rights which it can hardly have been intended should be assignable by virtue of the sub-section in question, as, for instance, shares, which can only be transferred as provided by the Companies Acts. It is probably necessary, therefore, to put some limit upon the generality of the words, but I think that the necessary limitation is shown by the considerations to which I have already referred, and also by the words of sub-s. (6) itself. I think the words "debt or other legal chose in action" mean "debt or right which the common law looks on as not assignable by reason of its being a chose in action, but which a court of equity deals with as being assignable." That is the point of difference or variance between the rules of equity and common law which it is intended to deal with by this sub-section.

Further, by the words of the sub-section itself, the assignment is to be effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee if the Act had not passed. This seems to mean that the cases dealt with are cases where the assignee had some right before the Act—that is to say, where the right of the assignee had previously been recognised by a court of equity. That the assignment is still to be subject to equities again seems to indicate that the rule of the court of equity is substantially being adopted, but it is to be remembered that in the cases within these first ten sub-sections there is not necessarily a simple adoption of the rules of equity as in cases under sub-s. 11. New rules are, at least in several cases, laid down for the new court which, while based mainly on the rules of equity, yet nevertheless are not a simple repetition of equity rules. For instance, the provisions of this sub-section as to interpleader and as to the Trustee Acts appear to be new; and I think also the provision that both the assignment and the notice of it must be in writing was a matter not held necessary in equity.

The question we have to consider in the present case is whether an executory contract of purchase, under which each party has rights and responsibilities, but of which there had been no breach at the date of the assignment, so that at that date no action could be brought upon the contract, but which, if occasion should ever arise to enforce it, must of course be enforced by action, is assignable by this sub-section as a "legal chose in action." That it is a legal chose in action and was so at the date of the assignment cannot be denied, but the question is whether it is so within the meaning of the words as used in the sub-section. I think it is, because it is a case in which the assignee would (at any rate after giving notice of the assignment) have had rights if the Act had not been passed. The court of equity would undoubtedly have recognised his right and would have treated the assignor as being trustee for his assignee, and they would have given to the assignee all the rights and remedies as against his assignor which they gave to a cestui que trust

A against his trustee, and would have given to him, as against the other party to the contract, all the rights and remedies which they give to or for the trust against a third person dealing with his trustee in reference to the subject of the trust after notice of the trust. I believe it to be clear that in such a case as the present, if the assignor, Rayner, had refused to sue the defendant for damages for the benefit of the present plaintiff, the assignee, the plaintiff, could have taken proceedings in a court of equity, and have got a decree that he should be at liberty, on giving a proper indemnity, to use the assignor's name for the purpose of suing the present defendant. Thus by going to two courts the plaintiff would have got his damages from the defendant, assuming, of course, that there had been a breach of contract by the defendant. It is true that the present plaintiff could not in the court of equity get damages from the defendant, but that is because the court did not (except in cases under Lord Cairns' Act) entertain a claim for damages at all, whether by the party to the contract or by his assignee, and not because of the plaintiff being assignee.

It is suggested that there is a difficulty in holding that such a contract as the present can be assigned by virtue of this sub-section because the contract cannot be transferred in its entirety—that is to say, only the benefit of it and not the liability under it can be transferred. But this is just what the sub-section deals with. It says that the assignment shall be sufficient to transfer the legal right to such debt or chose in action, and any difficulty as to the liability of the assignor is met by the clause as to the assignment being subject to equities. The assignee only takes subject to any claim under the contract which would have been good as against his assignor. Further, of course, he can only recover damages if he can show a breach by the defendant, and the question whether there had or had not been a breach might in many cases depend upon dealings between the original contracting parties.

In my opinion, upon the facts of the present case (assuming the breach which has been found by the Common Serjeant), the plaintiff might, before the Judicature Act, by going first to the court of equity, and then going in the name of the assignor to the court of common law, have got his damages; and I think under these circumstances the sub-section applies, and the plaintiff may now go to the High Court of Justice (or to the Mayor's Court, which has the same combined legal and equitable jurisdiction) direct for his damages.

I find nothing in the cases on the subject contrary to this view. It was the view of the colonial judges who decided the case which came before the Privy Council in *King v. Victoria Insurance Co., Ltd.* (1). The Privy Council did not dissent from this view. They simply decided the case on a different ground, and preferred to express no opinion what limitation, if any, should be placed on the literal meaning of the term "legal chose in action." That question they say is not free from difficulty, but it may be that they rather felt the difficulty of putting any limitation at all upon the literal meaning than a difficulty in limiting it to at least the same extent as the judges below had done. FARWELL, J., clearly expressed the same view in *Manchester Brewery Co. v. Combs* (2), but it seems that he, without much examination of the report, thought that it had been so held by the Privy Council. *May v. Lane* (3) appears to contain a dictum of Lord Esher that a claim for damages could not be assigned under this sub-section. This was not necessary to the decision, and it is not quite clear from the report, until the facts are carefully examined, what it was that Lord Esher thought to be the objection to such an assignment. RIGBY, I L.J., however, adds (64 L.J.Q.B. at p. 238):

"A legal chose in action is something which is not in possession, but which must be sued for in order to recover possession of it. It does not include a right of action [by that I think he means a mere right of action] such as, for instance, a right to recover damages for breach of a contract, or a legal right to recover damages arising out of an assault, for if the argument on behalf of the plaintiffs be correct, such a right would be assignable, and this sub-section of the Judicature Act would materially affect the law of champerty and maintenance."

When the facts of that case are looked at, it will be seen to be quite clear that the contract, by breach of which the alleged damages had accrued, had never been assigned at all. The document was in the form :

"We authorise you to pay £50 out of the moneys due or to become due from you to us on the buildings we are erecting."

If there had been any debt, this might have been a good assignment of £50 out of it, although *Brice v. Bannister* (4), which so holds, has been somewhat doubted in *Durham Brothers v. Robertson* (5) and *Jones v. Humphries* (6). There was, however, no debt, but at most damages (probably nominal only) for not advancing money pursuant to contract. It could not possibly be said that this document was an assignment of the contract; at most it was an assignment of damages in respect of a particular breach. I think RIGBY, L.J., did not mean that an assignee of a contract could never sue for damages for breach of it, but merely that when a breach of contract had occurred in respect of which the original party to the contract could sue for damages, he could not assign these damages so as to enable the assignee to sue.

I have no doubt that the practice of the court of equity prior to the Supreme Court of Judicature Act, 1873, was to refuse to give effect to an assignment of a mere right to litigate. These courts were bound by the law as to champerty and maintenance as well as the courts of common law.

It is not, however, necessary for us to deal exhaustively with the question of what contracts a court of equity would have held to be assignable. Here the contract is one to purchase a reversion. It is a class of contract in which the court of equity recognised the right of each party, vendor as well as purchaser, to specific performance, and where the purchaser was entitled to specific performance he was recognised as having an equitable interest in the property. In that state of things he could assign the contract and his equitable interest thereunder without any objection arising from the law as to champerty. The fact that something subsequently happened which prevented his getting specific performance, or the fact that he elected to claim damages and not specific performance, would not take away the right which had vested in him on notice of the assignment to all the legal and other remedies for the chose in action. The decision of CURRY, J., in *Western Waggon and Property Co. v. West* (7) is, I think, in accordance with this view. I may mention, not as an authority, but in explanation of the view I take, that I myself in *Marchant v. Morton, Down & Co.* (8) have held ([1901] 2 K.B. at p. 832) that this

"sub-section is merely machinery. It enables an action to be brought by the assignee in his own name in cases where previously he could have sued in the [assignor's] name, but only where he could so sue."

I think that in the present case, where there was a contract of sale which gave the purchaser an equitable interest in the property contracted to be sold, the assignment and notice gave the assignee a legal right to sue not only for specific performance, if he had a case for it, but also for damages, if he either was driven to or elected to take that remedy.

I think, therefore, that the appeal should be allowed and judgment be entered for the plaintiff. Counsel for the defendant had some complaint as to the amount of damages; but there is no cross-appeal, and I think we cannot go into that question. Judgment will be entered for the plaintiff for an amount to be assessed by the assistant judge of the Mayor's Court.

LORD ALVERSTONE, C.J.—I entirely concur.

DARLING, J.—I concur, and have nothing to add.

Appeal allowed. Leave to appeal.

Solicitors : *James W. Browne; George J. Fowler.*

[*Reported by W. W. ORR, Esq., Barrister-at-Law.*]

DAVIDSSON v. HILL AND OTHERS

KING'S BENCH DIVISION (Kennedy and Phillimore, J.J.), May 16, June 19, 1901

Reported [1901] 2 K.B. 606; 70 L.J.K.B. 788; 85 L.T. 118; 49 W.R. 630; 17 T.L.R. 614; 45 Sol. Jo. 619; 9 Asp.M.L.C. 223]

Maritime Accident—Alien—Action by—Competency—Death of alien through negligence of English subject.

A foreign seaman was drowned on the high seas while a member of the crew of a ship of his own country as a result of a collision between his ship and an English ship which was due to the negligence of those in control of the English ship. In an action by the widow of the seaman against the owners of the English ship for damages under the Fatal Accidents Acts, 1846 and 1864.

Held: in passing the Acts Parliament intended to confer the benefit of them on foreigners as well as on English subjects so that a foreigner had a right to maintain an action under the Acts against an English wrongdoer, and, therefore, the widow's action was competent although both she and her husband were aliens and neither was within the jurisdiction of the Crown.

Adam v. British and Foreign Steamship Co., Ltd. (1), [1898] 2 Q.B. 430, not followed.

Notes. Distinguished: *Tomalin v. S. Pearson & Son, Ltd.* (1909), 78 L.J.K.B. 863. Referred to: *Grein v. Imperial Airways, Ltd.* (1935), 154 L.T. 31.

As to the rights of aliens, see 1 HALSBURY'S LAWS (3rd Edn.) 500 et. seq.; and as to persons who benefit under the Fatal Accidents Acts, see *ibid.*, vol. 28, p. 37. For cases see 2 DIGEST (Repl.) 171-173 and 36 DIGEST (Repl.) 208-210.

Cases referred to:

- (1) *Adam v. British and Foreign Steamship Co., Ltd.*, [1898] 2 Q.B. 430; 67 L.J.Q.B. 844; 79 L.T. 2; 14 T.L.R. 540; 8 Asp.M.L.C. 420; 2 Digest (Repl.) 172, 24.
- (2) *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (1883), 10 Q.B.D. 521; 52 L.J.Q.B. 220; 48 L.T. 546; 47 J.P. 260; 31 W.R. 455; 5 Asp.M.L.C. 65, C.A.; 11 Digest (Repl.) 450, 881.
- (3) *The Leon* (1881), 6 P.D. 148; 50 L.J.P. 59; 44 L.T. 613; 29 W.R. 916; 4 Asp.M.L.C. 404; 11 Digest (Repl.) 453, 900.
- (4) *The Wild Ranger* (1862), Lush. 553; 1 New Rep. 132; 32 L.J.P.M. & A. 49; 7 L.T. 725; 9 Jur.N.S. 134; 1 Mar.L.C. 275; 1 Digest (Repl.) 225, 1146.
- (5) *The Zollverein* (1856), Sw. 96; 27 L.T.O.S. 160; 2 Jur.N.S. 429; 4 W.R. 555; 2 Digest (Repl.) 169, 1.
- (6) *Jefferys v. Boosey* (1854), 4 H.L.Cas. 815; 3 C.L.R. 625; 24 L.J.Ex. 81; 23 L.T.O.S. 273; 1 Jur.N.S. 615; 10 E.R. 681, H.L.; 2 Digest (Repl.) 174, 46.
- (7) *Colquhoun v. Heddon* (1890), 25 Q.B.D. 129; 59 L.J.Q.B. 465; 62 L.T. 853; 38 W.R. 545; 6 T.L.R. 331; 2 Tax Cas. 621, C.A.; 42 Digest 687, 1007.
- (8) *Roulledge v. Low* (1868), L.R. 3 H.L. 100; 37 L.J.Ch. 454; 18 L.T. 874; 16 W.R. 1081, H.L.; 2 Digest (Repl.) 172, 31.
- (9) *Cope v. Doherty* (1858), 4 K. & J. 367; 27 L.J.Ch. 600; 31 L.T.O.S. 173; 1 Jur.N.S. 451; 6 W.R. 537; 70 E.R. 154; affirmed, 2 De G. & J. 614; 27 L.J.Ch. 600; 31 L.T.O.S. 307; 1 Jur.N.S. 699; 6 W.R. 695; 44 E.R. 1127, L.J.J.; 11 Digest (Repl.) 536, 1467.
- (10) *The Vera Cruz* (No. 2) (1884), 9 P.D. 96; 53 L.J.P. 33; 32 W.R. 783, C.A.; affirmed *sub nom. Seward v. The Vera Cruz*, 10 App.Cas. 59; 51 L.J.P. 9; 52 L.T. 474; 49 J.P. 324; 33 W.R. 477; 1 T.L.R. 111; 5 Asp.M.L.C. 386, H.L.; 1 Digest (Repl.) 169, 557.

- (11) *Read v. Great Eastern Rail. Co.* (1868), L.R. 3 Q.B. 555; 9 B. & S. 714; 37 L.J.Q.B. 278; 48 L.T. 822; 33 J.P. 199; 16 W.R. 1040; 36 Digest (Repl.) 216, 1142.
- (12) *Griffiths v. Earl of Dudley* (1882), 9 Q.B.D. 357; 51 L.J.Q.B. 543; 47 L.T. 10; 46 J.P. 711; 30 W.R. 797, D.C.; 36 Digest (Repl.) 217, 1143.
- (13) *Ex parte Gordon* (1881), 14 Otto, 515.
- (14) *The Explorer* (1870), L.R. 3 A. & E. 289; 40 L.J.Adm. 41; 23 L.T. 604; 19 W.R. 166; 3 Mar.L.C. 507; 1 Digest (Repl.) 169, 554.
- (15) *The Bernina* (2) (1887), 12 P.D. 58; 56 L.J.P. 17; 56 L.T. 258; 35 W.R. 314; 6 Asp.M.L.C. 75, C.A.; affirmed sub nom. *Mills v. Armstrong, The Bernina* (1888), 13 App. 1; 57 L.J.P. 65; 58 L.T. 423; 52 J.P. 212; 36 W.R. 870; 4 T.L.R. 360; 6 Asp.M.L.C. 257, H.L.; 1 Digest (Repl.) 170, 560.
- (16) *The Ruckers* (1801), 4 Ch. Rob. 73; 1 Digest (Repl.), 123, 88.
- (17) *The Belfast* (1868), 7 Wallace, 624.
- (18) *Mersey Docks and Harbour Board v. Turner, The Zeta*, [1893] A.C. 468; 63 L.J.P. 17; 69 L.T. 630; 57 J.P. 660; 9 T.L.R. 624; 7 Asp.M.L.C. 369; 1 R. 307, H.L.; 1 Digest (Repl.) 164, 515.
- (19) *The Theta*, [1894] P. 280; 63 L.J.P. 160; 71 L.T. 25; 43 W.R. 160; 7 Asp.M.L.C. 480; 6 R. 712; 1 Digest (Repl.) 168, 551.
- (20) *The Sarah* (1862), Lush. 549; 1 Digest (Repl.) 123, 85.
- (21) *R. v. Keyn, The Franconia* (1876), 2 Ex.D. 63; 46 L.J.M.C. 17; 41 J.P. 517; 13 Cox, C.C. 403, C.C.R.; 1 Digest (Repl.) 127, 131.
- (22) *The Milford* (1858), Sw. 362; 31 L.T.O.S. 42; 4 Jur.N.S. 417; 6 W.R. 554; 1 Digest (Repl.) 162, 494.

Also referred to in argument :

The Guldfare (1868), L.R. 2 A. & E. 325; 38 L.J.Adm. 12; 19 L.T. 748; 17 W.R. 578; 3 Mar.L.C. 201; 1 Digest (Repl.) 169, 553.

The Franconia (1877), 2 P.D. 163; 46 L.J.P. 33; 36 L.T. 640; 3 Asp.M.L.C. 435; 25 W.R. 796, C.A.; 1 Digest (Repl.) 169, 556.

Harris v. The Franconia (Owners) (1877), 2 C.P.D. 173; 46 L.J.Q.B. 363; 1 Digest (Repl.) 206, 932.

Glaholm v. Barker (1866), 1 Ch. App. 223; 35 L.J.Ch. 259; 13 L.T. 653; 12 Jur.N.S. 82; 14 W.R. 296; 2 Mar.L.C. 298, L.J.J.; 42 Digest 710, 1272.

Le Mesurier v. Le Mesurier, [1895] A.C. 517; 64 L.J.P.C. 97; 72 L.T. 873; 11 T.L.R. 481; 11 R. 527, P.C.; 11 Digest (Repl.) 468, 1011.

General Iron Screw Collier Co. v. Scharmanns (1860), 1 John. & H. 180; 29 L.J.Ch. 877; 4 L.T. 138; 6 Jur.N.S. 883; 8 W.R. 732; 1 Mar.L.C. 60; 70 E.R. 712; 42 Digest 688, 1026.

Cail v. Papiyanni, The Amalia (1863), 1 Moo.P.C.C.N.S. 471; Brown. & Lush. 151; 32 L.J.P.M. & A. 191; 8 L.T. 805; 9 Jur.N.S. 1111; 1 Mar.L.C. 359; 15 E.R. 778; on appeal, 1 Moo. P.C.C.N.S. at p. 479, P.C.; 42 Digest 671, 827.

The Saronia, The Eclipse (1861), 1 Lush. 410; 15 Moo.P.C.C. 262; 31 L.J.M. & A. 201; 6 L.T. 6; 8 Jur.N.S. 315; 10 W.R. 431; 1 Mar.L.C. 192; 15 E.R. 493, P.C.; 1 Digest (Repl.) 125, 116.

Point of Law argued in an action under the Fatal Accidents Acts.

On Aug. 11, 1900, a collision occurred on the high seas between the defendants' steamship *Ereter City* and the Norwegian barque *Ratata*. Shortly after the collision and in consequence thereof the *Ratata* sank, and Johan Davidsson, a Norwegian subject employed as sailmaker on board the *Ratata*, and another man, also a Norwegian subject, were drowned. The collision and the drowning of Johan Davidsson were solely caused by the negligent navigation of the *Ereter City* by the defendants' servants. The plaintiff, Josefina Davidsson, the widow of Johan Davidsson, brought this action under the provisions of the Fatal Accidents Acts, 1846 and 1864, on behalf of herself and the six children lawfully begotten of herself and Johan Davidsson, to recover compensation for his death. The question

A to be decided by the court was whether upon the facts stated above the plaintiff was entitled to recover damages in this action.

By the Fatal Accidents Act, 1846, s. 1 :

B " . . . whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

C By s. 2 :

"Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused. . . ."

J. A. Hamilton, K.C., and Henry Stokes for the plaintiff.

Laing, K.C., and Balloch for the defendants.

Cur. adv. vult.

D June 19, 1901. The following judgments were read.

KENNEDY, J.—I am of opinion that the plaintiff is entitled to our judgment. If the deceased seaman, who came to his death through the negligence of the defendants' servants, had been a British subject, no doubt, in my view, could have arisen as to the right of the widow to maintain such an action as the present. The action is an action in tort. The defendants, whose servants occasioned the death, are British subjects, and at the material time their servants were navigating a British ship, the property of the defendants. Their negligence and the consequent death of the seaman by drowning, which give rise to the claim, both took place on the high seas, which, to quote the language of BRETT, L.J., in *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (2) 10 Q.B.D. at p. 537), "is the common ground of all countries," and, therefore, as he proceeds to state, the well-known rule in the case of actions of tort "with regard to the exclusive jurisdiction of a foreign country does not apply." Does it make any difference that the deceased was not a British subject, but a Norwegian subject? The contention put forward on behalf of the defendants is that the foreign nationality makes all the difference.

G In considering how this stands, it is, I think, not irrelevant to point out that, if the deceased had been only damaged by the negligence of the defendants' servants and not drowned, he could have prosecuted an action for the negligence in the High Court of Justice if it be assumed, as it properly must be in order to test the right, that the presence of the defendants in this country, and therefore, within the jurisdiction, had prevented any technical difficulty arising as to the service of the proceedings upon them. He could equally have maintained his action if, the circumstances being otherwise the same, the defendants, instead of being British subjects, had been foreigners: see the judgment of BRETT, L.J., in *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (2), and the judgment of SIR ROBERT PHILLIMORE in *The Leon* (3), citing the earlier decisions of Dr. LESHINGTON in *The Wild Ranger* (4) and *The Zollverein* (5). If this be so, it would seem to be rather a strange thing that the foreign nationality of the sufferer by another's negligence in no way prejudices his right of action here if he is only hurt and not killed, yet that, if he is killed, it should form, the circumstances being otherwise identical, an absolute bar to any relief of the sufferer's family under these Acts. The Acts are Acts the express object of which is to create a liability in an action for damages at the suit of relatives who suffer from the death of the deceased person, whenever the act, neglect, or default which causes the death is such as would, if death had not ensued, have entitled the party injured to maintain an action to recover damages in respect thereof.

It is contended, however, by the defendants that such is the law, and the ground upon which it is based is that the Fatal Accidents Acts, 1846 and 1864, must be understood as applicable only to British subjects and those persons, whatever be their nationality, who are actually within the territorial jurisdiction of the British Crown. The deceased man, Johan Davidsson, was a Norwegian subject, and, as I understand the statement of counsel, had his home with his family in Norway. The defendants properly rely on a recent decision of my brother DARLING in *Adam v. British and Foreign Steamship Co., Ltd.* (1), and there is no doubt we cannot decide in favour of the plaintiff in the present case without disagreeing from DARLING, J., in regard to that judgment. It becomes, therefore, my duty respectfully to consider the grounds upon which it is based, and to state why I feel myself compelled to differ from his decision.

The circumstances there were substantially identical with those of this case. The learned judge in his judgment agreed that

"there can be no doubt that had the deceased man been an English subject this action would have lain, notwithstanding that the negligence and death both occurred upon the high seas."

He decided against the plaintiff on the ground, as he stated [1898] 2 Q.B. at p. 432, that

"it is a principle of our law that Acts of Parliament do not apply to aliens, at least if they be not even temporarily resident in this country, unless the language of the statute expressly refer to them."

In a later passage in his judgment (*ibid.* at p. 434), the proposition is stated in a somewhat modified form.

"The intention of the legislature is to be collected from the statute, and I see no implied, and certainly no express, intention to give to foreigners out of the jurisdiction a right of action which even British subjects had not until the passing of 9 & 10 Vict., c. 93 [the Fatal Accidents Act, 1846]."

In support of the proposition thus laid down by my brother DARLING cites passages from the judgments of Dr. LUSHINGTON in *The Zollverein* (5), of JERVIS, C.J., in *Jefferys v. Boosey* (6), and of LORD ESHER in *Colquhoun v. Heddon* (7). I venture to think that it is very important, in order to judge rightly of the applicability of these expressions of judicial opinions to other cases, to pay careful attention to the kind of case which in each instance gave occasion for the utterance of them.

Before proceeding in this direction I will only remark in passing that in *Routledge v. Low* (8) LORD WESTBURY expressed his dissent from the reasoning in *Jefferys v. Boosey*, the sum of which he states (L.R. 3 H.L. at p. 119) to be:

"the conclusion that a British statute must be considered as legislation for British subjects only unless there are special grounds for inferring that the statute was intended to have a wider operation";

and that LORD BROUGHAM in his judgment in *Jefferys v. Boosey* (6) states the law in more guarded terms than those quoted from the judgment of the Chief Justice. He says (4 H.L. Cas. at p. 970):

"Generally, we must assume that the legislature confines its enactments to its own subjects over whom it has authority, and to whom it owes a duty in return for their obedience. Nothing is more clear than that it may also extend its provisions to foreigners in certain cases, and may, without express words, make it appear that such is the intendment of those provisions. But the presumption is rather against the extension, and the proof of it is rather upon those who would maintain such to be the meaning of the enactments."

If, now, we look at the cases in which the judicial dicta in question have been uttered, we find, in my opinion, that in each of them the statutory enactment

- A** under consideration was one which related to matter of a special and exceptional kind. In *Jefferys v. Boasey* (6) the Act under consideration was 8 Anne, c. 21 (19 in RULPHHEAD), creating the special and peculiar property in literary productions called copyright; in *Colquhoun v. Heddon* (7) the statute was an Income Tax Act, and the particular question was the construction of the words "in or with any insurance company existing on Nov. 1, 1844." In *The Zollverein* (5) the principal statutory provision in view was s. 296 of the Merchant Shipping Act, 1854 [repealed], which imposed a duty in regard to navigation, which had not been imposed by the maritime law, and could not be held in the Court of Admiralty to bind a foreign vessel, and the position is grounded upon the want of equity which there would be in a decision which allowed the foreigner to benefit by a breach of the municipal law to which he could not himself be held amenable. So, again, in *Cope v. Doherty* (9) the statutory provisions under consideration, the Merchant Shipping Act, 1854, Part 9 [repealed], were provisions of a peculiar character in so far as they placed a restriction, limiting liability, upon the general law of nations. Under that general law the owners of a ship injured by the negligent navigation of another are entitled to full damages; but to hold the provisions of the Act which created this peculiar restriction as intended to apply to foreigners would be, as WOOD, V.-C., puts it in his judgment (4. K. & J. at p. 379),

"an attempt [on the part of the British Parliament] to legislate for foreigners by taking away those rights and privileges which they enjoy by the general law, which gives full compensation for damages."

- E** Even in this case KNIGHT BRUCE, L.J., in his judgment on the appeal, reserved a question whether the Act might not apply if instead of both the plaintiffs' and the defendants' ships being foreign, one had been British. He said (2 De G. & J. at p. 621):

- F** "I assume that the plaintiffs [the parties who were claiming the limitation] would have been right if both the *Tuscarora* and the *Andrew Foster* had been British in ownership and character, all things else being the same; nor do I say whether the plaintiffs would have been right or wrong, if one only of the two ships had been of that description, or if the collision had happened in a British river or a British port."

- G** The law as to the limitation of liability is the same as applied to foreign ships as was afterwards dealt with by the Merchant Shipping Act Amendment Act, 1862.

- H** It seems to me that the Fatal Accidents Acts, which are under our consideration in the present case, embody legislation which is of a very different character. The basis of the claim to which they give statutory authority is negligence causing injury, and that is a wrong which I believe the law of every civilised country treats as an actionable wrong. They create, no doubt, a new cause of action: see per LORD SELBORNE and LORD BLACKBURN in *Seward v. The Vera Cruz* (10), for previously the relatives of the deceased could not in England sue the wrongdoer. The measure of damages is not the same as in an action by the injured man, and his death is an essential constituent of the right of action. None the less, as I venture to think, is it true so say that in substance the purpose effected by the legislation is to extend the area of reparation for a wrong which civilised nations treat as an actionable wrong; indeed, the right of redress given is, in a sense, according to the decisions of the Queen's Bench (BLACKBURN and LUSH, JJ.) in *Read v. Great Eastern Rail. Co.* (11) and the Queen's Bench Division in *Griffiths v. Earl of Dudley* (12), so far identified with the right of the injured man that, if death ensues after he has sued and recovered damages, the relatives have no cause of action under this legislation. In Scotland (see BELL'S PRINCIPLES OF THE LAW OF SCOTLAND) and in most of the American States (see *Ex parte Gordon* (13)) the right of action in the relatives of the deceased person for compensation for his death by the negligence of another is recognised by the law, and I believe, though

I cannot quote any authority upon the point, that it is also recognised by the law of France and Germany. A

It seems to me, under all the circumstances and looking at the subject-matter, more reasonable to hold that Parliament did intend to confer the benefit of this legislation upon foreigners as well as upon English subjects, and certainly that as against an English wrongdoer the foreigner has a right to maintain his action under the statutes in question. It is not necessary to decide whether—assuming, of course, that no technical difficulty arises as to service of proceedings—the action could be maintained in the English courts, the death occurring through negligence in collision on the high seas, and both parties were foreigners, or where the wrongdoers were foreigners and the sufferer English. My present opinion is that an action could be maintained, but I desire to be understood as not expressing, as it is not necessary to express, a decided opinion upon this point. Here the plaintiff seeks to enforce her claim against a British subject, and I cannot see why she should not do so. If she has not the right, we should have the anomaly, as it seems to me, that if a foreigner and an Englishman serving on the same ship were both drowned on the high seas by the same collision negligently caused by an English vessel, the widow of the one could, and the widow of the other could not, obtain by suing the owners of the ship in fault in personam that reparation which our legislature in these statutes has declared to be a just reparation. B

Let me add that the view which I have has the weighty authority of SIR ROBERT PHILLIMORE in *The Explorer* (14), after argument by R. G. Williams. That decision was no doubt overruled by the Court of Appeal and the House of Lords in *Seward v. The Vera Cruz* (10), but, as I understand, the decision of the House of Lords is upon a different point altogether—namely, that the Court of Admiralty had no jurisdiction to entertain an action in rem for loss of life under Lord Campbell's Act—and it will not be, I think, wholly undeserving of notice that in *The Bernina* (15), which was litigated in 1886 and 1887—that is, two years after the decision in *Seward v. The Vera Cruz* (10) was carried up to the House of Lords—one of the two successful claimants for damages under Lord Campbell's Act in an action in personam, against the owners of the wrongdoing ship, was, as I have ascertained from the Admiralty Registry of Bagdad, Habiba Toeg, the mother (as appears from the statement in the judgment of Lord Esher in *The Bernina* (15) (12 P.D. at p. 60), the administratrix of Moses Aaron Toeg, a passenger on a ship from London to Bushire who had lost his life in the collision caused by the negligence of the defendants' servants in the course of the voyage, and who, as I presume from his name and from his mother's nationality, was a foreigner. No question of her right to recover on the ground of nationality either of herself or the deceased was raised by the defendants, and, therefore, the case is not in any sense a decision in favour of the right. But in a case contested so persistently as this was, it is difficult to suppose that the question would not have been raised, had it been one in which the point could be rightly and successfully taken. I am of opinion that judgment must be for the plaintiff. C

PHILLIMORE, J.—I agree. We have here to determine whether a foreigner, the widow of a foreign seaman, killed on the high seas when navigating on board one of the ships of his own country by collision between his ship and a British ship, can maintain an action in England against the English owners of the British ship for the negligence of their servants in causing the collision and death. I start with the proposition that if the man had not been killed, but only injured, he during his life could have maintained an action for damages, such an action being maintainable by the *lex fori* and by the *lex loci delicti commissi*, whether the locus be regarded as English or British territory, or as the high seas over which maritime law, or maritime law as administered in this country, prevails. As regards English or British territory this is common knowledge. That such a tort would also be actionable by the law maritime as administered in this country is shown by *The* D

A *Ruckers* (16), and by other cases which I am about to cite. I have no doubt that other countries administer the law maritime in the same way. For some proof of it I take the observations in the American cases of *The Balize* (17) and *Ex parte Gordon* (13). This not being an action in rem, it is not necessary to show that the High Court of Admiralty would, while there was such a separate court, have had jurisdiction. But I have no doubt that it would. The principle of the decision **B** in *The Zeta* (18), and the reasoning of LORD HERSCHELL, in whose judgment all previous cases are cited, the language of my brother BRUCE in *The Theta* (19), and the settled practice of the Admiralty Division to allow in proper cases such actions in rem, have concluded this question, the true key to which might have been found long ago in the language of DR. LUSHINGTON in *The Sarah* (20).

I have hitherto not considered one possible *lex loci*, the law of the foreign ship, **C** in this instance that of Norway. If such a tort were not actionable by the law of Norway, it would be necessary to consider which was the law applicable, whether that of the British ship on which the act of negligence was committed, or that of the Norwegian ship on which the act was felt, or whether, as the death of the deceased seaman was in the sea by drowning, general maritime law, or maritime law as administered in the English courts, should apply. This matter underwent **D** great discussion in *R. v. Keyn* (21). It will be found treated of in the separate judgments of LINDLEY, J., 2 Ex. D. at p. 98; of DENMAN, J., *ibid.* at pp. 101 to 107; BRETT J., *ibid.* at p. 148; BRAMWELL, J., *ibid.* at p. 150; LORD COLERIDGE, C.J., *ibid.* at p. 158; and of COCKBURN, C.J., *ibid.* at pp. 232 to 238. It would be necessary also to consider *The Leon* (3). But till it is otherwise pleaded and **E** proved, I take the law of Norway to be the same as our own.

Having thus established my first proposition that an injured man could have maintained during his life an action for damages in such a case as the present, I came to apply the Fatal Accidents Act, 1846. The words of s. 1 of that statute are wide enough, and no one doubts that they apply to foreigners in England, or to British seamen as against a British shipowner on the high seas. There is the **F** *lex fori*, and, if the tort be held to be done on the British ship, the *lex loci*. It has not been pleaded that the law of Norway differs in this respect from ours; and I leave, as before, the possible consequences of such a state of things out of consideration. If the *lex loci* be the law maritime, I am not sure that it must not now be held that the injury done to the relatives of a dead man by killing the breadwinner is to be deemed an actionable tort by the law maritime. The reasoning **G** of the Supreme Court of the United States in *Ex parte Gordon* (13), already cited, and the fact that by the law of Scotland, and I believe now by the law of many civilised countries, for example, the United States (see *Ex parte Gordon* (13)), France (see ZACHARIAE, *Edn.*, 1878, vol. 4, p. 17), and Germany (as I am informed), this action lies, lead me to think that if at one time this tort was not actionable by the law maritime, it may yet well be actionable now.

H I have still to consider the decision and reasoning of my brother DARLING in *Aden v. British and Foreign Steamship Co., Ltd.* (1). That decision is in point, and, if we decide now in favour of the plaintiff, we must disagree with it. It rests mainly, I think, upon the principle that Acts of Parliament are to be deemed not to apply to non-resident aliens unless the court is compelled so to apply them. There are a number of decisions upon the construction of the Merchant Shipping **I** Act, 1854 [repealed], which set forth this principle as applicable to the construction of statutes imposing a burden upon a foreigner. Perhaps the strongest of these is *Cope v. Doherty* (9); but even in that case the reservation of KNIGHT BRUCE, L.J. (2 D. G. & J. at p. 621), would make me pause. On the other hand, where it is a case of giving a remedy to a foreigner, the decision of DR. LUSHINGTON in *The Milford* (22), and the constant practice which has followed upon that decision, is the other way. This latter position is, I think, sound. Our courts are not only open, but are open equally to foreigners as to British subjects, and foreigners who have the benefit of the English common law have also the benefit

of English statutes. At any rate, where a statute brings the English law into harmony with the law of the foreigner, as in *The Milford* (22), I think this must be so. If an Englishman on board a foreign ship, or a foreigner on board a British ship, is run down by a British ship upon the high seas, it seems almost certain that an action would lie. Are the representatives of a foreigner on board a ship of his own nationality, whose national law would probably give them at least as good a remedy as that given by the Fatal Accidents Act, to be deprived of their right to recover because they must have recourse to statute law instead of to unwritten common law? I think not. Is the law to be different for a Scottish owner of a British ship and the English owner of a British ship, and can it be that as against the owner in this case, if he were a Scot, the foreigner could maintain an action because the law of solatium is part of the common law of Scotland, but as against an English owner he cannot, because the Fatal Accidents Act is a statutory addition to the common law of England? I think not. There must be judgment for the plaintiff with costs.

Judgment for plaintiff.

Solicitors : *Stokes & Stokes; Ince, Colt & Ince.*

[*Reported by W. W. ORR, Esq., Barrister-at-Law.*]

GREAT WESTERN RAIL. CO. v. LONDON AND COUNTY BANKING CO., LTD.

[Horse of Lords (The Earl of Halsbury, L.C., Lord Shand, Lord Davey, Lord Brampton and Lord Lindley), May 2, 3, 6, July 22, 1901]

[*Reported* [1901] A.C. 414; 70 L.J.K.B. 915; 85 L.T. 152; 50 W.R. 50; 17 T.L.R. 700; 45 Sol. Jo. 690; 6 Com. Cas. 275]

Bank—Cheque—“Not negotiable”—Cheque obtained by fraud—Cashed by collecting bank—Defective title to both cheque and money received for it on presentation—Reimbursement of bank—“Customer”—Person having deposit or current account or some similar relation with bank—Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61), ss. 81, 82.

H. obtained from the appellants by false pretences a cheque payable to his order, crossed generally, and marked “not negotiable.” He took the cheque to a branch of the respondent bank where it was received in good faith and cashed, part of the proceeds being retained by the bank for the account of a customer of theirs and the balance handed to H. H. had not, and never had had, an account with the bank, but they had been in the habit for many years past of cashing cheques for him as a matter of convenience. The bank crossed the cheque to themselves and received payment for it. In an action by the appellants to recover the amount of the cheque from the bank,

Held: the bank were not entitled to the protection afforded by s. 82 of the Bills of Exchange Act, 1882, because (i) for a person to be a “customer” of a bank within s. 82, he must have either a deposit or a current account with the bank, or there must be some entry of debit or credit in a book or paper of the bank relating to his transactions, or some similar relation must exist, and, applying this test, H. was not a “customer” of the bank within s. 82;

- A** (ii) in the circumstances the bank did not receive payment of the cheque for H. within s. 82, for money in respect of the cheque had already been given to H. in exchange for the cheque, and so the money received by the bank when the cheque was presented was received, not for H., but for the bank's own account in reimbursement; (iii) furthermore, H. had never had any title to the cheque, and, it being marked "not negotiable," under s. 81 of the Act the bank could not acquire a better title to it than H. had, and the title to the money which the bank received for the cheque was as defective as their title to the cheque itself; accordingly, the appellants were entitled to succeed.
- B**

C **Notes.** Section 82 of the Bills of Exchange Act, 1882 (2 HALSBURY'S STATUTES (2nd Edn.) 505), was repealed by the Cheques Act, 1957 (37 HALSBURY'S STATUTES (2nd Edn.) 51), s. 4 of which extends the protection to collecting bankers formerly given by s. 82 in the case of crossed cheques to "where a banker, in good faith and without negligence, receives payment for a customer" of a cheque whether crossed or uncrossed.

D Explained: *Capital and Counties Bank v. Gordon, London County and Midland Bank v. Gordon*, post p. 1017. Referred to: *Crumplin v. London Joint Stock Bank*, [1911-13] All E.R. Rep. 647; *Morison v. London County and Westminster Bank*, [1914-15] All E.R. Rep. 853; *Taxation Comrs. v. English, Scottish and Australian Bank*, [1920] A.C. 683; *E. B. Savory & Co. v. Lloyds Bank, Ltd.* (1932), 48 T.L.R. 344; *Wilson and Mewson v. Pickering*, [1946] 1 All E.R. 394; *Marquess of Bute v. Barclays Bank, Ltd.*, [1954] 3 All E.R. 365.

E As to the position of a banker on the collection of cheques, see 2 HALSBURY'S LAWS (3rd Edn.) 176 et seq.; and for cases see 3 DIGEST (Repl.) 219 et seq., 261 et seq.

Cases referred to:

- (1) *Horwood v. Smith* (1788), 2 Term Rep. 750; 100 E.R. 404; 14 Digest (Repl.) 595, 5925.
- F** (2) *Higgons v. Burton* (1857), 26 L.J.Ex. 342; 29 L.T.O.S. 165; 5 W.R. 683; 3 Digest (Repl.) 50, 355.
- (3) *Cundy v. Lindsay* (1878), 3 App. Cas. 459; 38 L.T. 573; 42 J.P. 483; 26 W.R. 406; 14 Cox, C.C. 93; sub nom. *Lindsay & Co. v. Cundy*, 47 L.J.Q.B. 481, H.L.; 35 Digest 98, 72.
- (4) *Fisher v. Roberts* (1890), 6 T.L.R. 354, C.A.; 6 Digest (Repl.) 415, 2935.
- G** (5) *Mulhiesen v. London and County Bank* (1879), 5 C.P.D. 7; 48 L.J.Q.B. 529; 41 L.T. 85; 43 J.P. 560; 27 W.R. 838; 3 Digest (Repl.) 264, 758.
- (6) *Clarke v. London and County Banking Co.*, [1897] 1 Q.B. 552; 66 L.J.Q.B. 354; 76 L.T. 293; 45 W.R. 383; 41 Sol. Jo. 352, D.C.; 3 Digest (Repl.) 263, 753.

H Also referred to in argument:

Bissell & Co. v. Fox Brothers & Co. (1885), 53 L.T. 193; 1 T.L.R. 452, C.A.; 3 Digest (Repl.) 262, 742.

Mathews v. Brown & Co. (1894), 62 L.J.Q.B. 494; sub nom. *Matthews v. Brown & Co.*, 10 T.L.R. 386, D.C.; sub nom. *Mathews v. Williams, Brown & Co.*, 10 R. 210; 3 Digest (Repl.) 263, 748.

I *National Bank v. Silke*, [1891] 1 Q.B. 435; 60 L.J.Q.B. 199; 63 L.T. 787; 39 W.R. 361; 7 T.L.R. 156, C.A.; 3 Digest (Repl.) 223, 534.

M'Lean v. Cludeedale Banking Co. (1883), 9 App. Cas. 95; 50 L.T. 457, H.L.; 3 Digest (Repl.) 245, 654.

Lucare & Co. v. Crédit Lyonnais, [1897] 1 Q.B. 148; 66 L.J.Q.B. 226; 75 L.T. 514; 13 T.L.R. 60; 2 Com. Cas. 17; 3 Digest (Repl.) 263, 749.

Healdman v. Bonth (1862), 1 H. & C. 803; 1 New Rep. 240; 32 L.J.Ex. 105; 7 L.T. 638; 9 Jur.N.S. 81; 11 W.R. 239; 158 E.R. 1107; 3 Digest (Repl.) 50, 356.

Appeal from a decision of the Court of Appeal (A. L. SMITH, VAUGHAN WILLIAMS and ROMER, L.JJ.), reported [1900] 2 Q.B. 464, affirming a decision of BIGHAM, J., reported [1899] 2 Q.B. 172, in a case tried by him in the Commercial Court without a jury.

The action was brought by the appellants as plaintiffs against the respondents to recover "the sum of £142 10s., money had and received to the use of the plaintiffs, or, in the alternative, for the wrongful conversion by the defendants of a cheque of the value of £142 10s." On Nov. 16, 1898, one Huggins, by falsely pretending that a poor rate had been made, and that he, as assistant overseer, was entitled to receive the same, obtained from the appellants a cheque of the value of £142 10s., with intent thereby to defraud. Of this misdemeanour he was duly convicted. The cheque was drawn in favour of Huggins or order as payee on the London Joint Stock Bank, Prince's Street, London, and was crossed "& Co.," and bore on it the words "Not negotiable." On Nov. 16, 1898, Huggins offered the cheque for cash to the branch bank of the respondent company at Wantage, Berkshire, and they took it and gave him the sum of £117 10s. in notes and gold. The balance, £25, was not paid in cash to Huggins, but was held by the manager of the branch bank, in his capacity as treasurer of the Wantage Rural District Council, at the request of Huggins, in discharge of a liability to the council. The cheque was presented by the respondents at the London Joint Stock Bank, and payment was made on behalf of the appellants. Upon the discovery of the fraud the appellants demanded the proceeds of the cheque, and after refusal commenced this action. Huggins never had any banking account with the respondent company. It appeared, however, that he had during many years previously taken cheques received by him from various ratepayers to the respondents' branch bank at Wantage and received cash in exchange therefor. The appellants, in fact, had no knowledge of the circumstances of the transaction in question. In their defence the respondents alleged that Huggins was a customer of theirs, and that they gave value for the cheque in good faith and without negligence, and without notice that Huggins had a defective title to it.

It was contended by the appellants that Huggins was not a customer of the respondents within s. 82 of the Bills of Exchange Act, 1882, and even if he was a customer, that the respondents did not receive payment of the cheque for a customer within the section, but that the appellants' money was obtained in payment of the cheque by the respondents for themselves as holders of the cheque, for which they had given value to a person who was not capable of giving a better title than he had himself. Section 82 of the Bills of Exchange Act, 1882 [see note ante p. 1005], provided, that when a banker in good faith and without negligence received payment "for a customer" of a cheque crossed generally or specially to himself, and the customer had no title or a defective title, the banker should not incur liability to the true owner by reason only of having received such payment.

By s. 81:

"Where a person takes a crossed cheque which bears on it the words 'not negotiable' he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had."

BIGHAM, J., gave judgment for the defendants, and his decision was affirmed by the Court of Appeal. The plaintiffs appealed.

H. D. Greene, K.C., Asquith, K.C., and Park Goff for the appellants.

A. T. Lawrence, K.C., and Guy Lushington for the respondent bank.

Their Lordships took time for consideration.

July 22, 1901. The following opinions were read.

THE EARL OF HALSBURY, L.C.—The importance of this case depends upon the true construction of ss. 81 and 82 of the Bills of Exchange Act, 1882. I think that there are more reasons than one for the opinion which I entertain, but the

A sections to which I refer are of such wide and general importance that I prefer to rest my judgment upon the true construction of those two sections.

I think it very important that everyone should know that people who take a cheque which is marked "not negotiable" and treat it as a negotiable security must recognise the fact that, if they do so, they take the risk or the person for whom they negotiate it having no title to it. In this case it cannot be pretended
 B that Huggins had any title to the cheque at all. I do not understand what additional security is supposed to be given to a cheque by putting the words "not negotiable" upon it, if the fact of its being negotiated can give a title to anyone. The supposed distinction between the title to the cheque itself and the title to the money obtained by it seems to me to be absolutely illusory. The
 C language of the statute, which seems to be clear enough, would be absolutely defeated by holding that a fraudulent holder of the cheque could give a title either to the cheque or to the money. Section 82, which contemplates the receipt of such a cheque in the ordinary course of business for a customer of a bank, seems to me to contemplate a totally different class of transaction from that which is disclosed in this case. The bank thought proper to take this cheque as represent-
 D ing its face value, and if the holder of it had no title, as he certainly had not, there is nothing in s. 82 which will entitle them to treat it as a receiving payment for a customer. It is not true to say that the banker is here sought to be made liable by reason of his having received payment for a customer. I do not think that Huggins was a customer of the bank at all within the meaning of the section; but what the bank are really insisting upon here is the valid negotiability of a
 E cheque, fraudulently obtained, which, by the form of it comes within the provision in s. 81 that the person taking such a cheque shall not have a better title to the cheque than that which the person from whom he took it had. The bank insists, nevertheless, that Huggins gave a title to them which enables them to sue. As I have said, I do not think that Huggins was a customer at all. I do not think that the transaction was a banking transaction, and although I think that
 F there is another and a distinct ground which would defeat the bank's claim, I am content to rest my judgment upon the true construction of the statute. I, therefore, move your Lordships that the decision of the Court of Appeal be reversed, and that judgment be entered for the appellants with costs.

LORD SHAND (read by LORD DAVEY).—I have found the decision of this case to
 G be attended with much difficulty, but I have come to be of opinion, with your Lordships, that the judgment of BIGHAM, J., and of the Court of Appeal should be reversed. Having had an opportunity of considering the opinion about to be read by LORD LINDLEY, I concur in that opinion and in his Lordship's views of the provisions of the Bills of Exchange Act, and in the reasons which he has given for the reversal of the decision of the Court of Appeal.

LORD DAVEY.—The first point raised by the learned counsel for the respondents was that Huggins, in the circumstances which are stated in the case, had a
 H property in the cheque which was indeed voidable by the appellants, who had been defrauded, but that the money having been received by the respondents in good faith and without notice of the fraud before the appellants had disaffirmed the
 I transaction, it could not be recovered back from them, the respondents. *Horwood v. Smith* (1) and the Sale of Goods Act, 1894, s. 24, were cited in support of this proposition. I am of opinion that Huggins never had any property in the cheque, which was handed to him only as the collector and agent of the overseers in payment of a debt alleged to be due to them. The appellants never intended to vest any property in him for his own benefit, but the property in the cheque was intended to be passed to his employers the overseers, notwithstanding that it was made payable to Huggins's order. Huggins, therefore, had no real title to the cheque, and, it being marked "not negotiable," the respondents never acquired

title to it as against the appellants. I think that this is shown by *Higgins v. Barton* (2) and *Cundy v. Lindsay* (3). In the former case one Dix, pretending to be agent for one Fitzgibbon, obtained goods from the plaintiff, and pledged them to the defendant. It was held that the plaintiff could recover the goods from the defendant before any notice of the fraud or disavowance of the transaction. And in *Cundy v. Lindsay* (3) the same principle was affirmed in this House.

BIGHAM, J., however, and the Court of Appeal decided in favour of the respondents on the ground that Huggins was a customer of the respondents, and that they received the cheque for collection on his behalf within the meaning of s. 82 of the Bills of Exchange Act. The facts upon which they came to that conclusion are that Huggins had for about twenty years been in the habit of cashing cheques received by him as collector of rates at the respondents' bank. His employers, the overseers, kept their account at another bank at Newbury, and it was prima facie his duty to pay cheques received by him for rates into their banking account. It does not appear whether Huggins cashed cheques at the respondents' bank in any cases except those in which he had to make payments out of the rate collected as poor rate to the credit of the waywarden, or rural district council, who kept their accounts with the respondents. In all the instances which were put in evidence from the books of the respondents the transaction was similar to the one in question—namely, a payment to the credit of a customer of the respondents by means of a large cheque out of which Huggins received the change. He was asked the question in cross-examination whether he ever cashed cheques with the respondents except when he had to make a payment out of the rate to the credit of one of their customers. Unfortunately a discussion arose and the question was never answered. It is not shown that he did so, and I doubt whether he ever did.

But, be this as it may, I do not think that the relation of customer and banker was ever established between him and the respondents. It is true that there is no definition of customer in the Act, but it is a well-known expression, and I think that there must be some sort of account—either a deposit or a current account—or some similar relation to make a man a customer of a banker. On the facts proved in this case I do not think that the respondents undertook any duty towards Huggins. They took the cheque which he offered in payment of a sum to be placed to the credit of their customers, and gave him the change, or in some cases (though it is not proved) they may have bought his cheque, possibly for their own convenience in remitting to the head office. But this will not, in my opinion, prove that Huggins was a customer, or that they undertook to collect the cheques on his behalf, so as to bring them within the protection of s. 82. I, therefore, agree that the appeal should be allowed.

LORD BRAMPTON.—Although I am of opinion that the evidence in this case would have justified the conviction of Huggins for larceny under s. 88 of the Larceny Act, 1861, still, as the jury by their verdict in fact found him guilty of obtaining the cheque by false pretences, that is, of a misdemeanour and not of a felony, and as throughout the trial of this action the case was so treated, both by the appellants and the respondents, I have thought it right so to treat it in considering the question of the respondents' liability now before your Lordships. I do not, however, look upon this distinction as at all material, for the question before this House is not whether the respondents, when they received the cheque from Huggins, became the holders in due course in the sense that they were bona fide holders for value without notice of the fraud, nor whether they continued to be so until after the cheque was honoured by the appellants' bankers, upon whom it was drawn—for nobody impeaches the absolute integrity of the respondents, their officers, and clerks—but whether, in taking this cheque with the words "not negotiable," added to the general crossing "— & Co.," written upon the face of it by the secretary of the appellants before it was sent to Huggins, the

A respondents' right to receive payment of it was affected by s. 81 of the Bills of Exchange Act, 1882, and was not within the protection of s. 82.

I deal first with s. 81, which enacts:

B "Where a person takes a crossed cheque which bears on it the words 'not negotiable' he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had."

The object of this section is obvious. It is to afford to the drawer or the holder (s. 77) of a cheque who is desirous of transmitting it to another person as much protection as can reasonably be afforded to it against dishonesty or accidental miscarriage in the course of its transit, if he will only take the precaution to cross it with the addition of the words "not negotiable" so as to make it difficult to get such cheque so crossed cashed until it reaches its destination. To apply that section to the present case, I cannot imagine that anybody would entertain a C thought that a person who obtains from another, by a fraudulently false pretence, a cheque so crossed with the intent to appropriate the proceeds to his own use, as Huggins did, could make any real title to such cheque; practically it would be the same as if he had stolen it. Having no title himself he had none to give to anybody else, and if this had been the case of an obliging tradesman cashing the cheque for a friend it would have been unarguable.

But it is said the respondents, being bankers, are protected from liability to pay over to the appellants the moneys they have received by the honouring of the D chèque, by s. 82, which enacts that:

E "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally, or specially to himself, and the customer has no title, or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

F That the respondents in good faith received payment for the cheque is beyond question. I am not, however, quite so sure that it was altogether without negligence, for I must assume that the manager at Wantage knew the meaning and legal effect of the crossing, with the words "not negotiable." This point, however, does not appear to have been raised, and certainly there was no finding G upon it at the trial. I will reject it, therefore, for present purposes.

The only remaining question is whether the money received by the respondents' bank, when the cheque was honoured, was so received for any customer of the bank. I cannot come to the conclusion that it was. Nor do I think that the evidence would justify such a finding. Huggins had no banking account anywhere. It is not necessary to say that the keeping of an ordinary banking account is essential H to constitute a person a customer of a bank, for if it were shown that cheques were habitually lodged with a bank for presentation on behalf of the person lodging them, and that when honoured the amount was credited and paid out to such person, whether with or without any profit to the bank for so presenting them, I would not say that such transactions might not constitute such person a customer I within the meaning of s. 82. Indeed, I think that they would. But as between Huggins and the Wantage branch of the respondents' bank, the transactions amounted to nothing of the sort. It is true that for many years the branch bank manager had been in the habit of accommodating Huggins by cashing cheques made payable to him, some crossed and some not crossed; but none marked "not negotiable." All the cheques were cashed across the counter before presentation. Sometimes a portion of the amount was paid in by Huggins's direction to the credit of the account kept with the bank by the Wantage Rural District Council, but there was never a cheque so changed without Huggins getting some cash out of it, and upon no occasion was a cheque paid in to the credit of the Wantage

account above mentioned for presentation on their account. I can well understand why it was so, because once paid in it could not have been got out without a cheque of the Wantage Rural District Council. I should further observe that the language of s. 82 is where a banker "receives payment for a customer." In the case before your Lordships, on every occasion of cheques so cashed, the money had already been given to Huggins in exchange for the cheque; the money paid to the respondents has been received on their own account to reimburse them, and not on account of Huggins at all. For these reasons I think that the transaction between Huggins and the respondents is not within the protection of s. 82, and that, as Huggins could give the respondents no better title than he had himself, the appellants are entitled to your Lordships' judgment, and that this appeal should be allowed with costs.

LORD LINDLEY.—In the view which I take of this case it is unnecessary to determine whether Huggins was guilty of larceny in stealing the cheque, or whether he only obtained it by false pretences, which is the crime of which he was convicted. Whether the cheque was void or only voidable appears to me really immaterial. Be it void or be it voidable, it was marked "not negotiable," and by s. 81 of the Bills of Exchange Act, 1882, Huggins had not and was not capable of giving a better title to the cheque than he had himself.

But it is said that, although the bank had a defective title to the cheque, they have a good title to the money paid to them as holders of it. So to construe the section would destroy more than half its utility; a cheque marked not negotiable would be no safer than any other cheque if once cashed—i.e., unless payment of it was stopped before it was presented. I cannot think this an admissible construction; it has never yet been judicially adopted, and I advise your Lordships to reject it. Everyone who takes a cheque marked "not negotiable" takes it at his own risk, and his title to the money got by its means is as defective as his title to the cheque itself. *Fisher v. Roberts* (4) is an authority to this effect, and sect. 82 seems to me to be framed on the assumption that this view is correct. The section would not otherwise be wanted.

Upon the other point, it is plain to me that the bank obtained payment of the cheque for themselves and not for Huggins. Whether the bank is to be regarded as having purchased the cheque, or as having advanced him its amount on the security of it, seems to me immaterial. The bank wanted the money for themselves and not for him. They were entitled to hold the money as against him, and were under no obligation to remit it to him. In no ordinary sense of the expression can the bank be regarded as collecting the money for him, although, no doubt, if the bank could keep the money all liability on his part would be at an end, and in that way he would be benefited by their receipt of the money. Section 82 of the Act is a mere reproduction of s. 12 of the Crossed Cheques Act, 1876 [repealed by the Act of 1882], and the construction put upon that Act in *Matthiessen v. London and County Bank* (5) was, in my opinion, correct. In *Clarke v. London and County Banking Co.* (6), the cheque was paid in for collection, and this was the *ratio decidendi*.

Further, I cannot think that Huggins was in any sense a customer of the bank; no doubt he was known at the bank as a person accustomed to come and get cheques cashed, but he had no account of any sort with the bank. Nothing was put to his debit or credit in any book or paper kept by the bank. The entry in the waste book is only a memorandum of the transaction. *ROMER, L.J.*, thought that he was a customer because the bank had for years collected money for him; but, in my view, the bank collected money for themselves, not for him, in this particular transaction, and the evidence only shows that previous transactions were similar to this. The case suggested by *ROMER, L.J.*, of a customer paying in a non-negotiable cheque to his own credit when his account is overdrawn appears to me very different from that which is before your Lordships for decision. The

A *comment* of VAUGHAN WILLIAMS, L.J., commends itself to my mind, although out of deference to his colleagues he accepted a view which he would not otherwise have entertained. I am clearly of opinion that the decision appealed from should be reversed, and that judgment should be entered for the plaintiffs with costs.

Appeal allowed.

B Solicitors: *R. R. Nelson; Harries, Wilkinson & Raikes.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

C

WEST HAM CENTRAL CHARITY BOARD AND OTHERS v. EAST LONDON WATERWORKS CO. AND ANOTHER

[CHANCERY DIVISION (Buckley, J.), February 5, 6, 7, 1900]

D

[Reported [1900] 1 Ch. 624; 69 L.J.Ch. 257; 82 L.T. 85; 48 W.R. 284; 44 Sol. Jo. 243]

Landlord and Tenant—Waste—Permanent alteration of character of land demised—Increase in value of land.

E The test whether an act which a lessor alleges to be an act of waste by his lessee does amount to waste is whether the act permanently alters the character of the land demised, e.g., an alteration in the level of the soil. If it does so, it is an act of waste even though it increases the value of the land.

Notes. Applied: *Marsden v. Edward Hayes, Ltd.*, [1926] All E.R. Rep. 329. Referred to: *Sunderland Orphan Asylum v. River Wear Comrs.* (1911), 106 L.T. 288.

F As to a lessee's liability for waste, see 23 HALSBURY'S LAWS (3rd Edn.) 566-570, and for cases see 31 DIGEST (Repl.) 389 et seq.

Cases referred to:

- (1) *Lord Darcy v. Askwith* (1618), Hob. 234; 80 E.R. 380; 31 Digest (Repl.) 389, 5156.
- (2) *Queen's College, Oxford v. Hallett* (1811), 14 East, 489; 104 E.R. 689; 31 Digest (Repl.) 394, 5205.
- (3) *Jones v. Chappell* (1875), L.R. 20 Eq. 539; 44 L.J.Ch. 658; 31 Digest (Repl.) 392, 5178.
- (4) *Doe d. Grubb v. Earl of Burlington* (1833), 5 B. & Ad. 507; 2 Nev. & M.K.B. 534; 3 L.J.K.B. 26; 110 E.R. 878; 31 Digest (Repl.) 390, 5163.
- (5) *Barrel v. Barrel* (circa 1629), Het. 34; 124 E.R. 321; 31 Digest (Repl.) 390, 5159.
- (6) *Church v. Brown* (1808), 15 Ves. 258; 33 E.R. 752, L.C.; 31 Digest (Repl.) 409, 5384.

Also referred to in argument:

- Doherty v. Allman* (1878), 3 App. Cas. 709; 39 L.T. 129; 42 J.P. 788; 26 W.R. 513, H.L.; 31 Digest (Repl.) 391, 5169.
- Sramong v. Norton* (1831), 7 Bing. 640; 5 Moo. & P. 645; 9 L.J.(O.S.)C.P. 185; 131 E.R. 247; 31 Digest (Repl.) 391, 5167.
- Mour v. Cobley*, [1892] 2 Ch. 253; 61 L.J.Ch. 449; 66 L.T. 86; 8 T.L.R. 173; 31 Digest (Repl.) 390, 5161.
- London Corp. v. Hedger* (1810), 18 Ves. 355; 34 E.R. 352; 31 Digest (Repl.) 369, 4998.
- Cole v. Firth* (1672), 1 Mod. Rep. 94; 86 E.R. 759; sub nom. *Cole v. Green*, 1 L.v. 309; sub nom. *Greene v. Cole*, 2 Wms. scand. 228, H.L.; 31 Digest (Repl.) 393, 5181.

- Harrow School (Governors) v. Alderton* (1800), 2 Bos. & P. 86; 126 E.R. 1170; 31 Digest (Repl.) 399, 5279.
- Rich v. Basterfield* (1847), 4 C.B. 783; 16 L.J.C.P. 273; 9 L.T.O.S. 77, 356; 11 Jur. 696; 136 E.R. 715; 36 Digest (Repl.) 318, 643.
- Harris v. James* (1876), 45 L.J.Q.B. 545; 35 L.T. 240; 40 J.P. 663; 36 Digest (Repl.) 319, 650.
- Whitham v. Kershaw* (1886), 16 Q.B.D. 613; 54 L.T. 124; 34 W.R. 340; sub nom. *Witham v. Kershaw*, 2 T.L.R. 281, C.A.; 31 Digest (Repl.) 399, 5285.
- Attersoll v. Stevens* (1808), 1 Taunt. 183; 127 E.R. 802; 31 Digest (Repl.) 249, 3836.

Action by the reversioners of a lease against the lessees and a sub-lessee to restrain alleged acts of waste by raising the level of the land demised, which was being used for the purposes of a rubbish shoot. C

By an indenture of lease dated Sept. 29, 1830, the churchwardens and overseers of the poor of the parish of West Ham, Essex, demised twelve acres of meadow land, known as Oxleas, to the defendants, the East London Waterworks Co., for a term of ninety-nine years, at a rent, after the first six years, of £70 per annum. The lease contained a recital that the company were desirous of constructing and establishing a reservoir of water upon the land, and also of erecting certain buildings and works necessary and expedient for the effectual formation and establishment of the reservoir. It also contained covenants by the company that they would bear a proportionable part of the costs of keeping open the road leading into the demised premises from the high-road in Stratford, and would, at their cost, well and sufficiently D

"maintain, repair, uphold, sustain and keep up all sewers, ditches, gutters, drains, watercourses, wydraughts, gates, gate irons, stiles, pales, posts, rails, hedges, mounds, banks, river walls, and fences whatsoever of, in, upon or belonging to" E

the demised premises, and would deliver up the premises at the determination of the lease; and that they would not "take or carry away from off the said demised premises any of the soil or earth," and that two years before the expiration of the term they would F

"drain, fill up, level, and make good all pits, holes, and excavations that may be dug or made by the said company for the purposes aforesaid in or upon the said pieces or parcels of land and premises hereby demised, and shall and will for such two years as aforesaid lay down and sow the same pieces or parcels of land and premises so levelled, and made good with grass-seed to the intent that the same land and premises hereby demised may be reinstated and restored to the same plight and condition in which the same were previously to the granting of this present demise or lease." G

The premises in question were low-lying, marshy ground, forming part of lands devised by Sir Jacob Garrard in 1653 for the poor of the parish of West Ham, and by an order of the Charity Commissioners, made in 1870, approving a scheme for the regulation of certain charities, including "Garrards," the vicar, churchwardens, and overseers, who were thenceforth known as the West Ham Central Charity Board, were appointed trustees of the estates and properties of the charities. The Central Charity Board had not, however, been actually incorporated, and in the course of the proceedings in this action the Official Trustee of Charity Lands was added as a plaintiff, and, by an amendment allowed at the trial, the vicar, churchwardens, and overseers were made plaintiffs by name. The waterworks company never constructed the proposed reservoir, but they occasionally used the land for grazing purposes. In 1896, they were approached by Mr. Henry Base, a house-breaker in a large way of business, with the suggestion that the land should be sub-let to him for use as a rubbish shoot. By an indenture of under-lease, dated H

A April 25, 1836, the company demised the lands to him for the remainder of their term, less three days, at a rent of £105 per annum. The sub-lease contained a covenant by the lessee not to do anything which would be a nuisance, or contrary to the provisions of the head lease. It was found as a fact that the company knew that Mr. Base intended to use the land as a rubbish shed, and authorised him to do so, but not to shoot offensive materials. Mr. Base put upon the land large quantities of bricks, brick rubbish, mortar, and other products from the demolition of houses, as well as ordinary dustbin refuse, vegetable matter, old tin cans, bottles, clothes, sacks, road scrapings, mud, ashes, cartloads of paper, and other miscellaneous articles, whereby the level of the land was raised some 10ft.

C The plaintiff thereupon brought this action against the waterworks company and Mr. Base for an injunction to restrain these acts on the ground that the defendants were thereby committing waste. The defendants contended that to raise the level of the land demised was not an act of waste, and that the improvement in the value of the reversion as building land for factories by putting foundation material upon it would more than compensate the plaintiffs for any expense to which they might be put in digging down in order to obtain a foundation.

D *Astbury, Q.C.*, and *à-Beckett Terrell* for the plaintiffs.
Cripps, Q.C., and *J. G. Wood* for the waterworks company.
Birrell, Q.C., and *Scarlett* for the defendant Base.

E **BUCKLEY, J.** The plaintiffs are entitled to the reversion expectant upon the determination of a lease granted on Sept. 29, 1830, by their predecessor in title to the East London Waterworks Co. It is a lease of twelve acres of land situate in West Ham in the parish of Stratford, and the case is that the defendants, the East London Waterworks Co., and Mr. Henry Base, trading as J. C. Base, are liable to the plaintiffs for waste permitted upon the premises which are the subject of this demise of 1830.

F Before stating the facts of the case, I think it would be convenient that I should state what I understand to be the law which I have to apply to them. The best definition of waste that I have been able to find is in *Lord Darcy v. Askwith* (1), which is in these words (Hob. at p. 234):

G "It is generally true that the lessee hath no power to change the nature of the thing demised; he cannot turn meadow into arable nor stubb a wood to make it pasture, nor dig up an ancient pool in piscary, nor suffer ground to be surrounded, nor decay the pale of park, for then it ceaseth to be a park; nor he may not destroy nor drive away the flock or breed or anything, because it dis-herits and takes away the perpetuity of succession, as villeins, fish, deer, young spring of woods the like; but he may better a thing in the same kind, as by digging a meadow, to make a drain or sewer to carry away water."

H The test as there laid down seems to be whether the act which the lessor says is an act of waste by the lessee is an act which alters the nature of the land demised.

I At one time the principle of law seems to have been carried so far as that it was supposed that it was waste for a tenant even to build a new house on the land demised, and in *Coke upon Littleton*, 53a, the law is to be found stated thus: "If the tenant build a new house it is waste," and in *Queen's College, Oxford v. Hallett* (2) I find *LORD ELLENBOROUGH* saying this (14 East, at p. 490):

"It is an injury to the title of the reversioner and a present damage to it. *LORD MANSFIELD* held that building a wall where none was before was sufficient to entitle the reversioner in this kind of action pending the lease, though it might be pulled down again before the lease expired."

If that was the law at one time, I think it is plain it is not the law now. For that I may refer to *Jones v. Chappell* (3), a decision of *SIR GEORGE JESSEL, M.R.*, where he held that the lessee of land who erects buildings thereon without the consent of

his lessor does not commit waste within the definition of COKE UPON LITTLETON, 53A, nor can it be shown that such building is an injury to the inheritance. A

I am content to take the law from *Doe d. Grubb v. Earl of Burlington* (4) and I will read from 5 B. & Ad. at p. 517 :

"Upon the whole, there is no authority for saying that any act can be waste which is not injurious to the inheritance, either first, by diminishing the value of the estate, or, secondly, by increasing the burthen upon it, or thirdly, by impairing the evidence of title. And this law is distinctly laid down by RICHARDSON, C.J., in *Burlet v. Burlet* (5), cited at the Bar from HETLEY'S REPORTS."

If the permanent character of the property demised is not substantially altered, as, for instance, by the conversion of pasture land into plough land, of breaking up ancient meadows or the like, I conceive that the law is that it is not now waste for the tenant to do things which within the covenants and conditions of his lease he is not precluded from doing. Within those covenants and conditions he may use his holding as he pleases. As regards what is a dealing within the covenants and conditions of his lease, I may cite some words of LORD ELDON in *Church v. Brown* (6) where he says this (15 Ves. at p. 268) :

"The safest rule for property is that a person shall be taken to grant the interest in an estate which he proposes to convey, or the lease he proposes to make, and that nothing which flows out of that interest as an incident is to be done away by loose expressions, to be construed by facts more loose, that it is upon the party who has forborne to insert a covenant for his own benefit to show his title to it."

Here, therefore, it seems to me that what I have got to determine is : What is the nature of the property which was demised by the lease of 1830, and, is the act which is being done by the defendants, or one of them—because there is some difference in their two cases—an act which alters the nature of the thing demised. It lies at the threshold of that to see from the lease of 1830 what the thing demised was. [HIS LORDSHIP read the lease]. The effect of that lease seems to me to be that these twelve acres of ground were demised to the waterworks company with authority to alter it in a particular way. They might excavate it, and they might make a reservoir on it. They were not to take away any soil raised in the process of excavation. That was to be used, I suppose, to heighten the bank which surrounded it, but at any rate it was not to be taken away, and two years before the end of the term the lessees were to reinstate the premises in the original condition, and sow them again with grass seed. G

What took place was this. The East London Waterworks Co., never wanted and never made a reservoir there. There has been some contest as to the purpose for which this land was used. I am satisfied that it was at first used within certain limits for grazing cattle, and not for anything else. It is said it was marshy ground and low-lying, and no doubt it was more or less damp. It was used, so far as it could be, for grazing, and in the year 1892, one of the witnesses for the defence told us, the land was still under grass. It was protected by the banks which surrounded it, and its levels were what I am next going to describe. At West Ham the land is to a large extent low-lying ground. The river Lee comes down there, and there are several watercourses, and this twelve acres of land lies between the Waterworks river and the City Mill river. The evidence as regards its level is, roughly speaking, that its general height, at the date when it was demised and before the operations which I am going to describe commenced, was about 12ft. above Ordnance datum, and the banks which surround it are something like 17ft. above Ordnance datum, or 5ft. above the surrounding level. [HIS LORDSHIP referred to the negotiations between the waterworks company and Mr. Base, and read the sub-lease of April 25, 1896]. It seems to me plain that the authority which the waterworks company gave to their sub-lessee was this. They knew perfectly well H I

A that the demise to him was for the purpose of using the land for a shoot for materials of some description. I conclude, as a matter of fact, that they did not authorise him to shoot offensive materials, but they authorised him to fill up and to increase the level of the land. That appears from the lease itself, and from the evidence. That being the lease, Mr. Base put on the land large quantities of rubbish or refuse, thus raising the level of the land by some ten feet.

B The question I have to determine is this. Is this alteration of the land by there being imposed on it a heap of matter such as I have endeavoured to describe an alteration of the nature of the thing demised? The defendants say: No; it is not in this sense. They agree that it is an alteration of the thing demised in that, in order to build upon it hereafter one would have to do an act which, if it were left in its original condition, would not have to be done, that is to say, one would have to dig down through the 10ft. of superimposed material before one reached the foundations. It is an altered thing, therefore, they say, but the expense which would be incurred by digging down to obtain a better foundation would be more than compensated by the additional rent which would be got for the land. The land, they say, as raised, is so much more valuable that the increase in value would counterbalance the extra cost of going down to obtain your foundations. It appears to me, therefore, that that contention really amounts to this. It is allowable to alter the nature of the thing demised provided you so alter it that there is a counter-vailing advantage which reimburses the reversioner for the additional expense which he is put to by the alteration. It seems to me that that is waste. Directly it is admitted that this meadow land has been altered so that it must be dealt with in a different way—as building land—the nature of the thing demised, the land, has been altered within the rule that I have endeavoured to lay down as regards waste.

E There is another point of view from which you may look at it, and that is this. Supposing the landowner were minded to build cottages there and not factories—as he might do if he liked, although factories would be of more value—it is possible that with this heap of material there he would be forbidden to build dwelling houses at all. The local authority have a right, under s. 25 of the Public Health Act, 1890, [see now Public Health Act, 1936, s. 54 (1) (amended by Public Health Act, 1961, s. 5 (1) Sched. 1, Part 3)], to forbid dwellings to be put on land if the land be impregnated with foecal, animal, or vegetable matter. Why am I to expose the reversioner to the possibility of finding himself unable to build upon the land because of the deposit of this material upon it? The situation surely is altered.

F G Supposing the defendants are right in saying that it would all decay in the period of thirty years. The landowner would have to prove to the satisfaction of the local authority that that was the case before he would be free from the veto against building on the land. Is not that an alteration of the nature of the thing demised? You have new conditions to comply with before you can use it in the way you could have used it freely before. It appears to me that that is an alteration, and I need not say that the landowner ought not to be excluded from the opportunity of building cottages upon the land if he is so minded, although the land would be much more valuable for factories.

H There is a third way of looking at it, and that is this. Supposing the land had lain left at its original level, what would the reversioner have come into at the end of the term? He would have come into the possession of property which, according to the defendants' view, cannot be reasonably or beneficially used for building until it is raised. Assume that to be the case. But he would come into the enjoyment of a property out of which he could recover the rent or profit which was to be derived from allowing material to be shot there. He might protect himself by stringent conditions as to the quality of the material to be shot, and obtain a perfectly good foundation. It is proved here that the price obtained from shoot varies from 8d. to 1s. 3d. a load—very substantial payments indeed. That might have been recovered in the shape of additional rent from a factory owner who builds one factory in the way I have suggested, or the landowner might have employed a contractor like Mr.

Base and given him permission to shoot such material there, and, thus raised, his land, owing to the alteration, would be increasing in value. The inheritance has lost that benefit. Why should not the reversioners have that to which they are entitled under the lease of 1830, namely, the land as it stood in 1830, sown with grass seed, with an opportunity for them to do what they will with it?

It has struck me as strange, having regard to the fact that in many agricultural districts there exist mining industries in the immediate neighbourhood—and, as we know, mining industries produce a vast quantity of slag and other material to be got rid of—that there is not to be found any authority on the question whether the deposit of slag or other additional material on land so as to increase its height is or is not waste within the legal meaning of that term. Counsel have not been able to supply me with any, and such research as I have been able to make has not enabled me to find any. Counsel for the waterworks company, was not prepared to deny that, if the lessee were to use the land for the purpose of erecting a small mountain upon it some 1,000 or 1,500 feet high, that would be such an alteration of the thing demised as would be waste. I suppose, on the contrary, the plaintiffs would not contend that if the tenant top-dresses his land from time to time, and adds so many inches to the field, and alters the level slightly that that would be waste. It must be to a great extent a question of degree. It seems to me that here there has been such an alteration of the level of the soil, and such an alteration of the thing demised, that it does amount to waste, and I hold that, irrespective of the question whether the material added has been of an offensive description or an inoffensive description. In other words, I think that the waterworks company in authorising Mr. Base to go there and to do that which he did are equally responsible with him for the consequences of what has been done. Under those circumstances it is unnecessary for me to follow counsel for the defendant company into the consideration whether waste falls under the same category as nuisance, because he was not in the position to deny that the authority he gave to Mr. Base was an authority to tip there and to increase the height of the land, and, having given authority to do that, he was responsible for the act done. It appears to me, therefore, that the relief I must give the plaintiffs is this. I think they are entitled to an injunction restraining both the defendants, their officers, contractors, servants, agents, and workmen from bringing or permitting to be brought upon the land any rubbish, earth, or other material, or otherwise committing waste on the land. The statement of claim goes on to ask for a mandatory injunction against permitting to remain. I need not assign the reasons why I think such an injunction ought not to be asked, because the plaintiffs do not now ask for it, but they do ask for an inquiry as to damages. I think they are entitled to an inquiry as to damages in the past, and an injunction as regards the future, and that they are, as against both the defendants, entitled to the costs of the action.

Solicitors: *A. A. Banes; Bircham & Co.; Geo. Goodman.*

[*Reported by A. L. MORRIS, Esq., Barrister-at-Law.*]

A

CAPITAL AND COUNTIES BANK, LTD. v. GORDON
LONDON, CITY AND MIDLAND BANK v. GORDON

B

HURST & LORDES (Lord Macnaghten, Lord Shand, Lord Davey, Lord Robertson and Lord Lindley), December 4, 5, 8, 9, 1902, May 11, 1903]

[Reported [1903] A.C. 240; 72 L.J.K.B. 451; 88 L.T. 574; 51 W.R. 671;
19 T.L.R. 402; 8 Com. Cas. 221]

C *Bank—Holder for value of cheque paid in—Cheque credited to customer's account—Customer allowed to draw against cheque before clearance—Right of bank to proceeds of cheque when cleared—Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61), s. 82.*

D

By the Bills of Exchange Act, 1882, s. 82: "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment." A servant of the respondent, a trader who was the holder for value of a number of crossed cheques, fraudulently took possession of the cheques, forged on them indorsements in the name of the respondent's firm, and then took them to the appellant bank where he had an account and so was their customer. Before the cheques had been passed through the clearing house the bank credited their customer's account with the amounts of the cheques and allowed him to draw on his account as increased by the amounts of the cheques so paid in. The cheques were all honoured and the bank received the amounts of them from the various banks on which they had been drawn. In an action by the respondent against the bank for damages for the conversion of the cheques,

E

F

Held: although the bank had acted without negligence they were not entitled to the protection afforded by s. 82 because (per LORD MACNAGHTEN) if a bank before collection credited a customer with the face value of a cheque paid in to his account the bank became a holder for value of the cheque, and, as such, the bank, when they received payment of the cheque through the clearing house, could not be said to be "receiving payment for a customer" within s. 82; (per LORD LINDLEY) as between the bank and their customer the money belonged to the bank as soon as they received it; accordingly, the respondent's action succeeded.

G

H

Bank—Banker's draft—Draft drawn by country branch on head office—Draft misappropriated and indorsement forged—Payment into forger's account at bank—Account credited before amount of draft collected—Right of bank to proceeds when received.

I

Bankers' drafts, drawn by a country branch of the appellant bank upon the head office of the bank, were paid into another branch of the appellant bank by a customer who had misappropriated them and forged the indorsements. The bank gave the customer credit for the amount of the drafts and collected the proceeds. In an action by the true owner of the drafts against the bank for damages for conversion of the drafts,

Held: the bank, who were both drawer and drawee of these instruments, could not treat them as bills of exchange as defined in s. 3 of the Bills of Exchange Act, 1882, although a holder might sue the bank on them and treat them either as bills of exchange or as promissory notes under s. 5 (2) of the Act; the drafts not being bills of exchange, the bank were not entitled to the protection afforded by s. 82 of the Act, but they were entitled to rely on s. 19 of the Stamp

Act, 1853, which exonerated bankers from liability if they paid drafts or orders drawn on bankers and payable to order on demand to holders claiming under forged indorsements, and so the action failed.

Notes. Section 82 of the Bills of Exchange Act, 1882, was repealed by the Cheques Act, 1957, s. 4 (1) [37 HALSBURY'S STATUTES (2nd Edn.) 54] of which provides that where a banker, in good faith and without negligence, receives payment for a customer of a cheque, whether crossed or uncrossed, and the customer has no title to the cheque the banker does not incur any liability to the true owner of the cheque by reason only of having received payment thereof.

The present decision has met with some criticism, and in considering it reference should in particular be made to *A. L. Underwood, Ltd. v. Bank of Liverpool and Martins*, [1924] All E.R. Rep. 230.

Applied: *Bryan v. National Bank*, *Bryan v. Capital and Counties Bank* (1906), 23 T.L.R. 65; *Brown v. Swan* (1921), 31 T.L.R. 787. Considered: *Re Farrol's Bank*, [1923] 1 Ch. 41; *London and Montrose Shipbuilding and Repairing Co. v. Barclays Bank* (1925), 31 Com. Cas. 67; *Slingsby v. Westminster Bank, Ltd.*, [1931] 1 K.B. 173; *Carpenters' Co. v. British Mutual Banking Co.*, [1937] 3 All E.R. 811. Referred to: *Akroherri Mines v. Economic Bank*, [1904] 2 K.B. 465; *Jones v. Corentry*, [1909] 2 K.B. 1029; *Dey v. Mayo*, [1920] 2 K.B. 346; *Sutlers v. Briggs*, [1922] 1 A.C. 1; *Underwood v. Bank of Liverpool and Martins*, *Underwood v. Barclays Bank*, [1924] 1 K.B. 775.

As to collection of cheques, see 2 HALSBURY'S LAWS (3rd Edn.) 176 et seq.; and for cases see 3 DIGEST (Repl.) 219 et seq. For the Bills of Exchange Act, 1882, see 2 HALSBURY'S STATUTES (2nd Edn.) 505.

Cases referred to:

- (1) *Great Western Rail. Co. v. London and County Banking Co., Ltd.*, ante p. 1004; [1901] A.C. 414; 70 L.J.K.B. 915; 85 L.T. 152; 50 W.R. 50; 17 T.L.R. 700; 45 Sol. Jo. 690; 6 Com. Cas. 275, H.L.; 3 Digest (Repl.) 263, 751.
- (2) *Brown, Brough & Co. v. National Bank of India, Ltd.* (1902), 18 T.L.R. 669; 46 Sol. Jo. 617; 3 Digest (Repl.) 262, 746.

Also referred to in argument:

- Charles v. Blackwell* (1877), 2 C.P.D. 151; 46 L.J.Q.B. 368; 36 L.T. 195; 25 W.R. 472, C.A.; 3 Digest (Repl.) 261, 741.
- Matthiessen v. London and County Bank* (1879), 5 C.P.D. 7; 48 L.J.Q.B. 529; 41 L.T. 35; 43 J.P. 560; 27 W.R. 838; 3 Digest (Repl.) 264, 758.
- Bissell & Co. v. Fox Brothers & Co.* (1885), 53 L.T. 193; 1 T.L.R. 452, C.A.; 3 Digest (Repl.) 267, 765.
- National Bank v. Silke*, [1891] 1 Q.B. 435; 60 L.J.Q.B. 199; 63 L.T. 787; 39 W.R. 361; 7 T.L.R. 156, C.A.; 3 Digest (Repl.) 223, 534.
- Royal Bank of Scotland v. Tottenham*, [1894] 2 Q.B. 715; 64 L.J.Q.B. 99; 71 L.T. 168; 43 W.R. 22; 10 T.L.R. 569; 38 Sol. Jo. 615; 9 R. 569, C.A.; 3 Digest (Repl.) 222, 528.
- M'lean v. Clydesdale Banking Co.* (1883), 9 App. Cas. 95; 50 L.T. 457, H.L.; 3 Digest (Repl.) 245, 654.
- Prince v. Oriental Bank Corpn.* (1878), 3 App. Cas. 325; 47 L.J.P.C. 42; 38 L.T. 41; 26 W.R. 543, P.C.; 3 Digest (Repl.) 252, 696.
- Clarke v. London and County Banking Co.*, [1897] 1 Q.B. 552; 66 L.J.Q.B. 354; 76 L.T. 293; 45 W.R. 383; 41 Sol. Jo. 352, D.C.; 3 Digest (Repl.) 263, 753.
- Fine Art Society, Ltd. v. Union Bank of London, Ltd.* (1886), 17 Q.B.D. 705; 56 L.J.Q.B. 70; 55 L.T. 536; 51 J.P. 69; 35 W.R. 114; 2 T.L.R. 883, C.A.; 3 Digest (Repl.) 231, 587.
- Ogden v. Benas* (1874), L.R. 9 C.P. 513; 43 L.J.C.P. 259; 30 L.T. 683; 38 J.P. 519; 22 W.R. 805; 3 Digest (Repl.) 270, 781.
- Arnold v. Cheque Bank*, *Arnold v. City Bank* (1876), 1 C.P.D. 578; 45 L.J.Q.B. 562; 34 L.T. 729; 40 J.P. 711; 24 W.R. 759; 3 Digest (Repl.) 260, 738.

A Appeals from decisions of the Court of Appeal, reported [1902] 1 K.B. 242 (Sir RICHARD HANS COLLINS, M.R., STIRLING and MATHEW, L.J.J.), reversing two decisions of BUCKNILL, J., on further consideration of cases tried before him at the Birmingham Assizes with a special jury.

The cases arose out of the frauds of one Jones, for some ten years ledger clerk to the respondent James Gordon, who carried on business in Birmingham as a manufacturer of coffin furniture under the style of Gordon and Munro. In March, 1899, the respondent discovered that Jones had, since the beginning of 1895, been in the habit of opening letters addressed to the respondent by his customers and stealing therefrom cheques made payable to the respondent under his trade name. The cheques so abstracted were stated to have amounted to over £3,000. In the case of the Capital and Counties Bank thirty-two cheques were in question, amounting together in value to £388 9s. 6d. They were drawn payable to Gordon and Munro or order; all but two were crossed generally by the drawers; one was also marked "not negotiable." None of these thirty-two cheques was drawn upon the Capital and Counties Bank. On Nov. 13, 1896, Jones opened an account with the Birmingham branch of the appellant bank in the name of "Warner & Co.," which he told the appellants was the name under which he was trading as a general factor at Dale End, Birmingham. Jones was in fact so trading; but the respondent was in ignorance of the fact up to March, 1899, when he discovered Jones' fraud and forgeries. It appeared on the trial of the action that Jones paid into this account with the appellants' bank the thirty-two cheques after forging thereon the respondent's indorsement. He also indorsed all these cheques (with the exception of five cheques paid in during July, 1898) to the appellants' bank. On the cheques respectively being so paid in by Jones, the appellants at once placed the same to his credit and stamped them with a rubber stamp, thereby imprinting across the cheques the name of the Birmingham branch of the appellants' bank. As soon as a cheque was paid in by him to the appellants' bank Jones became entitled as between himself and them to draw against it, and did so at his pleasure. After stamping the cheques the appellants proceeded to get and did get payment of the same from the various banks whereon such cheques were drawn.

In the case of the London City and Midland Bank 116 cheques were traced representing about £2,067. These cheques were treated by the courts below as being divisible into eight classes, viz.: (1) Cheques payable to Gordon and Munro or order, not drawn on the appellants, and not crossed when taken by them; (2) one cheque payable to Gordon and Munro or bearer, not drawn on the appellants, and not crossed when taken by them; (3) bankers' drafts, drawn by one of the country branches of the appellants' bank upon the appellants' head office, payable to Gordon and Munro or order, and not crossed when received by the appellants from Jones; (4) crossed cheques drawn on the appellants, and payable to Gordon and Munro or order; (5) crossed cheques marked "not negotiable," payable to Gordon and Munro or order, and not drawn upon the appellants; (6) crossed cheques payable to Gordon and Munro or order, and not drawn on the appellants. This class comprised the great majority of the cheques; (7) crossed cheques payable to Gordon and Munro or bearer, and not drawn on the appellants; (8) instruments drawn in favour of Gordon and Munro and crossed, payable only upon signature by the payees of a form of receipt at the foot of the instrument, and not drawn upon the appellants. No question arose upon this appeal concerning the cheques comprised respectively in classes (2) and (7), as to which it was admitted in the court below that the respondent could not succeed, nor as to the cheques comprised in class (4), as to which the Court of Appeal decided in favour of the appellants. These three classes together only included eight out of the 116 cheques.

On July 29, 1895, Alfred Jones opened an account with the appellants, at their branch at Sparkbrook, Birmingham. He did so in the name of "Jones & Co.," under which style he was trading. In October, 1898, Jones took one Blackham into partnership, and Jones' account with the London City and Midland Bank was thereupon

closed, and a new account opened by Jones and Blackham in the name of "Jones, Blackham & Co." The accounts were constantly overdrawn from November, 1897, and but for the 116 cheques stolen from the respondent there would have been a continuous overdraft almost from the opening of the account. Jones had no agreement with the appellants for an overdraft, and they could have stopped his overdraft at any moment.

The respondent was up to March, 1899, when he discovered Jones' fraud and forgeries, in complete ignorance that Jones was carrying on any business either alone or in partnership, or had any banking account. It was proved that Jones from time to time paid into these accounts the 116 cheques, after forging upon them the respondent's endorsement. It also appeared that Jones indorsed all the cheques either "Jones & Co.," or "Jones, Blackham & Co.," as the case might be. This was done, as the bank manager stated, in order that the appellant might have the security of Jones' name. The manager further stated there was no necessity expressly to request Jones so to indorse the cheques, since Jones always did so, and that if Jones had omitted to indorse a cheque he should probably have asked him to do so, since he desired to have that indorsement. The cheques, as soon as they were paid in by Jones, as before stated, were placed by the appellants to Jones' credit at once, without waiting for their collection. After stamping the cheques with their rubber stamp, the appellants proceeded to get and did get payment of those included in classes (1), (5), (6), and (8) from the various banks whereon such cheques respectively were drawn. As to the drafts included in class (3), the same were forwarded by the appellants' Sparkbrook branch to the appellants' head office in London, who credited the Sparkbrook branch in account with the amount of such drafts respectively.

In March, 1899, the respondent discovered the frauds, and Jones was prosecuted and convicted. The trial of the present actions took place at the Birmingham Summer Assizes, 1900, before BUCKNILL, J., and a special jury. The judge gave judgment for the respondent as to the cheques comprised in classes (1) and (2). As to all the other classes the judge decided in favour of the appellants. The Court of Appeal entered judgment with costs for the respondent for £388 9s. 6d. in the case of the Capital and Counties Bank, and for £1,954 16s. 7d. in the case of the London City and Midland Bank, being the total amount of the cheques or drafts comprised in classes (1), (3), (5), (6), and (8) above mentioned. Judgment without costs was given for the present appellants as regards the cheques in class (4), and also as regards those in classes (2) and (7), which latter, as before stated, were abandoned by the present respondent, without argument, in the Court of Appeal. The jury found at the trial that neither of the appellant banks had been guilty of negligence in their dealings with Jones.

Cohen, K.C., and Spencer Bower for the Capital and Counties Bank.

Haldane, K.C., Hugo Young, K.C., Henriques, and Holden for the London City and Midland Bank.

A. T. Lawrence, K.C., and Leslie for the respondent.

Their Lordships took time for consideration.

May 11, 1903. The following opinions were read.

LORD MACNAGHTEN.—I am sure that I need not trouble the House by recounting in detail the facts of these cases or describing the classes into which, for the sake of convenience, the drafts forming the subject of this litigation have been divided. It will be enough, I think, to remind your Lordships that all the drafts now in question were stolen from the respondent Gordon, trading in Birmingham under the style of Gordon and Munro, by a man called Jones, who was Gordon's ledger clerk for about ten years. Jones himself lived at Sparkbrook. Unknown to his employer he carried on a small business of his own as a coffin furniture maker in Birmingham. In the name of the firm under which he traded he kept an account with the Birmingham branch of the Capital and Counties Bank, and also with the

A Spitalfields branch of the London City and Midland Bank. Into one or other of those accounts Jones paid all the drafts which he stole from Gordon, forging the necessary indorsement when the draft was payable to order on demand, as was generally the case. When the fraud was discovered and Jones had been prosecuted and convicted, Gordon brought an action against each of the two banks for conversion of such of the stolen drafts as could be traced to its hands, with a count B in the alternative for money had and received to his use.

The action came on to be tried before BUCKNILL, J., and a special jury. The only question left to the jury was the question of negligence. The result of the findings of the jury on this point was in favour of the banks. All other questions were reserved for the judge. On the principal matter in controversy BUCKNILL, J., gave judgment for the banks. This decision, however, was reversed by the Court of C Appeal. The main question, and the most important as regards amount, related to crossed cheques payable to order on demand drawn on banks other than the bank which was being sued. It is not disputed now that as regards these cheques there can be no defence, unless protection is afforded by s. 82 of the Bills of Exchange Act, 1882, which declares:

D "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner by reason only of having received such payment."

It is admitted that each of the two banks acted in good faith. The suggestion of negligence on their part has been negatived by the findings of the jury. It cannot E be denied that Jones was a customer within the meaning of the section. The only question, therefore, is: Did the banks receive payment of these cheques for their customer? If they did, it is obvious that they are relieved from any liability which, perhaps, might otherwise attach to some preliminary action on their part taken in view and anticipation of receiving payment. The section would be nugatory F—it would be worse than nugatory—it would be a mere trap, if the immunity conferred in respect of receipt of payment, and in terms confined to such receipt, did not extend to cover every step taken in the ordinary course of business, and intended to lead up to that result.

The character in which a bank receives payment of a cheque is, as has been already said in this House, a question of fact. To my mind it would have been more satisfactory if the jury, under proper direction from the judge, had answered this G question themselves. It was, however, withdrawn from their consideration. The appeal was argued very fully and very ably by the learned counsel for the appellants. At first sight there is not much difference between the case of a bank which at once credits a customer with the face value of a cheque paid in to his account and allows him to draw against his credit balance thus increased, and the case of a bank which, without crediting the customer with the value of a cheque before collection, H allows him to overdraw his account in view of the anticipated credit. In each case, it was said, the credit is only provisional, whether entered in the customer's account or not. In each case, it was said, payment when received is received for the customer. And in a sense that is true.

Then it was urged with some force that practically the only result of upholding the decision under appeal will be to compel some bankers to keep a double set of I books, where now one set only is required, and thus to impose upon bankers a good deal of extra, and, perhaps, unnecessary, trouble. But the protection conferred by s. 82 is conferred only on a banker who receives payment for a customer—that is, who receives payment as a mere agent for collection. It follows, I think, that if bankers do more than act as such agents they are not within the protection of the section. It is well settled that if a banker before collection credits a customer with the face value of a cheque paid in to his account the banker becomes a holder for value of the cheque. It is, impossible, I think, to say that a banker is merely receiving payment for his customer and a mere agent for collection when he receives

payment of a cheque of which he is the holder for value. So long as a bank has for its customers only persons of position with whose circumstances the manager is fully acquainted, as is not unfrequently the case in country districts, where one bank by arrangement with its competitors has a monopoly, it matters little whether the bank at once credits a customer with the face value of cheques paid in to his account or waits until collection. The bank only looks to its own customers. But Parliament may have thought that in the increase of banking business likely to arise in consequence of the legislation with respect to crossed cheques, and the competition sure to follow, it would not be improbable that small accounts might be opened with banks by persons of little or no credit, and that it might be a dangerous thing to extend protection to bankers dealing with crossed cheques in all cases, whether they acted simply as agents for collection or in a different character. Or possibly at the time bankers asked for no further protection than that which s. 82 purports to confer. However that may be, your Lordships have only to construe the language of s. 82 in connection with the language of the other sections of the Act bearing on the point.

It seems to me that the decision of the Court of Appeal on this question, which is the main question involved, is perfectly right. In the judgments of the learned judges of the Court of Appeal, and especially in the judgment of SIR RICHARD HENX COLLINS, M.R., I find the subject dealt with so completely, both as regards the history of the legislation and the principles and decisions applicable to the case, that, speaking for myself, I think that it would be a waste of time to do more than say that I accept their view. It appears to me that the Master of the Rolls has accurately summed-up the whole case when he says :

"The protection afforded by s. 82 must be limited to that which is necessary for the performance of the duty which by the legislation as to crossed cheques was imposed on bankers. If bankers deal with crossed cheques in the ordinary way in which bankers dealt with cheques before the legislation as to crossed cheques and in which they deal with cheques other than crossed cheques at the present time—namely, by treating them as cash, and upon receipt of them at once crediting the customer with the amount of them in the ordinary way instead of making themselves a mere conduit pipe for conveying the cheque to the bank on which it is drawn and receiving the money from that bank for their customer—I think that they are collecting the money, not merely for their customers, but chiefly for themselves, and, therefore, are not protected by s. 82."

On all the other questions that have been raised, I agree with the Court of Appeal except as regards the small drafts of which class (3) is composed. On this point I agree with LORD LINDLEY, whose opinion I have had the advantage of reading. It is a very small point and ought not, I think, to make any difference as regards the costs of the appeal. Subject, therefore, to a slight variation as regards these drafts, amounting in all to £32 15s. 9d., I move your Lordships that the decree be affirmed and the appeal dismissed with costs.

LORD SHAND, LORD DAVEY, and LORD ROBERTSON concurred.

LORD LINDLEY. The question raised by this appeal turns entirely on the true construction and effect of s. 82 of the Bills of Exchange Act, 1882. The facts are simple, and not in controversy. Gordon, who traded as Gordon and Munro, was the holder for value of thirty-two crossed cheques, drawn by various persons on various banks, and payable to Gordon and Munro or order. Gordon had a clerk named Jones, and Jones forged indorsements in the name of Gordon and Munro on these cheques, and then took or sent them to the Capital and Counties Bank, where he had an account. Jones also indorsed them in his own name, and the bank credited his account with the amounts, and he drew on his account while the amounts of the cheques so paid in stood to his credit. The bank manager dealt in this matter with perfect bona fides and without negligence, having no suspicion

A that anything was wrong. He said that he held the cheques until he received payment for Jones and credited his account with the proceeds, and that he received the cheques in the ordinary course of banking business, and that all the cheques were collected for Jones. The bank manager was not cross-examined on these answers, but there is some ambiguity about them. The documents and accounts, however, show exactly what was done, and it is plain that the bank did not wait
B until the cheques paid in by Jones had been passed through the clearing-house before the amounts were placed to his credit. They were placed to his credit when he paid the cheques in, and he was allowed to draw upon his account increased by them as above stated. None of the cheques was ever returned to the bank; they were all duly honoured and the appellant bank received the amounts in due course
C from the banks on which they were respectively drawn. Afterwards Jones' frauds were discovered, and he was prosecuted and convicted. Gordon, who had been robbed of the cheques and wrongfully deprived of the money represented by them, brought an action against the bank to recover that money which the bank had received under the circumstances above described.

If this case had to be determined on general principles of English law apart from statutory enactment the bank would have had no defence to Gordon's action.
D Before the Judicature Acts he could have recovered the value of the cheques, either in an action of trover or in an action for money had and received. A long series of well-established authorities, which cannot, I apprehend, be now questioned, establishes the liability of the bank beyond all dispute; nor was this seriously contested by the counsel for the appellants. But reliance is placed on s. 82 of the Bills of Exchange Act, 1882. This section has come before the courts more than
E once, and before this House in *Great Western Rail. Co. v. London and County Bank* (1). Those cases only go to show that a bank is not protected by the section unless, first, the bank acts in good faith and without negligence; unless, secondly, it receives payment for a customer; and unless, thirdly, the bank only receives such payment. The last paragraph of the section shows that this last condition is as
F important as the first and second. But the questions in any particular case whether a bank has received payment for a customer, in good faith and without negligence, and whether the bank has only received such payment, are questions of fact depending on the circumstances of each case.

The facts of this particular case do not, in my opinion, bring the bank within the operation of the section. What has to be considered is not the cheque, but its payment.
G When the cheque was paid to the bank, the bank received the payment for itself rather than for Jones. It is no doubt true that if the cheque had been dishonoured Jones would have become liable to reimburse the bank the amount advanced by it to him when it placed the amount to his credit. This he would have to do whether any cheque, crossed or not, was placed to his credit and was afterwards dishonoured. To this extent and in this sense it may be said that the bank
H received payment for Jones, because payment of the cheque discharged him from the liability he would have been under to repay to the bank the sum placed to his credit if the cheque had not been paid. But what your Lordships have to consider is not Jones' liability to the bank if the bank never received payment of the cheque, but for whom did the bank, in fact, receive such payment. The amount would not be again placed to Jones' credit; it was already there. The bank in its then ignorance
I of the forgery could not withdraw that credit after it had received payment of the cheque. As between the bank and Jones, the money belonged to the bank as soon as the bank received it. The bank had a right to sue for the money and to apply it in any way it thought proper, provided only that Jones was not treated as owing the amount.

It was said by the appellants' counsel, with some confidence, that any jury of business men would find, as a fact, that the bank received payment of these cheques for Jones and nothing more. All I can say is that I think it very likely that they would do so if left to themselves without proper direction from the judge.

but that if proper direction was given to them they would not be likely to go wrong. It must never be forgotten that the moment a bank places money to its customer's credit, the customer is entitled to draw upon it, unless something occurs to deprive him of that right. Nothing occurred in this case which had any such effect to the knowledge of the bank. It appears to me impossible to say that under these circumstances the bank received payment of the cheques in question for their customer Jones. Whether it is desirable to alter the wording of s. 82, is not for your Lordships to consider on the present appeal; but so long as that section stands in its present form bankers who desire its protection will have to be more cautious and not place crossed cheques, paid in for collection, to the credit of their customers, before such cheques are paid. This appeal should, in my opinion, be dismissed with costs.

I pass now to the appeal of the London City and Midland Bank, Ltd. This appeal raises not only the same question as the last, but also several further questions owing to the forms of the cheques and drafts paid by Jones into the appellant bank. In the respondent's case eight classes of instruments are described, but of these only classes (1), (3), (6), and (8) have to be considered by your Lordships. Class (6) is like those which had to be considered in the appeal of the Capital and Counties Bank. It is unnecessary for me to say more about these, for the reasons already given are applicable to them. It may, however, be useful to mention that Jones was required by the London City and Midland Bank to indorse the cheques which he paid into it, and that he frequently availed himself of the credit given to him for those cheques by drawing against such credit. The accounts show that this was constantly done and to a much greater extent than in the case of the Capital and Counties Bank. These additional circumstances cannot in any point of view improve the position of the appellant bank. The decision of the Court of Appeal on this class was, in my opinion, correct. Class (1) consists of cheques not crossed when taken by the appellant bank. It appears to me that s. 82 would be deprived of all meaning if it were held to apply to cheques not crossed when they came to the hands of the bank seeking the protection of that section. Section 77 (6) [applied by s. 5 of the Cheques Act, 1957, to instruments not being bills of exchange] does not assist the appellant bank in the present case, although it might be useful if an indorsement were forged after a crossing. As regards this class, I can usefully add nothing to what was said in the courts below.

Class (3) presents more difficulty. It consists of four small drafts drawn by a country branch of the appellant bank on its own head office and not crossed. The first question which has to be considered is whether these instruments are bills of exchange as defined in s. 3 of the Bills of Exchange Act, 1882. If they are, then, not being crossed, s. 82 will have no application to them, even if that section could have applied in this case to such documents if crossed. But if these drafts are bills of exchange within the meaning of s. 3 they will come within s. 60, and the bank will be protected by it, for these cheques are drawn on the bank sought to be made liable for paying them. But I agree with the Court of Appeal in thinking that the bank, which is both drawer and drawee of these instruments, is not entitled to treat them as bills of exchange as defined in s. 3 of the Bills of Exchange Act, 1882, although a holder may sue the bank upon them and treat them either as bills of exchange or as promissory notes (see s. 5 (2)). An instrument on which no action can be brought by the drawer can hardly be a bill of exchange within s. 3 of the Act, whatever it may be called in ordinary talk.

Next it was contended that s. 17 of the Revenue Act, 1883, [repealed] extended to these documents, and brought them within the protecting clauses of the Bills of Exchange Act. But, as pointed out by the Court of Appeal, s. 17 of the Revenue Act, 1883, only applies to drafts issued by a customer of a bank, while these drafts were issued, not by a customer, but by a bank to a customer. I agree, therefore, with the Court of Appeal on this point.

But then reliance was placed on the Stamp Act, 1853, s. 19, which relates to

A drafts or orders drawn on bankers and payable to order on demand. The section exempts the bankers drawn upon from liability if they pay such drafts or orders to holders claiming under indorsements which are forged. This statute was passed before crossed cheques were regulated by statute, and it has no special reference to them, nor does it refer to any bankers except those on whom the instruments are drawn. The history of this section is well known. It was inserted at the instance of Lord Overstone, when cheques to order on demand bearing 1d. stamps were first introduced. He saw that these would become common, and would expose bankers to serious risks from forged indorsements; and the section was inserted for their protection. The Stamp Act, 1853, except s. 19, has been repealed; but s. 19 has been preserved, and in 1872 it was made applicable to documents issued by the Paymaster-General in pursuance of the Court of Chancery Funds Act, 1872, s. 11. [repealed]. This section, although referred to in the amended points of defence, was apparently overlooked in the court below; at all events, it is not noticed in the judgments delivered by the Court of Appeal. I can, however, find no reason for saying that it does not apply to class (3). In terms it clearly does.

B BIGHAM, J., had this point before him in *Brown, Brough, and Co. v. National Bank of India* (2), and he decided that in that case the bank was not protected. He did so on the authority of the decision of the Court of Appeal in the case now before your Lordships, but it is manifest that had it not been for this authority the learned judge would have decided the other way. The draft he had to deal with was drawn in Madras on London, and Mr. GRANT, in his *LAW OF BANKERS AND BANKING COMPANIES* (5th Edn.), p. 24, says that s. 19 only applies to inland bills. It is unnecessary to consider whether he is right in this respect, as the drafts now under consideration are inland drafts.

E I invite your Lordships' attention to the fact that s. 19 of the Act of 1853 is left unrepealed by the Bills of Exchange Act, 1882, although s. 60 of that Act is evidently taken from s. 19 of the Act of 1853, and made applicable to bills of exchange, and to cheques, as defined in ss. 3 and 73 in the Bills of Exchange Act, 1882. The only conclusion which I can draw from these enactments is that s. 19 of the Act of 1853 was purposely left unrepealed in order that it might apply to drafts or orders which did not fall within the definitions of bills of exchange or cheques in the codifying Act of 1882. These definitions are far more limited and scientific than the sweeping descriptions contained in the Stamp Acts, and s. 19 of the Act of 1853 appears to me to be purposely preserved in order to protect bankers cashing drafts or orders on them which are not bills of exchange or cheques as defined in the Act of 1882, in the same way as s. 60 of that Act protects them from cashing documents drawn on them which are bills of exchange and cheques as defined in it. As regards these four drafts, therefore, I think that there has been an oversight, and that the decision appealed from is wrong.

G There remains only class (8)—i.e., instruments drawn in favour of Gordon and Munro and crossed payable only upon signature by the payees of a form of receipt at the foot of the instrument and not drawn upon the appellants. These documents are clearly not bills of exchange within the meaning of the Bills of Exchange Act. Nor, for reasons already given, are they brought within it by s. 17 of the Revenue Act, 1883. Nor do they come within s. 19 of the Stamp Act, 1853, which, as I have already observed, applies only to banks which are drawees. In substance this appeal fails, although as to a few drafts of comparatively small amounts it succeeds. The result, in my opinion, therefore, is, that the decision of the Court of Appeal should be affirmed except so far as it relates to the drafts forming class (3), but that as to them the decision should be reversed. This success is, however, too small to affect the costs of the appeal, which should be borne by the appellants.

Appeals dismissed.

H Solicitors: *Cameron, Kenn & Co.; Keen, Rogers & Co.; Pepper, Tangye & Co., for Pepper, Tangye & Winterton, Birmingham.*

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

